Liability Of The Superintendent For Wrongfully Certifying

Patrick Mead, Partner, Carter Newell, Brisbane.

"... the contractor ... has pledged himself to submit this very dispute ... to the person with whom he virtually is wagering it ... the engineer, on such occasion, must be the judge, so to speak, in his own quarrel."1

Stripped to its basic elements, a construction contract is an exchange of promises to produce a project for a price within a period2. Given the reciprocal rights and obligations between the principal and contractor, a mechanism is usually required to make those mutual promises work. This mechanism is usually found in the appointment by the principal of the contract administrator or superintendent. Dorter and Sharkey describes the contract administrator’s role as being an invidious and almost impossible one:

"Apart from ... duties to both principal and contractor, he or she has a duty to the achievement of the contractual aim. Although the principal and the contractor are supposed to be cooperating in that achievement, in practice they are very soon evidencing their competing commercial concerns. Yet he [or she] is required to try to hold the balance between those contenders."3

The superintendent generally has a dual role as agent of the principal and as certifier under the contract. The superintendent is not a party to the construction contract between the principal and contractor (although in its agreement with the principal to act as contract administrator, it will agree to bind itself to the obligations cast upon it under that contract) and cannot be held liable to the contractor for breach of contract. As agent of the principal, however, its actions may expose the principal to a suit by the contractor for breach of its obligations. The modern trend, however, is for the contractor to look beyond the strict contractual remedies and seek further redress against the superintendent directly in tort or pursuant to the Trade Practices Act 1974 (Cth) ("TPA"). Similarly, although the superintendent may be liable to the principal for breach of its agreement to act as superintendent, principals have also sought redress outside of the contractual relationship.

This article will examine the scope for the imposition of a co-extensive tortious duty between principal and superintendent arising out of the superintendent’s certifying functions. It will thereafter consider the circumstances in which a tortious duty may be owed to a contractor, as a third party. The article will finally consider the relatively novel remedy of the TPA as a further basis of "attack" upon the superintendent’s determinations, from the point of view of both principal and contractor.

It will be demonstrated that not only is the role of the superintendent an "invidious and almost impossible one", it is also one which now lends itself to a dual attack by both principal and contractor, even though the likely success of that attack, in many instances, remains uncertain.

PART 1 - THE ROLE OF THE SUPERINTENDENT AS CERTIFIER

An engineer or architect appointed as superintendent may have a number of roles additional to that of certifier. It remains the agent of the principal and in administering the contract it will inevitably have as its primary objective, the achievement of the principal’s objectives. Aside from its duty to superintend or supervise the works, the superintendent is also often involved in the design of the works, with varying degrees of responsibility.

It is trite to say that a superintendent’s certifying function cannot be viewed in isolation and whether or not certain conduct may “offend” against the principles under discussion is only capable of ascertainment by reference to the overall context in which the contract is being administered.

It is in its role as certifier, however, that the superintendent faces its greatest potential exposure to both client and contractor. Its determinations will have immediate economic consequences for both parties and it is the nature of this loss, being purely economic, which makes discussion of liability in this area even more topical.

While it is beyond the scope of this article to consider the general role of the superintendent and the duties (contractual or otherwise) which it may owe in the performance of its other functions, decisions in those areas will be referred to by way of example or analogy to indicate the likely attitude of the courts to a claim in respect of the superintendent’s certifying function.
Certifier or arbitrator?

In Australia, the case of *Perini Corporation v Commonwealth of Australia* ("Perini's" case) established beyond doubt, that the superintendent has a dual role as agent or employee of the Principal and is also vested with duties which oblige him or her to act fairly and justly and with skill to both parties to the contract. Additionally, in that case it was made clear that the superintendent’s role was one of certifier not arbitrator.

The classification of the superintendent’s role as certifier is important in the overall context of superintendents’ liability.

Prior to the decision of the House of Lords in *Sutcliffe v Thackrah*, it had been thought that the architect, when acting as certifier, at least insofar as it was required to exercise professional knowledge, skill and judgment, was exercising arbitoral functions and was therefore immune from suit. This was based on the principle that: "where a third party undertakes the role of deciding as between two other parties a question, the determination of which requires the third party to hold the scales fairly between the opposing interests of the two parties, the third party is immune from an action for negligence in respect of anything done in that role."

In *Sutcliffe v Thackrah*, the House of Lords considered a claim by an employer against the architects who, during the course of the works, issued interim certificates to the builders. The builders failed to complete the work satisfactorily and were removed from site and another builder completed the work at a higher cost. The original builder went into liquidation and the employer brought an action against the architects in negligence and for breach of contract or tort or both, confining their attention to the question of the classification of the architect’s role and the immunity from suit (or lack thereof) which flowed from this classification.

The official referee upheld the proprietor’s claim for negligent over certification and the House of Lords considered a claim by an employer against the architects for breach of duty. Their Lordships did not specifically consider the question of whether the action against the architect lay in contract or tort or both, confining their attention to the question of the classification of the architect’s role and the immunity from suit (or lack thereof) which flowed from this classification.

The classification of the architect’s role by the House of Lords reflects the Australian position. As was pointed out, however, by *J in Forsyth Inc v Australasian Gold Mines NL (No 1)*, 10 where a contract commits the determination of some question to a third person, it is a matter of construction whether that person is to act as an arbitrator. This is not the position with respect to the superintendent’s functions under any of the standard contracts currently in use in this country.

How must the Superintendent act?

*Perini’s case* 12 considered the duties of the superintendent as certifier. The court pointed out that the particular duties of the certifier are to be found in the instrument which gives it its authority.

