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# The Engineer to the Contract: How the role evolved and the part played in dispute resolution

Stuart Robertson

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# Engineering as a profession

- Early 18<sup>th</sup> century – the professional engineer
- Smeaton and the ICE
- Local builders
- Mid -1830's – railway construction boom
- Burnel and others
- *Ranger v Great Western Railway Co.*
- *Bona fides, fraud or unfairness*

# Background to NZS 3910

- NZSS 623
- NZSS 623:1964 and Smellie
- No clearly defined role
- NZ cases lead the charge:
  - *Brown & Doherty*
  - *N C Construction*
  - *Canterbury Pipelines*

*‘fairness involving impartiality and independence’*

# The modern Engineer under NZS 3910

- NZS 3910:1987 – Section 6

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

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

- The dual role or is it?
- Agent of the Principal
  - Expert advisor and
  - Agent
- Independent decisionmaker/certifier

Linked to objective of minimising disputes (NZS 3910:2013, G 6.2)

# The modern Engineer under NZS 3910 (cont.)

*'...reasonably and in good faith.'*

- *Canterbury Pipelines*
- Objective test of the Engineer's conduct
- No need for Engineer to have:
  - acted dishonestly, or
  - been deliberately unfairly

# So who is the Engineer?

## Three types:

- Employee
  - NZS 3910:1987 – specific office holder
  - Perception of partiality?
- Consultants/designers
  - Impartiality improved?
  - Project specific skills and institutional knowledge
  - PI limitations
- Principal (an individual)
  - No prohibition
  - *Scheldebouw BV v St James Homes (Grosvenor Dock) Ltd*
  - NZS 3915:2005

# End of the Engineer's duties

## During the contract

- Contractor powerless to change the Engineer
- Interim Engineer and consultation

## End of the contract

- PC
- FCC
- Final payment schedule
- Any remaining disputes for formal decision

# Pitfalls for the Engineer

## Claims against the Engineer?

- *Hudson's* powerful factors against a duty
- NZ: broader contractual matrix
- *Day v Ost*

## Claims against the Principal

- Generally Principal liable for Engineer's conduct
- CI 6.2.4 – Engineer's delays
- CI 6.1.1 – ensure Engineer performs...in good faith
- CI 7.1.3 – indemnity
- Consultant's agreement



# Other mechanisms under the contract

## Dispute resolution meeting

- Clause 13.2.2 – mandatory if requested
- After ordinary decision, but before formal decision

## Expert determination

- Clause 13.2.3 - requires agreement
- Improve with agreed procedure for Expert

## Advance notification

- Clause 5.21 – mandatory meeting if requested
- Would benefit from balance of NEC3 provisions being added

# Other standard forms

## FIDIC 1999 Red Book

- Engineer consults, seeks agreement
- If not, determines dispute

## FIDIC Red Book 2017

- Similar to 199, but now with time limits

## AIA A201-2007

- Architect's decision
- Initial decision
- Mediation then arbitration

## Other standard forms (cont.)

### NEC4

- W1 – private adjudication, then tribunal
- W2 – HGCRRA adjudication, then tribunal
- W3 – DAB and then tribunal

### AS4000-2007

- 14 days to attempt resolution
- Then arbitration

## Other standard forms (cont.)

### NZIA SCC 2016

- Similar to NZS 3910
- But omits Engineer's review
- More weight on mediation prior to arbitration

# Opportunities for the Engineer

*'...one objectives of this being to minimise disputes'*

Quasi-mediator or conciliatory?

Improved early notification process?

Introduce another person or process?

Amendments to NZS 3910 required?

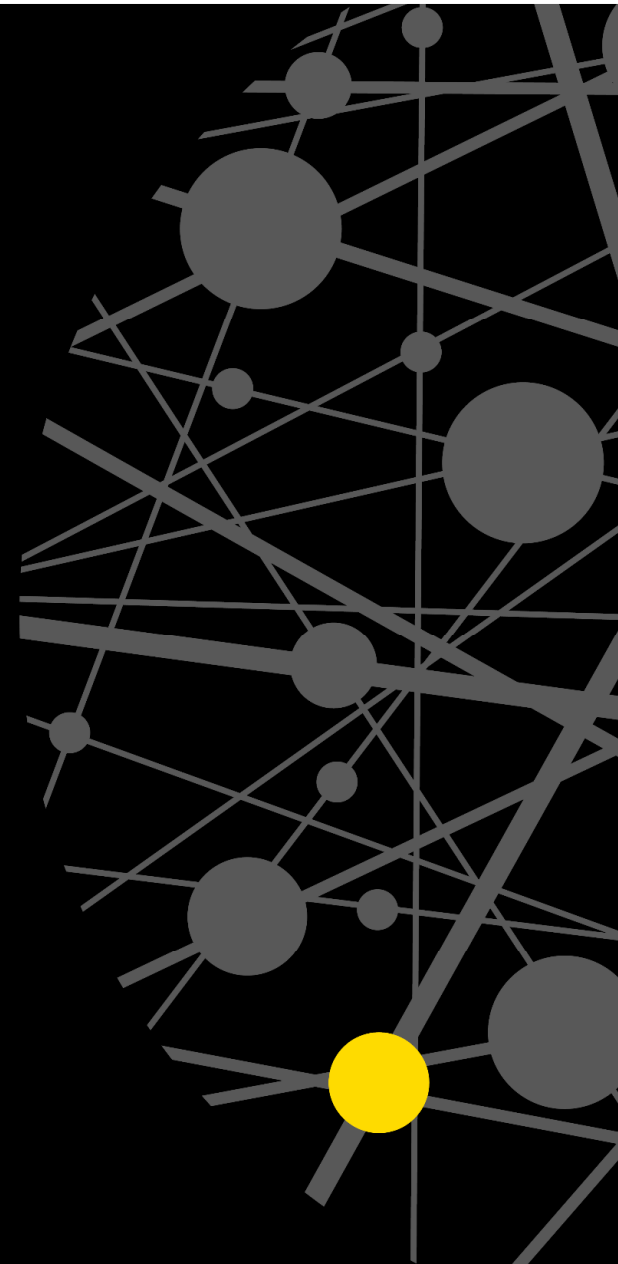
Thank you.