The court found that what is required, for instance in certifying an extension of time, is that the superintendent make its own personal decision on the point, having ensured that it is in possession of all the facts and circumstances which could affect that decision.

Although always subject to the express terms of the contract, in its role as certifier, the superintendent generally has an obligation to act “fairly and impartially”. 13

This principle is usually given effect to by the express terms of the contract between the principal and contractor. For example, pursuant to clause 42.1 of AS2124, the superintendent has a responsibility by virtue of clause 23 to arrive “honestly and fairly” at a reasonable value of work, quantities or time in formulating its certificate. 14

In imposing on the superintendent a requirement to act honestly and fairly in its role both as agent for the principal and certifier under the contract, clause 23 affords the superintendent protection, as it is the principal who is liable to the contractor in respect of the performance of the superintendent’s obligations.

This factor was considered important in deciding against allowing recovery by the contractor against the superintendent in the English decision of *Pacific Associates Inc v Baxter* 15, to be considered more fully later in this article.

The successor to AS2124, AS4000 (only recently issued by Standards Australia), changes the role of the superintendent. The superintendent is now required to fulfill all aspects of the role “reasonably and in good faith”. 16

John Pilley suggests that this makes the superintendent independent and requires the principal to ensure that the superintendent acts reasonably, rather than honestly and fairly. Mr Pilley suggests that this is likely to extend the protection the superintendent will receive under this contract, at least in respect to the exercise of the power to issue directions under the contract. 17

The obligations cast on the superintendent either at general law or by the express terms of the contract, will govern the exercise of the superintendent’s certifying functions which commonly include:
to value the increase or decrease in value to the principal of a variation directed in lieu of the contract rectifying defective work or materials;
• to value the resulting decrease or increase in value to the principal of acceptance of defective work or materials;
• to determine extensions of time;
• to estimate liquidated damages;
• to value extra costs of delay payable to the contractor;
• to value the work done and materials supplied by the contractor and to issue a payment certificate;
• to correct any payment certificates;
• to issue a certificate of practical completion;
• to issue a final certificate;
• to certify the costs of the principal completing work taken out of the hands of the contractor; and
• to give a decision on a dispute.

PART II - CONCURRENT LIABILITY

The question of whether an architect, exercising its functions pursuant to its terms of engagement with a principal, may be liable to the principal in both tort and contract, now appears settled in this country. In Bryan v Maloney\(^1\), the majority of the High Court approved the statement of the contract/tort position by Le Dain J in the unanimous judgment of the Supreme Court of Canada in Central Trust Co v Rafuse\(^2\), expressed as follows:

"1. The common law duty of care that is created by a relationship of sufficient proximity is not confined to relationships that arise apart from contract ...
2. What is undertaken by the contract will indicate the nature of the relationship that gives rise to the common law duty of care, but the nature and scope of the duty of care that is asserted as the foundation of the tortious liability must not depend on specific obligations or duties created by the express terms of the contract ...
3. A concurrent or alternative duty in tort will not be admitted if its effect would be to permit the plaintiff to circumvent or escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort ... ."\(^3\)

This reflects the position which already existed in this country with respect to a client and its architect/engineer.

For instance, in Brickhill v Cooke\(^4\), the New South Wales Court of Appeal held that an engineer may be sued in tort as well as in contract.

Similarly, in Pullen v Gutteridge Haskins & Davey Pty Ltd\(^5\), the Appeal Division of the Supreme Court of Victoria noted that since the decision in Voli v Inglewood Shire Council\(^6\), it had been clear that an architect or engineer could be held liable to its client in tort as well as in contract. The Court then referred with approval to the Victorian decision in MacPherson v Kevin J Prunty & Associates\(^7\), where it said that the view was no longer tenable that concurrent liability in tort exists only where some physical injury or damage is likely to result.

It is clear, however, that the terms of the contract between the client and architect (either express or implied) can modify or even exclude liability in certain circumstances. This is because the "tort duty ... must yield to the parties' superior right to arrange their rights and duties in a different way."\(^8\) Similarly, a defendant's disclaimers may have a powerful effect in negativing a Hedley Byrne liability or even a proximity base test founded on assumption of risk and reasonable reliance.

Absent a contractual modification, the duty which will be owed is that laid down by Windeyer J in Voli v Inglewood Shire Council\(^9\), where it was said of the architect:

"He is bound to exercise due care, skill and diligence. He is not required to have an extraordinary degree of skill or the highest professional attainments. But he must bring to the task he undertakes the competence and skill that is usual among architects practising their profession."\(^10\)

Recently in Collins v ACT Building Consultants & Managers Pty Ltd\(^11\) and also in John Holland Construction & Engineering Pty Ltd v Majorca Projects Pty Ltd and Bruce Henderson Pty Ltd\(^12\) (John Holland’s Construction case), it was confirmed that the appropriate standard of care was not to be determined solely by reference to practices followed or supported by a responsible body of opinion in the relevant profession or trade.

The Courts in both cases relied on the decision of the High Court in Rogers v Whitaker\(^13\) where it was held that the duty to supply information and advice takes its precise content from the nature and detail of the information to be provided from the needs, concerns and circumstances of the recipients of the advice.

It was pointed out by Kirby J (as he then was) in Waimond Pty Ltd v Byrne\(^14\):

"Although the contractual retainer will be an important indicium of the nature of the relationship which gives rise to the common law duty of care ... it will not chart exclusively the parameters of that duty."\(^15\)

For example, it was argued by the architect in McBeath v Sheldon\(^16\) that the extent of its duties of supervision was limited by correspondence passing between itself and the client. While the Court seemed to accept that it was open to the architect to have contracted on a more limited basis, on the facts of the case, the contention failed and economic loss was held to be recoverable in tort.\(^17\)
Interestingly, in England where it had been thought that inconsistency between the contractual and the tortious duty was sufficient to exclude the wider tortious duty, this may no longer be the case in view of the decision of the Court of Appeal in David Holt and Bernard Holt v Payne Skillington and de Groot Colliß in which it was said:

“In such circumstances ... [where the same parties enter into a contractual relationship involving more limited obligations than those imposed by the duty of care in tort ... the duty of care in tort and the duties imposed by the contract will be concurrent and not co-extensive. The difference in scope between the two will reflect the more limited factual basis which gave rise to the contract and the absence of any term in that contract which precludes or restricts the wider duty of care in tort.”

Cole J was faced with these considerations when called on to consider the impact of an architect’s limited retainer on the duty of care in tort in Jawan Holdings Pty Ltd v Design Collaborative Pty Ltd. In that case, His Honour accepted as correct, the proposition that one had to look at the circumstances to see if the relationship between the architect and the plaintiff (arising from a limited contract of engagement), imposed an obligation to take steps “beyond the specifically agreed professional task or function” to avoid real and foreseeable risks of loss by the plaintiff. On the facts of that case (involving a limited commission to the architect to issue certificates “beyond the specifically agreed professional task or function”), Cole J held it did not.

Aside from pleading a tortious duty to create a “wider duty” than that owed under contract, the issue can also be relevant from a limitation of actions perspective. In actions for breach of contract, the cause of action is usually complete and the limitation will therefore commence upon breach, whereas in negligence, the cause of action will not arise until damage is suffered.

The relevance of the distinction in this context can be illustrated by reference to the facts of McBeath v Sheldon, and in particular Giles J’s separation of the two duties owed by the architect, that of approving the foundations for payment by the proprietor to the builder and that of providing a general duty of supervision over the works. The proprietor did not sue upon the first duty, which would have been breached upon payment by the proprietor to the builder for the foundations. Rather, the proprietor sued upon the broader duties of “supervision of the construction from commencement to completion and handover”, which was held to have continued at least until practical completion of the building work.

**Liability as certifier**

Most recently in the United Kingdom, the liability of the superintendent to the principal in its role as certifier was considered in the case of Wessex Regional Health Authority v HLM Design Ltd. In that case, the principal issued a writ against the superintendent claiming breach of contract and/or breach of its common law duty of care owed to it, in either granting extensions of time where no extension should have been granted or in over-certifying extensions of time due to the contractor. The damage alleged by the principal was the direct loss and/or expense paid to the contractor and the loss of liquidated damages which would otherwise have been paid by it.

His Lordship Judge James Fox-Andrews QC, having considered the decision of the House of Lords in Pirelli General Cable Works Ltd v Oscar Faber & Partners and Caparo PLC v Dickman stated:

“I am satisfied that where there is a contractual relationship between a person and someone professing special skills for which professional qualifications are necessary and the contract relates to the exercise of those skills and the case falls within the principles of Hedley Byrne as explained in Caparo and Murphy there may be a concurrent duty to take reasonable care to prevent or avoid economic loss so long as it is fair and reasonable ... I see nothing unfair or unreasonable in the architects and the engineers being liable for economic loss over a longer period than they would be under their contracts where the damage giving rise to the cause of action occurs at a later date.”

His Lordship also made it clear that the architects certifying function should not be viewed in isolation, saying it was “... artificial to select certain aspects of an architect’s work such as written certificates and regard those aspects alone as matters on which the client placed reliance.” The learned Judge considered that if the principle were to be narrowly confined, the client might have a cause of action in tort if the certificate was negligently mis-stated but would have no such cause of action if through prolonged delay in giving instructions to the contractor, the client suffered major loss.

His Lordship also noted that the reason a person seeks to establish the existence of a concurrent duty in tort is usually because of actual or perceived limitation problems if the claims are advanced solely in contract.

This same observation was made by Byrne J in John Holland Construction & Engineering Pty Ltd v Kvaerner R J Brown Pty Ltd & Anor in which His Honour expressed surprise that a tortious claim had been pleaded noting that none of the traditional “reasons” for preferring tort appeared to be present.

In relation to the claim pleaded in that case, his Honour stated:

“It is well established that a person may owe to another a duty to exercise reasonable care in the performance of an obligation arising from a contract between them. In the case of a professional person that duty may be expressed as one to perform the professional task with due skill and care; Voli v Inglewood Shire Council (1963) 110 CLR 74. In accordance with this authority and those following it, the concurrent nature of the tortious and contractual duties arises from the readiness of the Court to import into certain contracts a term requiring the contractor to perform its contractual tasks with due skill and care. To that extent, this...
obligation is concurrent with the tortious duty arising from the relationship of proximity between them to act with due care. What the present Statement of Claim shows is that the pleaders are moving in the opposite direction. They allege a duty of care to perform the contract. In every respect it is a duty which is contractual in description; its terms, its breaches and the consequent loss, as pleaded, are indistinguishable from contract-based obligations, breaches and loss. It is nonetheless given a tortious tag by the opening assertion that the defendant owed to the plaintiff a duty of care to perform those obligations. What the law of negligence in this context imposes is, not that the defendant owes a duty of care to perform a contract, but that it owes a duty to perform a contract with due care: *Macpherson & Kelley v Prunty (1983) 1 VR 573 ... The contractual duties here are expressed as obligations to perform work to achieve a particular objective: the concurrent duties in tort, if they exist, must be to perform the same work with due skill, care and diligence.*\(^{52}\)