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# The Engineer to the Contract: How the role evolved and the part played in dispute resolution

Stuart Robertson

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Hamilton: 27 and 28 February, 1 March 2018 and 5 April 2018 respectively

# The Engineer to the Contract: How the role evolved and the part played in dispute resolution<sup>1</sup>

## 1 Introduction

- 1.1 The managing and make the most of dispute resolution in construction contracts should be an objective of all parties involved. For those parties unfortunate enough to have been embroiled in drawn-out litigation, predominantly arbitration prior to the Construction Contracts Act 2002<sup>2</sup>, even if you 'win' the true cost to your business can be detrimentally affected for years.
- 1.2 What role then can the administrator of the contract play in the avoidance and/or resolution of construction disputes? This paper considers that proposition and in doing so reviews the history of the engineer and how he/she became an administrator to the contract; how New Zealand standard form contracts evolved to set out the dual roles of the Engineer<sup>3</sup>, the various provisions under NZS 3910 where the Engineer plays a part.

## 2 Engineering as a profession

- 2.1 The English/European medieval and early modern world recognised three professions – medicine, the clergy, and the law. Since the early 18<sup>th</sup> century we now recognise engineers 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.
- 2.2 The world's first self-proclaimed 'Civil Engineer' was a man born in England in 1724, by the name of John Smeaton<sup>4</sup>, and not Isambard Kingdom Brunel<sup>5</sup>, for whom most would recognise. Though Smeaton started his career as a lawyer, he came to follow his passion for mechanics and mathematics.
- 2.3 In 1771 Smeaton founded the Society of Civil Engineers (now known as the Smeatonian Society) 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.<sup>6</sup> As is well known, the ICE still exists today. In countries all around the world there are a multitude of professional bodies bring together many engineering disciplines. In New Zealand they include such organisations as Engineering New Zealand (formerly IPENZ), ACENZ, IPWEA, and more specialised organisations such as NZIA, NZIQS and so on. Many of these organisations have produced self-titled standard form construction contracts similar to NZS 3910, under which it anticipates its members to play the role of administrator to the contract (Engineer, Architect, etc.).

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<sup>1</sup> At least in the early part of this paper the Engineer is referred to in the male gender. This is a simply a fact of the language in the cases and texts. References and quotes from various sources are noted in this paper. However, there is more material than referenced from various sources on the www. In addition, special mention is made to the work of Dr Donald Charrett in his article *The Engineer is dead. Long live the Engineer!*, Australian Construction Law Newsletter #134 September/October 2010, and his presentation of the same title to the Society of Construction Law NZ, 11, 12 and 13 November 2014, and to the early input of Sherwyn Williams. Sherwyn is a former Partner and Consultant of Kensington Swan, but more importantly chair of the NZ Standards committee that developed and issued NZS 3910:2013, for which Sherwyn won an award for that role.

<sup>2</sup> The CCA came into force on 1 April 2003.

<sup>3</sup> Basing this paper predominantly on NZS 3910, capitalised terms are those define in that suite of contracts.

<sup>4</sup> Smeaton (1724 – 1792).

<sup>5</sup> Brunel (1806 – 1859).

<sup>6</sup> The Smeatonian Society is now largely a social forum for engineers.



- 2.4 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.
- 2.5 But Smeaton was not alone. Other notable English engineers such as Telford and Rennie<sup>7</sup> were also instrumental in developing contractual systems that still appear today in our modern standard form contracts.
- 2.6 Most civil (public and private) works of the early 18<sup>th</sup> 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.<sup>8</sup>
- 2.7 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.
- 2.8 Brunel was the engineer to this contract. 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.<sup>9</sup> Finally, Brunel was a shareholder of the Principal.
- 2.9 The aggrieved contractor 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:<sup>10</sup>

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,

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<sup>7</sup> 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.

<sup>8</sup> 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).

<sup>9</sup> 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.

<sup>10</sup> *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.

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.

- 2.10 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:<sup>11</sup>

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, 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.

- 2.11 Unfortunately for Ranger, the case did not end there, as in 1859 there is a reported case of him successfully obtaining a discovery order<sup>12</sup> and it wasn't finally resolved until 1864 with Ranger being awarded £100,000 plus interest and costs.

### 3 Background to NZS 3910

- 3.1 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.<sup>13</sup>
- 3.2 The Foreword to Smellie's commentary to NZSS 623:1964 was provided by the late I.N. Duncan Wallace Q.C and 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 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.

<sup>11</sup> *Ranger v Great Western Railway Company* [1843-1860] All ER 321 at 328E.

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

<sup>13</sup> A Commentary on Standard Conditions of Contract NZSS 623:1964, Smellie, R.P., Butterworths, Wellington, 1983.

3.3 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 NZSS 623 does not define the duties or role of the Engineer, at least not in a single clause.

3.4 The Engineer is defined 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.

3.5 However, the Engineer's Representative does have specific provisions within the standard.<sup>14</sup>

3.6 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; publications such as the Building Law Reports were only started in 1976, and personal computers (let alone the www) were still some way off.

3.7 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 Engineer's discharge of his duties. In the New Zealand case of *Brown & Doherty Ltd v Whangarei County Council*<sup>15</sup> Justice Smellie referred to the English case of *Jackson v Barry Railway Company* (from 1893)<sup>16</sup>, 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 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.

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

3.9 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.

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<sup>14</sup> Part 6: Engineer's Representative.

<sup>15</sup> *Brown & Doherty Ltd v Whangarei County Council*, unreported, CP 3/86, Auckland, Smellie J, 13 February 1987, at page 20.

<sup>16</sup> *Jackson v Barry Railway Company* (1893) 1 Ch 238, Bowen L.J., at page 246-247

- 3.10 Justice Smellie goes on in *Brown & Doherty* to summarise the development in the New Zealand common law, 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.<sup>17</sup>

- 3.11 On the question of the discharge of the duty of fairness and impartiality by the Engineer, His Honour held:<sup>18</sup>

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 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.

- 3.12 The decision in *Brown & Doherty* was delivered on 13 February 1987 and as prefaced by Smellie in his commentary on NZSS 623:1964, by year's end the New Zealand Standards Council had approved and publish NZS 3910:1987 Conditions of Contract for Building and Civil Engineering Construction. It had been more than 20 years since NZSS 623:1964 had been published and well overdue for major revision. SANZ received some 1,500 comments to the draft new standard form (DZ 623) resulting in the first NZS 3910.<sup>19</sup>

## 4 The modern Engineer under NZS 3910

- 4.1 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 swapping the subsection numbering.<sup>20</sup>

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<sup>17</sup> 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.