Accordingly, it would appear to be open to a principal in the United Kingdom\(^ {57}\), Canada and Australia\(^ {57}\), to plead an action in negligence against its architect or engineer, acting as agent for the principal and in its role as certifier. In such circumstances, absent limiting provisions, it is arguable that there exists a wider duty in tort than that owed pursuant to the express terms of the contract. It is also open to assert that a co-extensive tortious duty can be founded on no more than a breach of contractual obligations (either express or implied), thus circumventing the contractual limitation period on the basis of the “discoverability” test for economic loss.\(^ {66}\) It seems clear however, in view of Byrne J’s pronouncements in *John Holland Construction & Engineering Pty Ltd v Kwaerner RJ Brown Pty Ltd & Anor*\(^ {59}\) that such a breach must be pleaded in terms of a duty to perform the contract with due care.\(^ {58}\)

**PART III - LIABILITY OF THE SUPERINTENDENT TO THE CONTRACTOR FOR WRONGFULLY CERTIFYING**

This section of the article will consider two areas of potential tortious liability for a superintendent to a contractor. The first relates to an action in negligence for wrongfull certification. The second considers whether a cause of action for actionable interference with a contract might be available to an aggrieved contractor.

There are only a handful of decisions in both the United Kingdom and Australia which involve a claim by a contractor against the superintendent in respect of its certifying functions. Prior to considering these, we should briefly turn to the general principles which are likely to govern recoverability.

The writer has previously considered in some detail the respective positions taken by the Courts in Australia, Canada and the United Kingdom, with respect to the recoverability of economic loss.\(^ {59}\)

To summarise: In England, recovery of pure economic loss (i.e. loss which is not consequent upon physical damage to either person or property) will not be permitted unless the plaintiff can bring itself within the *Hedley Byrne* criteria, i.e. assumption of responsibility by the defendant and (reasonable) reliance by the plaintiff.\(^ {64}\) While this liability was originally based on express representations acted on by the plaintiff to its detriment, it has more recently been extended to an affirmative duty of care in tort owed by the defendant, thus extending to negligent omissions.\(^ {56}\) Recently the Canadian Supreme Court has also seen fit to allow recovery based on a *Hedley Byrne* criteria to create an affirmative duty of care in a professional contractual relationship.\(^ {65}\)

In Australia, it was thought to be well established that where the plaintiff’s claim is for pure economic loss, the categories of case in which the requisite relationship of proximity are to be found were to be seen as “special”, in that they will be categorised by some additional element or elements which will commonly (but not necessarily) consist of known reliance (or dependence), the assumption of responsibility or a combination of the two.\(^ {64}\)

Most recently, there appears to have been a retreat by the High Court in the use of proximity as a unifying rationale for the category of cases in which recovery will be allowed.\(^ {56}\) Rather, the establishment of proximity within a particular category of case may now be seen to place a limitation on the recoverability of loss which is reasonably foreseeable.\(^ {66}\)

The factors which will be relevant to the establishment of the necessary proximity to found a duty of care are likely to be a combination of policy considerations (e.g. the “flood gates” argument and the principle of “competitive advantage”)\(^ {59}\) and the existence or otherwise of an assumption of responsibility and reliance.\(^ {66}\)

These dual notions of assumption of responsibility and reliance would appear to be a particularly relevant consideration when considering the scope for recovery by a contractor against a superintendent. For example, in *R W Miller v Krupp (Aust) Pty Ltd*,\(^ {66}\) Giles J refused to find negligence as against the supervising engineer, in part because the contractor had not relied upon the engineer, but had held itself out as an expert in the particular field.

Accordingly, as will become apparent from the following examination of the UK and Australian authorities, not only express disclaimers and exclusions but also the contract structure or setting may militate against a finding of proximity in this country or negative the *Hedley Byrne* pre-requisites in Canada and the United Kingdom.

**The UK position**

Turning firstly to the decision of the English Court of Appeal in *Lubenham Fideliities and Investments Co Ltd v South Pembrokeshire District Council*,\(^ {70}\) In that case, the plaintiff was a bondsman who had elected to complete certain building contracts in place of the original contractors. Disputes arose between the parties
relating to the issue of interim certificates by the architect. The interim certificates were not correctly calculated in accordance with the contract, although the architect honestly believed that they were. After the dispute had arisen in relation to the certificates but prior to its resolution, both parties purported to determine the contract. Both principal and contractor made claims against the superintendent on the basis that its negligence was the cause of the losses suffered.

The claims of both parties failed because the superintendent’s breach of duty in issuing the incorrectly calculated interim certificates was held not to be the cause of the losses. They were caused by the contractor’s breach of contract in suspending the works without reasonable cause and persisting with the suspension notwithstanding the service of the relevant notice. The judgment confirmed that the issue of the certificate was a condition precedent to the right to receive interim payment and that any error or calculation had to be corrected by the issuing of another certificate or by the award of an arbitrator. The Court considered relevant the presence in the contract of a very wide arbitration clause which expressly permitted arbitration upon interim certificates during the currency of the contract and before practical completion.

The potential for the superintendent to be liable to the contractor was next considered on the determination of a preliminary demurrer point in *Michael Salliss & Co Ltd v Calit*. In that case the official referee concluded: “If the architect unfairly promotes the building employer’s interests by low certification or merely fails properly to exercise reasonable care and skill in his certification, it is reasonable that the contractor should not only have the right as against the owner to have the certificate reviewed in arbitration but also should have the right to recover damages against the unfair architect.”