<sup>18</sup> *Brown & Doherty Ltd v Whangarei County Council*, unreported, CP 3/86, Auckland, Smellie J, 13 February 1987, at page 30.

<sup>19</sup> NZS3910: 1987, Foreword, p 4, Standards Association of New Zealand, Wellington, 1987.

<sup>20</sup> For convenience, reference to 'NZS 3910' in the balance of this paper will refer to NZS 3910:2013.

4.2 The Contract states<sup>21</sup>:

‘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’.

4.3 This clause immediately raises several questions. Who is the Engineer? What is his/her role and function, and what does ‘reasonably and in good faith’ mean? These will be discussed below, before carrying on to address other issues which can arise for Engineers, or for people who work with Engineers.

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

4.4 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 the Contract.<sup>22</sup>

4.5 In the ordinary course of tendering, the identity of the Engineer will 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<sup>23</sup>.

4.6 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, as in many cases the Engineer is an employee of a consultant engaged by the Principal to develop and/or design the project.

4.7 While the Principal and Contractor can be a natural person or a body corporate<sup>24</sup>, NZS 3910 is clear that the Engineer must be a single, natural person, not being a body corporate or a firm.<sup>25</sup> 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.

4.8 The origin of this requirement lay in the strong desire amongst contractors, which subsists today, to be able to look to an identifiable individual for the numerous decisions entrusted to the Engineer.

4.9 Many of those 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 accountability being dissipated within a corporate entity and the decision-maker being able to ‘hide behind’ the relative anonymity afforded by the corporate entity.

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<sup>21</sup> Clause 6.1.1.

<sup>22</sup> 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.

<sup>23</sup> Clause 6.1.3.

<sup>24</sup> Most commonly a company under the Companies Act 1991, but also, for a Principal, a body corporate under the Unit Titles Act 2010.

<sup>25</sup> Clause 6.1.4.

- 4.10 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 attributes. With it difficult for a Contractor to sue an Engineer, for losses arising from the decisions made by the Engineer under the Contract, having a company as Engineer (with its own professional indemnity (PI) insurance) does not improve the Contractor's position.
- 4.11 Appointing an individual is not a universal approach, as such restrictions are not necessarily found in other, similar standard form contracts.<sup>26</sup> 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.<sup>27</sup>
- 4.12 The guidance notes for NZS 3910 suggest that there 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...*

- 4.13 Since 1987 the Engineer's express role has been a 'dual role':<sup>28</sup>
- (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
  - (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.
- 4.14 The functions of the Engineer circle back to one of these two roles.

*'Agent of the Principal'*

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

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<sup>26</sup> 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.

<sup>27</sup> *The Engineer is dead. Long live the Engineer!* Dr Donald Charrett, Australian Construction Law Newsletter #134 September/October 2010, page 20.

<sup>28</sup> Clause 6.2.1.

- 4.16 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 provide advice in his or her area of specialist expertise (a geotechnical engineer, a hydraulics engineer, etc.) with a lack of impartiality.
- 4.17 When the Engineer is not making decisions under the Contract they are expected to be providing expert advice to their employer, the Principal.
- 4.18 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 legal binding relationships between the grantor and a third party.<sup>29</sup> 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.
- 4.19 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.
- 4.20 The Engineer can issue ‘proper instructions’ in relation to the Contract<sup>30</sup> and make Variation orders to the scope of work to be performed.<sup>31</sup> In doing so, the Engineer binds the Principal to meet the cost of that Variation and to allow any relevant time extension.
- 4.21 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.
- 4.22 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’*

- 4.23 Under the second limb the Engineer is no longer acting as expert advisor or as the agent of the Principal. The Engineer must consider in an independent and impartial manner all matters empower to them for their decision. This could be making a decision on an unforeseen physical condition (clause 9.5) or valuing and certifying the work completed in a month (clause 12.2.2).

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<sup>29</sup> As defined in the New Zealand Law Dictionary, 8<sup>th</sup> ed. LexisNexis, Wellington, 2015.

<sup>30</sup> Clause 5.1.2.

<sup>31</sup> Clause 9.1.1.

- 4.24 In this role the Engineer is acting in a quasi-judicial role. This was confirmed in *Bowen & Doherty* in the learned judge adopting the findings of the Court of Appeal (Woodhouse and Cooke JJ).<sup>32</sup>

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.

- 4.25 The guidance notes confirm that the requirement to act fairly and impartially is to give effect to one of the objectives, this being to minimise disputes.<sup>33</sup> 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:<sup>34</sup>

... 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.

- 4.26 An addition to the FIDIC Red Book 2017 is for the Engineer to act neutrally between the parties when reaching agreement or a determination under clause 3.7.

- 4.27 The following are further examples of where the Engineer is to exercise his or her power independently, fairly and impartially, but is by no means exhaustive:

a Scheduled amounts:

- i When the Engineer receives payment claims and issues payment schedules, he or she does as agent for the Principal.<sup>35</sup> However, the Engineer must act impartially and independently when assessing and certifying the value of the work completed.<sup>36</sup>

b Variations:

- i The Engineer can order Variations and bind the Principal to the consequences (i.e. time and cost) of those Variations to the Contract Works.<sup>37</sup> Where the Engineer instructs the Contractor and it is not in writing or not expressed to be a Variation, but the Contractor believes it is, or any matter not covered by clause 9.1 arises, then the Contractor shall notify the Engineer. The Engineer must then make a decision granting or disallowing a Variation. The decision must be accompanied by reasons.

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<sup>32</sup> *Canterbury Pipelines v Canterbury Drainage Board* [1979] 2 NZLR 347 at 357.

<sup>33</sup> Guidance note G 6.2.1.

<sup>34</sup> *Kennedy-Grant and Weatherall on Construction Law*, Lexis Nexis, Chapter 20, [280: 310]. In particular note the cases referenced at footnote 1.

<sup>35</sup> Clause 12.2.2.

<sup>36</sup> Clause 12.2.1 and 12.2.2 (d)

<sup>37</sup> Clause 9.1.