The issue next arose before the Courts in England in the case of *Pacific Associates Inc v Baxter*. This case arose from a contract between the plaintiff contractor, Pacific Associates Inc and the ruler of Dubai as proprietor of the dredging and reclamation work to a lagoon in the Persian Gulf. The defendant was the engineer administering the contract. Pacific Associates Inc made claims for extensions of time and additional expenses when the work was delayed when it encountered hard materials which were said to have been unforeseen. These claims were rejected by the engineer. The contract contained a two-tier arbitration clause. Disputes were in the first instance to be submitted or re-submitted by either party to the engineer for decision. If the proprietor or the contractor was aggrieved with that decision, it was entitled within 90 days to refer the dispute to arbitration.

Pacific Associates Inc went through these steps and in due course settled its disputes with the proprietor by accepting the equivalent of £10 million in full settlement of its claims against it. Pacific Associates Inc then sued the engineer for a further sum alleging that, in rejecting the claims for hard materials upon first submission and upon re-submission under the arbitration clause, it committed a breach of its duty to act with the care, skill, fairness and impartiality to be expected of engineers of their high standing and repute and that, as a result, the builder suffered loss and damage. The case came before the Court of Appeal in which each of the three Justices delivered separate judgments dismissing the appeal and holding that no duty of care existed.

All of the Judges emphasised the relevance of the existence of an arbitration clause and also the role of a contractual disclaimer when considering the question of whether or not the architect could be said to have voluntarily assumed responsibility for its actions to the contractor.

Purchas LJ posed the question thus: “Does the engineer owe a duty to the contractor in tort to exercise reasonable skill and care?” … this question can only be answered in the context of the factual matrix including especially the contractual structure against which such duty is said to arise … The central question which arises here is: against the contractual structure of the contract into which the contractor was prepared to enter with the employer, can it be said that it looked to the engineer by way of reliance for the proper execution of the latter’s duties under the contract in extension of the rights which would accrue to it under the contract against the employer? … It may be argued that it would not be just and reasonable to impose on the engineer by way of liability in tort rights in favour of the contractor in excess of those rights which the contractor was content to acquire against the employer under the contract.”

The Lord Justice thought that it was not, noting that not only did the terms of the contract provide a three stage process under which the contractor could obtain payment for its work but the third stage of which included a reference to one or more independent arbitrators who were given the power “to open up, review and revise any decision, opinion, direction, certificate or valuation of the engineer”. Further, Purchas LJ thought that the presence of the exclusion clause (which purported to exculpate the engineer for personal liability for its acts or obligations under the contract) whilst not being directly binding between the parties, could not be excluded from a general consideration of the contractual structure against which the contractor demonstrates reliance on and the engineer accepts responsibility for a duty in tort, if any, arising out of the proximity established between them by the existence of the very contract.

Accordingly, there was no justification for superimposing on the contractual structure an additional liability in tort as between the engineer and contractor.

Ralph Gibson LJ similarly put great weight in the presence of the arbitration clause, saying:
“It is, I acknowledge, foreseeable that a contractor under such an arrangement may suffer loss by being deprived of prompt payment as a result of negligent under-certification or negligent failure to certify by the engineer but arbitration should secure interest on the unpaid sums ... The contractual duty of the engineer, owed to the employer, to act fairly and impartially is a duty in the performance of which the employer has a real interest. If the engineer should act unfairly to the detriment of the contractor claims will be made by the contractor to get the wrong decisions put right. If arbitration proceedings are necessary the employer will be exposed to the risk of costs in addition to being ordered to pay the sums which the engineer should have allowed. If the decisions and advice of the engineer, which caused the arbitration proceedings to be taken were shown by the employer to have been made and given by the engineer in breach of the engineer’s contractual duty to the employer, the employer would recover his losses from the engineer. There is, therefore, not only an interest on the part of the employer in the due performance by the engineer of the duty to act fairly and impartially but also a sanction which would operate, in addition to the engineer’s sense of professional obligation, to deter the engineer from the careless making of unfair or unsustainable decisions adverse to the contractor.”

Similarly, Russell LJ said:

“The engineer presented the contractor with the contract documents, and the contractor freely chose to enter into the contract with the employer. The contractor was aware that the engineer were not (sic) a party to the contract ... Given the contractual structure between the contractor and the employer, can it be fairly said that it was ever within the contemplation of the contractor that, outside the contract, it could pursue a remedy against the engineer? ... the contractor in reality had its rights adequately protected by the terms of its bilateral contract with the employer. If the contractor had thought not, then it was at liberty to insist upon a tripartite contract before embarking on the work.”

This, with respect, fails to give due accord to the commercial reality that a contractor would very rarely be able to demand let alone negotiate such added protection, nor would the additional exposure be willingly accepted by the superintendent’s professional indemnity insurer.

In any event, Russell LJ thought that the condition purporting to exclude liability in the engineer destroyed the duty of the engineer, if ever there was a duty. At page 1038:

“I would hold that, the parties having sought to regulate their relationships the one with the other by a contractual process, the law should be very cautious indeed before grafting on to the contractual relationships what might be termed a parasitic duty, unnecessary for the protection of the interests of the parties and, ... contrary to the express declarations of the engineer”

In the Australian case of RW Miller & Co Pty Ltd v Krupp (Australia) Pty Ltd, Giles J, when referring to the judgment in Pacific Associates Inc v Baxter, pointed out:

“In each of the judgments it was stressed that the decision turned on the particular circumstances, but important amongst the circumstances was the “contractual framework” (per Purchas LJ at 1022) from which it appeared that the plaintiff was not relying on the defendants performing their duties in supervising the execution of the works in “the same quality of proximity required to establish a duty of care.”