- ii When the Engineer is assessing Cost and time associated with a Variation he/she is expected to independently and impartially determine:
  - A whether the work undertaken is in fact a Variation, rather than encompassed in the existing scope of work or specifications;
  - B the Cost (if any) of the Variation, having regard to the different mechanisms available to value a Variation under clause 9.3;
  - C whether the Variation has an impact on the Due Date for Completion; and
  - D whether time-related Costs are payable and if so how much.
  
- c Default notice:<sup>38</sup>
  - i The Principal may issue a 'Default Notice' by which the Contractor has ten Working Days to remedy its defaults. A failure to do so, where the default arises under clause 14.2.1(c), provides the Principal with a right to terminate the contract. Before doing so, the Engineer is to certify in writing to the Principal that in his or her opinion, the Contractor has abandoned the Contract or is persistently, flagrantly or wilfully neglecting to carry out its obligations under the Contract.<sup>39</sup>
  
- d Engineer's Review and Engineer's formal decision:<sup>40</sup>
  - i In keeping with reducing the incidence of ongoing disputes, clause 13.1.1 provides a time limit on questioning or challenging decisions, valuations or certificates of the Engineer.
  - ii While the intent of this clause is clear to both parties, its usefulness has been reduced in light of sections 12 and 25 of the Construction Contracts Act 2002, or improved with the enactment of the CCA depending on your perspective (but that is for others to consider).<sup>41</sup>
  - iii If the decision, valuation or certificate is challenged (remembering there is no presumption this is solely by the Contractor) the Engineer is charged with determining that dispute.<sup>42</sup> Of note is that the Engineer can may correct or modify that second decision by way of subsequent decision.<sup>43</sup>
  - iv There is then a third level of Engineer's decision in the form of 'a formal decision' under clause 13.2.4. The Engineer has a relatively short timeframe in which to issue a formal decision – only 20 Working Days. The referral of a dispute to the Engineer for a formal decision is a precondition to mediation and arbitration.<sup>44</sup>

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<sup>38</sup> Clause 14.2.1.

<sup>39</sup> Clause 14.2.1(c).

<sup>40</sup> Clauses 13.2.1 and 13.2.4.

<sup>41</sup> Section 12 of the CCA prevents parties contracting out of the Act. Section 25 preserves the right to refer a 'dispute' to adjudication. The attempt within the latter part of clause 13.1.1 to limit a right to adjudication to within 3 months, has yet to be judicially tested.

<sup>42</sup> Clause 13.2.1.

<sup>43</sup> The exception is where second decision is one under 13.2.4 (a formal decision).

<sup>44</sup> Clauses 13.3 and 13.4. The parties can agree to mediation at any point.

4.28 We will return to the Engineer's role in the dispute resolution process later in this paper.

*... reasonably and in good faith.*

4.29 In finding against the Engineer in *Canterbury Pipe Lines v Christchurch Drainage Board*, Cooke P articulated key principles around the standard to which Engineers are to be held.<sup>45</sup>

4.30 The general conditions 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.

4.31 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 a 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. The question is whether the effect of the Engineer's conduct is unfair on the parties, on a test of objective conduct.<sup>46</sup>

## **5 So who is the Engineer?**

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

### *Employee*

5.2 Historically all 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.

5.3 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, always gave fair decisions, often ruling in favour of the Contractor.

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

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<sup>45</sup> *Canterbury Pipe Lines Ltd v Christchurch Drainage Board* [1979] 2 NZLR 347 (CA) at 358.

<sup>46</sup> [1979] 2 NZLR 347 at page 358.

- 5.5 It is not hard to imagine the huge capacity for the employee-Engineer to feel conflicted in his or her role. They wished 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.<sup>47</sup> This includes not allowing the internal policies of the Principal to control the employee-Engineer's decision (although internal policies may be considered)<sup>48</sup>. If a decision was found to be made unfairly, it will be held to be invalid.
- 5.6 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*

- 5.7 To overcome these issues, whether voluntarily or due to other factors<sup>49</sup>, over the last 20 years there has been a significant movement towards engaging a third party to perform the role of Engineer. This person is commonly an employee of the engineering consultancy or architectural practice providing advice to the Principal on the project.
- 5.8 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.
- 5.9 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.
- 5.10 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 insurance, PI or otherwise, has an express obligation on the insured not to admit liability. To do so will void cover.
- 5.11 For example, the Engineer is asked to determine a claim of unforeseen physical condition (clause 9.5), 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.

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<sup>47</sup> *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 in issuing a variation instruction, or whether he acted unfairly or unconscionably while issuing that instruction and a certificate of practical completion.

<sup>48</sup> *Perini Corporate v Commonwealth of Australia* [1969] 2 NSW 530.

<sup>49</sup> 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 Opus International Consultants and Works Infrastructure.

### *Can the Principal appoint itself?*

- 5.12 Clauses 6.1 and 6.2 do not prohibit the Principal appointing him or herself (assuming the Principal is a natural person), or an 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.
- 5.13 In a 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.<sup>50</sup>
- 5.14 In coming to this conclusion, the Court found 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 to make an independent decision against the Principal's own interests than a senior and professional person, who can conscientiously put the Principal's interests to one side when making a decision.<sup>51</sup>
- 5.15 This is another marked step in the evolution of the role of the Engineer, but one that has not reached New Zealand.
- 5.16 If a Principal does not wish to operate the administration of 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.
- 5.17 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.'<sup>52</sup>

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

<sup>51</sup> *Scheldebouw BV v St James Homes (Grosvenor Dock) Ltd* [2006] EWHC 89 (TCC); [2006] BLR 113 at 127, paragraph [45] onwards.

<sup>52</sup> *WMC Resources Ltd v Leighton Contractors Pty Ltd* [1999] WASCA 10; (2000) 16 BCL 53 at 62 per Ipp J.