Pacific Associates Inc v Baxter was subsequently followed by Bokhary J in the High Court of Hong Kong in the case of Leon Engineering & Construction Co Ltd v K A Duk Investment Co Ltd.

In that case, the plaintiffs were building contractors who had contracted to construct the basement of a hotel for the defendants. Having commenced proceedings, they applied to join the architects named in the building contract, as second defendants, on the grounds that they owed a duty of care to give proper, timely and impartial consideration to the plaintiffs’ claims and to issue all certificates in strict accordance with the terms of the contract. It was alleged that they had been negligent and had failed to perform that duty.

It was held by Bokhary J, dismissing the summons, that where there is adequate machinery under the contract between the employer and the contractor to enforce the contractor’s rights and there is no good reason at tender stage to suppose that such rights of machinery would not together provide the contractor with an adequate remedy, then, in general, a certifying architect or engineer does not owe to the contractor a duty in tort co-terminus, with the obligation in contract owed to the contractor by the employer.

The Australian position

Prior to the recent decision of Byrne J in the John Holland case, the issue of the contractor’s ability to sue a superintendent in respect of its certifying function had been brought before the Courts in this country only twice, in both cases the Courts refusing to strike out the contractor’s claim for damages for economic loss based on alleged negligent certification.

The first was the case of P & E Phontos Pty Ltd v McConnell Smith & Johnson Pty Ltd.

In that case, Cole J stated:

“There may well be significant policy considerations affecting a court’s decision whether in the usual case and absent any special factual circumstances the law should impose upon a superintendent engaged by a proprietor to act on his behalf in the supervision of the works, and also to perform independent certifying functions with economic consequences both for the proprietor and the building contractor, where the decisions of the superintendent are open to review through an
agreed arbiter mechanism, a duty of care to the building contractor. Problems may arise in reconciling any such duty with the obligation of the superintendent to act in the interests of his employer in supervising construction in accordance with the contract. Should such a duty of care be superimposed on the contractual structure existing between the proprietor and the building contractor in circumstances where the superintendent’s decisions are subject to arbitral review? 97

His Honour considered that any applicable policy considerations could not be adequately weighed on an application to strike out the summons, and granted the plaintiff leave to file an amended statement of claim. 93

The issue arose a short time later in Christiani & Nielsen Pty Ltd v Goliath Portland Cement Co Ltd 94 where the Full Court of the Tasmanian Supreme Court considered Cole J’s approach to be correct, and similarly declined to strike out the contractor’s counterclaim.

The issue most recently came for full determination before Byrne J in John Holland’s case. 95

In that case, the principal entered into an architect/client agreement with the architect to provide design and contract administration services in relation to a major redevelopment in the Melbourne CBD. It subsequently entered into a construction contract with John Holland pursuant to which the architect was named as superintendent.

Questions regarding the entitlements of the contractor under the contract were referred to a referee. Before the referee had completed his review, the principal went into liquidation.

The contractor’s claim in negligence against the architect was based principally upon the ground that the architect was in breach of a duty to act fairly and impartially in carrying out its functions as certifier under the building contract and that, as a consequence, the builder suffered loss and damage. As pleaded, this loss and damage was the amount owing by the proprietor to the builder. 96

The duty of care pleaded was expressed to be “a duty of care, the relevant content of which was a duty to act fairly and impartially in carrying out [the architect’s] functions under JCC B”. 97 Argument was presented on the basis that the duty applied only to those functions which had traditionally been referred to as requiring the contract administrator to act independently of its employer and particularly those under which the architect is authorised to act as assessor, valuer or certifier in respect of specified matters. As to these functions, there was no issue that the architect had an obligation to perform them fairly and impartially.

It was put by the contractor that the obligation to act fairly and impartially was a particular manifestation of the common law duty of care.

The existence of this duty of care was said to be based upon the principles laid down by the High Court with respect to claims in negligence for pure economic loss. These establish that the duty only arises where there exists between the parties a relationship with sufficient proximity that the common law recognises the existence of the duty to take reasonable care to avoid a reasonably foreseeable risk of injury to the claimant. 98

Byrne J considered that the judgment of the majority in the case of Bryan v Maloney 99 made it clear that the existence of the relationship of proximity had to be determined in the given case with respect to the relevant class or act or omission and the relevant kind of damage. Furthermore, his Honour considered that in a case where the relationship was not settled by authority, the task of the Court was to analyse the factors alleged to give rise to the relationship of proximity, including the circumstances surrounding the relationship between the parties, having regard to policy considerations. 99

His Honour found that the circumstances surrounding the relationship between the parties were essentially to be found in the terms of the building contract. The builder alleged three factors existing at the time of entering into the building contract from which the duty of care was said to arise. The first was the obligation of the builder to abide by the decisions of the architect. 100 The second was that, by the terms of the building contract, the builder was necessarily dependent on the architect to carry out its functions impartially. 101 The third factor was that the builder relied upon the architect to exercise its functions under clause 5.02.02 impartially and that it would not have entered into the building contract unless there existed in the architect an obligation to exercise its functions fairly and impartially. 102