## 6 End of the Engineer's duties

### *During the Contract*

- 6.1 The Contractor is essentially powerless to change the Engineer once the contract is underway. There is no obligation for the Principal to change the Engineer if it does not want to.
- 6.2 If at any point the Engineer has his or her appointment revoked, or ceases to be available, then the Principal is to appoint an interim Engineer, notify the Contractor of the person it proposes to appoint as new Engineer.<sup>53</sup> This could be the interim Engineer or a new person.
- 6.3 The Principal needs only to 'consider' any representations made on behalf of the Contractor before it notifies the Contractor of the appointment of the new Engineer. There is no obligation for the Principal to follow the Contractor's representations.<sup>54</sup>

### *End of the Contract*

- 6.4 Bringing the project to end involves three further tasks of the Engineer:
  - a Have the Contract Works achieved Practical Completion? If yes, then the Engineer issues the Practical Completion Certificate;<sup>55</sup>
  - b Has the Contractor completed its obligations during the Defects Notification Period? If yes, the Engineer issues the Final Completion Certificate,<sup>56</sup> and
  - c Finally, the Engineer assesses the final value of the Contract Works completed and issues the final payment schedule.<sup>57</sup>
- 6.5 Subject to any matters already in dispute that may require an Engineer's formal decision (for example a dispute referred to adjudication awaiting a determination)<sup>58</sup>, then subject to any challenge to the final payment schedule, the Engineer's role is at an end.

## 7 Pitfalls for the Engineer

- 7.1 The preceding sections provide the background to the essential elements of the Engineer, including examples of where he or she acts as the Principal's agent, and where he or she must exercise quasi-judicial powers.
- 7.2 Before exploring other contractual mechanisms for the Engineer to avoid, manage and/or resolve disputes, it is useful to appreciate the pitfalls for the Engineer. It could be against these risks that it is practical or not for the Engineer to take a more active role, with or without changes to NZS 3910.<sup>59</sup>

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<sup>53</sup> Clause 6.1.3(a) and (b).

<sup>54</sup> Clause 6.1.3(c).

<sup>55</sup> Clause 10.4.

<sup>56</sup> Clause 11.3.

<sup>57</sup> Clause 12.5.

<sup>58</sup> Clause 12.4.3.

<sup>59</sup> This is necessarily a brief summary on the topic, which is worthy of a conference in itself.

### *Acting outside of his or her authority*

- 7.3 While the Engineer has authority from the Principal to act as its agent and expert advisor, there are some powers under the Contract which remain exclusively with the Principal. The Engineer must be clear about as to the scope of his or her role.
- 7.4 As briefly touched on above, a distinction must be made between Variations to the Contract Works (under clause 9), and varying the contract terms. The former is within the power of the Engineer. The latter is reserved to the Principal and the Contractor. Any change to the agreed terms is an amendment to the contract and the sole purvey of the Principal and the Contractor. The FIDIC 1999 and 2017 Red Books expressly state the Engineer has no authority to amend the contract.<sup>60</sup>
- 7.5 If the Contractor acts on an instruction of the Engineer, purported to be on behalf of the Principal, but is in fact beyond the scope of the Engineer's authority (as set out in the contract), and the Contractor suffers financial harm as a result, the Engineer may be personally liable to the Contractor under long-standing common law principles.<sup>61</sup> Alternatively, if the Contractor is able to establish that there was authority, whether such representations have been made or the Principal knew about the Engineer's assertions and failed to prevent the work from being carried out, the Principal may be liable for the decisions of a rogue Engineer.

### *Claims against the Engineer*

- 7.6 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.<sup>62</sup> 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
  - 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.

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<sup>60</sup> FIDIC 1999 Red Book, clause 3.1; 2017 Red Book, clause 3.2.

<sup>61</sup> *Firbank v Humphreys* (1887) 18 QBD 64 at 60; *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465; [1963] 2 All ER 575; and *Sika Contracts Ltd v BL Gill & Closeglen Properties Ltd* (1978) 9 BLR 11 where an Engineer ordered repairs to a concrete beam without mentioning the Principal. The Court found that the Engineer did not act as an agent and the Contractor was entitled to rely on the Engineer, as no other person was named in the correspondence.

<sup>62</sup> *Hudson's Building and Engineering Contracts*, Robert Clay and Nicholas Dennys, QC (eds) (13th ed, Sweet & Maxwell, London, 2015) at 307.

7.7 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.<sup>63</sup> On this basis, previous attempts by Contractors to claim against Engineers under standard form construction contracts have been almost entirely unsuccessful:

- a In *Pacific Associates v Baxter*,<sup>64</sup> the UK Court of Appeal found that notwithstanding possible cases of fraud, dishonesty and collusion, the degree of contractual proximity between the Contractor and the Engineer was insufficient to establish a duty of care to prevent economic loss. The Court found it highly influential that the contract contained a clause excluding liability for a number of parties including Engineer and its staff, and contained an arbitration clause to provide for a remedy against the Principal. The Contract in this case was a FIDIC contract.<sup>65</sup>
- b In *R W Miller v Krupp (Aust) Pty Ltd*,<sup>66</sup> the Contractor claimed a breach of a tortious duty of care when a counterweight boom collapsed in a coal-handling and preparation mine after a contract administrator had issued a final certificate that the works had been completed to the requisite standard. The Supreme Court of New South Wales applied established economic loss principles and found that there was no duty of care because there was insufficient proximity (reliance and loss, looking at the contract) and the Contractor's duties under the contract were not dependent on the Engineer carrying out a supervisory function. Furthermore, the Contractor had not relied upon the Engineer in relation to the works, but had rather held itself out as an expert in that field.
- c In *John Holland Construction & Engineering Ltd v Majorca Products*,<sup>67</sup> the Contractor claimed against the Engineer on the basis that it acted in breach of a duty to act fairly and impartially as a certifier, and that it procured a breach of contract by the Principal issuing unauthorised and excessive provisional assessments. The Court applied the test from *Pacific Associates* and found that no duty existed. The Court held that:
  - i Whether the certifier's (i.e. Engineer's) duty to act fairly and impartially gives rise to a duty in negligence is determined by the extent of the reliance upon the certifier to act in such a manner; and the assumption by the certifier of that legal responsibility. Both of those questions are to be answered by reference to the contract.
  - ii Whether the Engineer is in breach of a duty of care is determined with regard to the standards expected of ordinary skilled persons exercising or professing the skill of an Engineer administering a building contract.
  - iii It was no basis for finding a breach of a duty of care by receiving material representations which were not passed on to the Contractor; or, by making decisions exclusively or predominantly with regard to the Principal.

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<sup>63</sup> *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 Kerlake & Partners* [2000] 3 NZLR 406 (CA).

<sup>64</sup> *Pacific Associates v Baxter* [1990] 1 QB 993; (1990) 44 BLR 33 at 68 per Purchas LJ.

<sup>65</sup> 2nd edition, 1969.

<sup>66</sup> *R W Miller v Krupp (Aust) Pty Ltd* (1995) 11 B.C.L. 74.

<sup>67</sup> *John Holland Construction & Engineering Ltd v Majorca Products* (1997) 13 BCL 235; (1996) Victoria SC, 26.vii.1996; (2000) 16 Const. L.J. 114.

- iv An action for interference with contract will fail where there is a bona fide belief reasonably entertained by the architect (i.e. Engineer) that its conduct would not deprive the Contractor of payments to which it is entitled.

- 7.8 A Contractor may have an arguable case where there is no remedy against the Principal under the contract. In *Metrowell Holdings v Periwine Development*,<sup>68</sup> a strike-out application was declined for this reason, indicating that (at least in Hong Kong) the Court was prepared to consider distinguishing *Pacific Associates*.
- 7.9 The authors of *Hudson's* submit<sup>69</sup> that only a positive unqualified intervention or representation, made or given in circumstances where the Engineer could be said to accept responsibility for its efficacy and accuracy, will lead to the creation of a duty of care to the Contractor. This would involve the Engineer taking actions outside of their normal duties and otherwise incurring liability on a general common law basis.<sup>70</sup>
- 7.10 *Kennedy-Grant and Weatherall* suggest that a useful analogy can be found in a case where an Engineer assured the subcontractor that there were ample funds to complete the works and that he would be paid if he continued the works. In *Day v Ost*<sup>71</sup> when the subcontractor was only paid \$1,000 of \$4,888 owing, the subcontractor successfully established that the it was entitled to assume, and was meant by the defendant (Engineer) to assume, that in assuring the subcontractor of the Principal's availability of funds there was no need to worry.

#### *Claims against the Principal*

- 7.11 Generally, if the Contractor has a dispute in relation to the way the Engineer has performed his or her duties, the Contractor brings its claim against the Principal:
- a The Contract states that if the Contractor suffers delay or loss because the Engineer's failure or inability to carry out properly his or her duties as described in the Contract, that failure shall be treated as a Variation.<sup>72</sup> This clause has the effect of referring the liability for the Engineer's breach of duty to the Principal, as the Principal has liability to pay for any Variation under the Contract.
  - b The actions of the Engineer, as the Principal's agent, are considered to be the actions of the Principal at law. The Principal owes the primary duty under the Contract to the Contractor, and is therefore the proper defendant. Further, the Contract provisions state that it is the *Principal who shall ensure* the Engineer performs its role and functions in good faith.<sup>73</sup>
  - c The language of clause 6.1.1 is that of a positive obligation to act, and this is reflected in the case law. In *Perini Corporation v Corporation of Australia*,<sup>74</sup> the Court held that unless the contract expressly provides, the Court will imply terms beyond preventing the Principal from encouraging the Engineer to act partially. The Principal must actively ensure that the Engineer acts impartially.

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<sup>68</sup> *Metrowell Holdings v Periwine Development* [2001] HKCFI 923.

<sup>69</sup> *Hudson's Building and Engineering Contracts*, Robert Clay and Nicholas Dennys, QC (eds) (13th ed, Sweet & Maxwell, London, 2015) at 309.

<sup>70</sup> For example, negligent misstatement in accordance with *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465; [1963] 2 All ER 575.

<sup>71</sup> *Day v Ost* [1973] 2 NZLR 385.

<sup>72</sup> Clause 6.2.4.

<sup>73</sup> Clause 6.1.1.

<sup>74</sup> *Perini Corporation v Corporation of Australia* [1969] 2 NSWLR 530.



- d In the absence of a provision deeming an Engineer's breach a Variation, the Principal indemnifies the Contractor for the Engineer's actions where loss is caused to the Contractor under clause 7.1.3, by virtue of clause 7.1.2(c).<sup>75</sup>
- e The Principal can ensure it has recourse against the Engineer under its own contract for services with the Engineer, should any failures in the Engineer's performance of his or her duties causes loss to the Principal.

7.12 Overseas jurisdictions are not adverse to opening the way for the Engineer to owe a duty of care to the Contractor, the breach of which founds a basis of direct claim. In New Zealand, notwithstanding *Day v Ost*, the courts' view on the importance of the contractual arrangements between the parties lends itself to no duty of care being owed by the Engineer. But as all Engineers have some form of PI cover, a cautious approach will always be taken by them.

## 8 Other mechanisms under the contract

8.1 In addition to the decision and review processes under clause 13, there are three other provisions within NZS 3910 which provide opportunities for the Engineer to more actively play a role in dispute avoidance and resolution.

8.2 A meeting - Clause 13.2.2 states:

The Engineer or the Principal or the Contractor may, before or after the Engineer has given a decision (other than a decision under 13.2.4), ask for a meeting, and in such case the Engineer and a representative of the Contractor shall meet as soon as practicable and endeavour to resolve the dispute amicably.

8.3 This clause is only triggered by virtue of a party questioning or challenging a prior decision, valuation or certificate of the Engineer (per clause 13.1.1). Further, a formal decision is excluded. Accordingly, this provision is only applicable to an Engineer's review under clause 13.2.1.

8.4 The clause excludes the Principal from being compelled to meet. The meeting is between the Engineer and the Contractor. For the purposes of this meeting the Engineer appears to be acting as the agent of the Principal, rather than in his/her quasi-judicial role.

8.5 Clause 13.2.2 does, however, provide some basis for the Engineer to better avoid, manage and/or resolve disputes. But the clause could do with some tweaking, in the Special Conditions.

8.6 Expert determination - Clause 13.2.3 states:

The Engineer and the Contractor may, with the consent of the Principal, jointly submit the dispute or any question arising in connection with it to an agreed expert, with a request to make a recommendation to assist them to resolve the matter. The Principal and the Contractor shall each pay one half of the costs of the agreed expert.

8.7 The Engineer is acting as the Principal's agent in presenting the dispute to an agreed expert. That dispute is with a decision, valuation or certificate of the Engineer, placing the Engineer in an even more precarious position. Which hat is he or she wearing at any one time? The

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<sup>75</sup> Similar clauses appear in NZIA SCC 2016, clause 5.2.1; FIDIC 1999 Red Book, clause 17.1;

provision presumes it is only the Contractor who will raise a dispute. This maybe more in the language used than in substance.