Having considered the various English authorities, His Honour concluded that the case before him required him to consider the decision of the Court of Appeal in England in Pacific Associates Inc v Baxter 103 and its application in Australia on the facts of the case before him. 104

Having so asserted, his Honour went on to say:

“It would not be profitable for me to embark upon an analysis of this important decision; it depends very much upon the contractual situation in which the certifier was working and, more importantly, upon the substantive law of negligence in England which differs in this area from that in Australia ... My task ... is to apply the law as it stands in this country but, at the same time, with an eye to overseas experience which may serve as a pointer to policy aspects.” 105

Byrne J concluded that it was reasonably foreseeable that the decisions of a certifying architect might cause loss to a contractor in a conventional building project if made negligently. Whatever that loss might be would depend upon the nature of the decision in question, but it was in any event pure economic loss. 106

His Honour was not troubled by either of the examples of policy considerations referred to in Bryan v Maloney 107, considering that the builder was clearly an identifiable member of the limited class of two persons...
who must have been in contemplation of the architect as being directly affected by its decisions. Nor was it an affront to the standards expected of a professional person that he or she should exercise the onerous responsibilities of certifier with due care and without partiality or unfairness.

At page 246 his Honour stated:
“...The solution to the present problem must be found in the answer to the questions whether, in the contractual framework in which the parties to this project operated, it is established that the Builder relied on or depended upon the careful and impartial performance by the architect of its certifying functions as are alleged and whether the architect, for its part, assumed a legal responsibility to the contractor so to perform them. 
...To adopt the expression of Kelly J in F W Nielsen v PDC Constructions (ACT) Pty Ltd (1987) 71 ACTR 1 at 8, have the architect and the builder deliberately distanced themselves from each other so that no relationship of proximity was contemplated. 
...In my opinion, it is clear from these that the question of the rights and remedies of the builder for acts and decisions of the architect were considered by the builder and the proprietor, and in many cases, dealt with by making the builder responsible in some cases for loss suffered as a consequence of those decisions, and by giving to the proprietor the responsibility of supporting them upon review before the court or before an arbitrator if it so choose, and at its own risk for an order for costs. 
...The builder is a well-known and experienced building contractor. 
...Against this background, and given the state of the law of negligence as it then stood, and given the well established common law entitlements of the builder in the case of fraud, corruption or collusion between the certifying architect and the proprietor, it is, in my opinion, not appropriate for me to seek to engraft upon the contractual background a tortious obligation of the kind contended for by the builder. 
There is in this case no room for a duty of care owed by the architect to the construction to the relevant content of which was a duty to act fairly and impartially in carrying out its functions referred to in cl 5.02.02."

The relevance of the Arbitration Clause
His Honour’s judgment also addressed a question which had arisen in some of the English cases, particularly Pacific Associates Inc v Baxter, being whether the existence of an arbitration clause would preclude a duty arising or impact upon a contractor’s entitlement to recover from a causation point of view.

In Pacific Associates Inc v Baxter, Purchas LJ considered there to be “considerable force” in the submission that a settlement occurring in the context of an arbitration pursuant to the contract constituted a novus actus interveniens and would prevent the recovery of any loss occurring to the contractor as a result of a settlement on the arbitration. Ralph Gibson LJ was of the same view, stating:
“Nothing suggests that the alleged negligence of the engineer was a cause of the contractor choosing to settle its claim as it did. If the engineer were not to blame for the circumstances which caused the contractor to choose to settle the claim for a fraction of what was properly due to the contractor, and if such an outcome was not a foreseeable consequence of any negligence on the part of the engineer in dealing with the contractor’s claims - and it is not alleged that it was - the negligence of the engineer in rejecting the contractor’s claims could be regarded as relegated to no more than part of the history and circumstances in which the contractor’s decision was made to settle those arbitration proceedings.”

On the other hand, Russell LJ entertained some reservations, considering that the non-certification or under-certification by an engineer might lead, in an individual case, to such financial embarrassment for the contractors that withdrawal from the contract might become necessary. In such a situation, the fact that subsequently the contractor would be able to recoup its loss via arbitration (weeks, months or years ahead) would be cold comfort. The writer agrees with that approach. It does, however, address a different issue to that considered by Ralph Gibson LJ.

In the John Holland case, Byrne J took a similar approach, stating:
“To my mind it is reasonably foreseeable that the decisions of a certifying architect might cause loss to a contractor in a conventional building project if made negligently. Whatever that loss might be will depend upon the nature of the decision in question; it is in any event pure economic loss. This foreseeability is not removed by a right to review the decision by arbitration. Insofar as an entitlement to payment is concerned, a contractor who is successful upon arbitration might necessarily incur the cost of that arbitration and may suffer a deferment of payment, perhaps without a right to interest pending payment: Farrans (Construction) Ltd v Dunfermline District Court (1988) SLT 466.”

Similarly, in Wessex Regional Health Authority v HLM Design Ltd & Ors, His Lordship Judge James Fox-Andrews QC said:
“For there to be a duty there must of course be damage. Since I have heard no evidence it is of course not open to me to hold whether or not there was damage in the light of the arbitration clause in respect of at least some of the claims. But I do find if the matters complained of as regards the breaches of duty are established it is reasonably arguable that Wessex would be able to show that they have
suffered damage ... an employer who had to go to arbitration for a review of certificates and like and who succeeds in that review is likely nevertheless to be financially worse off in respect of irrecoverable costs and the like than if the certificate had been properly given in the first place.”18

This would appear to be correct. The mere existence of the arbitration clause should not be determinative of the issue. Aside from the obvious damages which flow to a party forced to pursue a remedy by way of arbitration, the existence of an arbitration clause will not avail a party if, in the meantime, one of the other parties goes into liquidation. The issue of the effect of a settlement pursuant to the arbitration is one which is, however, currently unresolved.