- 8.8 NZS 3910 could benefit from a standard set of expert determination terms (say as a Schedule) to both avoid disputes as to the terms to be adopted and ensure the expert does not fall foul of the Arbitration Act 1996.<sup>76</sup>
- 8.9 Clause 13.2.3 does not, as clause 13.2.2 does, limit the disputes that can be referred to the expert. However, in the consecutive nature of the clauses and the reference in clause 13.2.4, it would appear this provision does not apply to a formal decision.
- 8.10 Advance Notification - Clause 5.21 states:
- 5.21.1** The Contractor and the Engineer shall notify each other in writing as soon as either of them becomes aware of any matter which is likely to:
- (a) Materially alter the Contract Price;
- (b) Materially delay completion of the Contract Works; or
- (c) Result in a breach of a statutory duty in connection with the Contract Works
- 5.21.2** Either the Engineer or the Contractor may require the other to meet for the purpose of exploring proposals for avoiding or reducing the impact of the notified matter.
- 5.21.3** If the Contractor does not notify a matter which it reasonably ought to have notified under 5.21.1, any Variation arising out of the matter shall be valued under 9.3 as if notification had been given and that notification might reasonably have resulted in the impact of the matter being avoided or reduced.
- 8.11 The Engineer is presumed to be acting as the agent of the Principal if he or she calls a meeting under clause 5.21.2. Aside from the imbalance in clause 5.21.3<sup>77</sup> the introduction of the advance notification process is a marked step forward in dispute avoidance. The Engineer has an active role to play here.
- 8.12 There is usually a 'but', and there is one here. Clause 5.21 is taken from NEC3 clause 16. But NZS 3910 omits two critical parts of the NEC provision:

- 16.3 At a risk reduction meeting, those who attend co-operate in
- making and considering proposals for how the effect of the registered risks can be avoided or reduced,
  - seeking solutions that will bring advantage to all those who will be affected,
  - deciding on the actions which will be taken and who, in accordance with this contract, will take them and
  - deciding which risks have now been avoided or have passed and can be removed from the Risk Register.

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<sup>76</sup> *Lighter Quay Residents' Society Inc & Ors v Waterfront Properties (2009) Ltd & Or* [2013] NZHC 2678. Paragraph [51] refers to *Northbuild Constructions Pty Ltd v Discovery Beach Project Pty Ltd* [2008] QCA 160, in which at [119] the Court said: "... the problem is not whether the parties intended expert determination... The question is whether what that has become can any longer be described as an expert determination. If it no longer can be so described, the "expert determination" would be ultra vires and liable to be set aside. It would, in short, be unenforceable."

<sup>77</sup> If the Engineer becomes aware of one of the three circumstances in clause 5.21.1, a failure to notify the Contractor carries no risk.

16.4 The Project Manager revises the Risk Register to record the decisions made at each risk reduction meeting and issues the revised Risk Register to the Contractor. If a decision needs a change to the Works Information, the Project Manager instructs the change at the same time as he issues the revised Risk Register.<sup>78</sup>

- 8.13 The advance notification process under NZS 3910 could be markedly improved with the adoption of NEC3 clauses 16.3 and 16.4. The Engineer could then proactively with the Contractor avoid disputes or at worse better manage risks that may result in decisions, valuations or certificates that will subsequently be disputed.

## 9 Other standard forms

- 9.1 What then of other standard form contracts and their dispute avoidance/resolution provisions?

- 9.2 In the third edition of 'The FIDIC Forms of Contract', the learned author records:<sup>79</sup>

In performing his duties, the engineer is under an implied duty in common law, where it applies, and an express duty under the Code of Ethics of FIDIC to act with complete impartiality of judgement or decision in applying the terms of the contract between the employer and the contractor. It should be noted that the 1996 Supplement to the 1992 Edition of the Red Book and the 1999 Red Book have removed the requirement of impartiality from the engineer, and his role as a quasi-arbitrator or adjudicator has been allocated to a Dispute Adjudication Board, see Chapter 26.

- 9.3 However, the text goes on to acknowledge the debates that still reign as to independence and concludes that each contract must be assessed on its merits and specific conditions added as required.

- 9.4 Under the 1999 Red Book, the Engineer first consults with each party, separately and/or jointly, and endeavours to achieve the agreement of both parties (not, it should be noted, just the Engineer's agreement with one party). If the agreement of both parties cannot be achieved within a reasonable time, the Engineer is then required to make a 'fair determination in accordance with the Contract'.<sup>80</sup> As in the quote above, the Engineer's determination is not required to be made impartially, unless such a requirement is stated in the Particular Conditions. However, the Engineer should carry out this duty in a professional manner, utilising his/her 'suitably qualified engineers and other professionals' mentioned in sub-clause 3.1. The Engineer is then required to notify both parties of the determination, which is binding upon them unless and until revised under the dispute resolution procedures in Clause 20.

- 9.5 It has been suggested that:<sup>81</sup>

In practice, the Engineer may first make an interim determination(s), indicating his intention to review it when further particulars are presented to him, and meanwhile including the appropriate adjustment in Interim Payment Certificates. Although an interim determination may nevertheless be referable to the DAB directly without further delay, it is usually

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<sup>78</sup> 'Risk Register' is defined as: 'The Risk Register is a register of the risks which are listed in the Contract Data and the risks which the Project Manager or the Contractor has notified as an early warning matter. It includes a description of the risk and a description of the actions which are to be taken to avoid or reduce the risk.'

<sup>79</sup> The FIDIC Forms of Contract, 3<sup>rd</sup> edn., N.G. Bunni, Blackwell Publishing, Oxford, UK, at p 82.

<sup>80</sup> Clause 3.5.

<sup>81</sup> The FIDIC Contracts Guide, 1<sup>st</sup> edn, 2000, p 89.

preferable, if further particulars become available, for the Engineer to review his previous determination.

- 9.6 Under the 2017 Red Book, a similar approach is taken but with the introduction of time limits in sub-clause 3.7.3. Whereas previously an agreement reached under clause 3.5 (now clause 3.7.1) can be revisited under clause 20, this is not the case under the 2017 Red Book.
- 9.7 Claims or disputes that are eligible for further consideration are dealt with under clause 20 of both versions of the Red Book. Under both versions of the Red Book, once the claims are particularised and submitted to the Engineer, the Engineer shall proceed under sub-clause 3.5 or 3.7, respectively, to agree or determine the eligible claim.
- 9.8 Where, however, the difference between the parties is a Dispute, then this is dealt with by the Dispute Adjudication Board (1999) or the Dispute Avoidance/Adjudication Board (2017). In this regard a new process of avoidance of disputes is provided for in clause 21.3 of the 2017 Red Book. If the parties agree they may jointly request the DAAB to provide assistance and/or informally discuss and attempt to resolve any issue or disagreement. In any event the parties are entitled to refer their dispute to the DAAB for its decision. Under both versions of the Red Book if a party is dissatisfied with the decision of the DAB/DAAB they shall attempt to settle the Dispute amicably before the commencement of arbitration.<sup>82</sup>
- 9.9 Under the AIA A201 – 2007, decisions of the Architect ‘will be consistent with the intent of, and reasonably referable from, the Contract Documents...’ and:<sup>83</sup>
- ..the Architect will endeavour to secure faithful performance by both the Owner and the Contractor, will not show partiality to either ...
- 9.10 Where a party is dissatisfied with the Architect’s decision, they lodge a Claim with the Initial Decision Maker. That person can be the Architect, unless otherwise indicated in the Agreement.<sup>84</sup> The balance of clause 15.2 deals the procedures for obtaining an initial decision. Absent is any express provisions as to the duties of the Initial Decision Maker.
- 9.11 Following the initial decision, either party may elect to go to mediation and thereafter arbitration.<sup>85</sup>
- 9.12 Under NEC4, in its unique way, there is no traditional contractual provision, such as Section 13 of NZS3910. At various places throughout the Core Clauses is the ability to challenge the decisions, valuations and/or acts of the Project Manager or Supervisor. In preparing the contract the parties will select one of three options (W1, W2 or W3) under the ‘Resolving and Avoiding Disputes’ section:
- a Option W1 is used when adjudication is the method of dispute resolution and the UK Housing Grants, Construction and Regeneration Act 1996 does not apply. The process is set out in a table in W1, but in summary the dispute goes to the Senior Representatives of the parties who attempt to resolve the dispute. If unsuccessful, the dispute goes to the Adjudicator<sup>86</sup>. The process of adjudication is set out in W1.3. If a party is dissatisfied

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<sup>82</sup> Please note that clause 21 of the 2017 Red Book is a new addition and together with the existing clause 20 substantially enlarges the provisions around resolution of disputes, timing and other parties that are critical for the parties to understand.

<sup>83</sup> AIA A201 – 2007, clause 4.2.12.

<sup>84</sup> AIA A201 – 2007, clause 15.2.1

<sup>85</sup> AIA A201 – 2007, clauses 15.2.6, 15.3 and 15.4.

<sup>86</sup> This person is named in the Contract Data and appointed under the NEC Dispute Resolution Service Contract current at the date of the contract. The Adjudicator is not an adjudicator under the HGCR

with the adjudicator's decision, then it can refer the dispute to the Tribunal. The Tribunal can be an arbitration or other, as agreed.

- b Option W2 is used when adjudication is the method of dispute resolution and the UK Housing Grants, Construction and Regeneration Act 1996 ('HGCRA') applies. The only apparent difference to W1 is the adjudicator is now one under the HGCRA. The final step of the Tribunal is still present under this option.
- c Option W3 is used when a Dispute Avoidance Board ('DAB') is the method of dispute resolution and the HGCRA does not apply. The DAB assists the parties in resolving potential disputes before they become disputes. Only if the DAB cannot avoid or resolve a dispute, does it then go the Tribunal.

9.13 Under AS4000 – 2007, claims by the Contractor are made under the relevant provisions, and where there is a lacuna, under clause 41. Should a party be unhappy with the Superintendent's direction then the dispute is referred under clause 42 to arbitration. However, once a dispute is notified, the parties have 14 days in which to confer, at least once, to resolve the dispute or agree on methods of doing so. If not resolved within a further 14 days<sup>87</sup>, the dispute goes to arbitration.

9.14 Finally, under NZIA SCC 2016 the process is similar to NZS3910, but with the omission of the Engineer's review step found at clause 13.2.1. If a party is dissatisfied with the Architect's Direction, it is straight to a formal decision. However, the NZIA form places more weight on going to or attempting to go to mediation as a precondition to arbitration. Under NZS3910, a party can elect mediation or arbitration after the formal decision process.

## **10 Opportunities for the Engineer**

10.1 There can be few, if any, construction projects that could justify a wholesale return to the 'old days' of the Engineer being an employee of the Principal. But should the Engineer be empowered to take a more proactive role in the avoidance of, and management of, disputes?

10.2 An immediate concern is introducing a third role to the Engineer's existing dual roles – as quasi-mediator. More accurately the role would be that of conciliator as in the event the dispute was not avoided or resolved, the Engineer would then be called on to give a decision.

10.3 Conciliation has its draw backs, primarily in the reluctance of parties to be fully open in their exchanges, for fear that information they would otherwise have not presented in an open forum would be available to the Engineer for later determination. This factor is often ameliorated by making the subsequent decision non-binding or capable of rejection within a set period.

10.4 As noted above, expanding the advance notification provisions of clause 5.21 would be a marked improvement.

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<sup>87</sup> A total of 28 days from the giving of notice of the dispute.

- 10.5 Is there any benefit in the Engineer essentially considering the same issue three times: the primary decision, valuation or certification, and then two reviews?<sup>88</sup>
- 10.6 An alternative is to introduce another party or process independent of the Engineer. This could be a disputes avoidance or adjudication board.
- 10.7 For any initiative to improve the avoidance, management and resolution of disputes under NZS 3910, the general conditions would need to be amended. This is especially so if the Engineer is to take a broader role in those processes. It is unlikely that the Engineer (or its PI insurer) would embark on extend duties or powers without an express contractual basis.

### **Stuart Robertson**

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<sup>88</sup> Clauses 13.1.1, 13.2.1 (Engineer's review) and 13.2.4 (a formal decision).