Summary of the position in the relevant jurisdictions

Although there are ostensibly different principles underpinning the decisions of the Courts in the United Kingdom and Australia with respect to the recovery of economic loss, there is a marked similarity in the approach taken and the factors considered relevant in arriving at the Courts determination.

The learned author of Hudson’s Building and Engineering Contracts, Ian Duncan Wallace QC, suggests that there are “powerful” factors against allowing recovery by a contractor against a superintendent who has, for example, negligently under-certified.19 Included amongst these factors are:

- The architect is employed (to the knowledge of the contractor) to protect the owner’s interests, not to provide a safeguard to the contractor.
- The imposition of a duty not accepted by the principal under its construction contract and in circumstances where a remedy against the principal is available under that contract, is outside the “contractual setting” or “contract structure”.
- A liability in the superintendent to be “shot at by both sides” would be created, which would increase the cost through insurance of employing superintendents and would introduce a clear conflict of interest impeding a wholehearted protection by the superintendent of its client’s interests.
- Where the contractor is free, under the terms of the contract, to arbitrate or litigate against the owner if dissatisfied with the architect’s determination, the contractor may be afforded a second bite of the cherry, by re-litigating against the superintendent if dissatisfied with the determination at first instance.20

While all of these factors are no doubt influential, the cases in both the United Kingdom and Australia suggest to the writer that the possibility of a successful claim being mounted by a contractor against a superintendent cannot be entirely discounted.

Critical to the success of such a claim will be the “contractual framework” and whether it would be “fair and just” to impose on the superintendent by way of liability in tort, rights in favour of the contractor in excess of those rights which the contractor was content to acquire against the principal under the contract.21

Relevant to this determination will be whether a remedy is available against the principal under that contract and whether it could be said that the architect, for its part, assumed a legal responsibility to the contractor in the performance of its certifying functions. The existence of express disclaimers in the contract may be a relevant factor in this regard.22

It seems clear that in formulating a view as to whether the “... architect and builder deliberately distanced themselves from each other so that no relationship of proximity was contemplated ...”, it will be necessary to look at the circumstances in existence at the time prior to, and contemporaneous with, entering into the building contract.23

It is this “contractual framework” (which is, of necessity concluded prior to the performance of the parties obligations), that is likely to be determinative of the question of whether a duty of care is owed, rather than any subsequent conduct (unless the superintendent gives the contractor gratuitous advice during the performance of the works).

While the existence of comprehensive dispute resolution procedures within the contract has been considered a relevant factor, the presence of such clauses will not remove the “foreseeability” of loss24 and will not, of itself, break the chain of causation.25 The effect of a contractor’s decision to compromise a claim in an arbitration and subsequently proceed against the Superintendent for the “balance”, remains unsettled.26

Although the judiciary in Canada appear to have recently gone further than any other Commonwealth jurisdiction in holding that construction owners and architects/engineers owe duties of care in tort to safeguard contractors against incurring economic loss, Ian Duncan Wallace QC submits that in principle no affirmative duty of care is owed by a professional to a contractor to guard itself against loss of this nature. He suggests that it is only a positive unqualified intervention or representation, made or given in circumstances where the professional could be said to accept responsibility for its efficacy and accuracy, that will lead to the creation of such a duty.27

There is little point in attempting to review the United States law on this subject, as the cases there are nominally based on “third party beneficiary” theories, which have not found favour with courts in Commonwealth jurisdictions in this context.28

Actionable interference with a contract

In a number of the cases already discussed, the builders raised as a secondary cause of action that the architect was liable in damages to the builder for procuring breaches of or interfering with the execution of the building contracts.

In Lubenham’s v South Pembrokeshire District Council29, the Court rejected the contractor’s argument
that the architect ought to be held liable for damages for “interfering with” the performance of the building contract on the simple and straightforward basis that an architect who was seeking to further its performance (albeit in a misguided manner) could not be regarded as someone who intended to “interfere” with it. The Court was, however, prepared to contemplate the possibility of the architect being held liable in this way if it deliberately misapplied the contractual provisions with the intention of depriving the contractor of sums to which it was properly entitled.

It was this allegation which arose for consideration before Judge John Lloyd QC in John Mowlem & Co Plc v Eagle Star Insurance Co Ltd & Ors. In that case, it was alleged by the contractor that the architect failed to act independently of the principal, in that it failed to exercise any proper or independent judgment and deliberately misapplied the contract with the intention of depriving the contractor of the sums to which it was entitled. It was alleged that the architect was liable in tort for having wrongfully interfered with the performance of the management contract and having knowingly and wrongfully procured or facilitated a breach of the management contract, by the principal, by acceding to the principal’s wishes for the certificates of deduction to be issued. The contractor further contended that since the architect was of the opinion that the contractor was entitled to certain extensions of time, by failing to grant those extensions the architect had interfered with the performance of the management contract and had conspired with the second defendants to injure the contractor by unlawful means, namely by interfering with the performance of the contract by withholding extensions of time.

Noting that the elements of the tort of actionable interference were:

1. knowledge of the existence of the contract;
2. intention to interfere with the performance of it;
3. the doing of unlawful acts with such knowledge and intention; and
4. causing a breach of the contract or the non-performance of a primary obligation in consequence,

Judge John Holland QC held that it was certainly arguable that the architect, in issuing the certificates of deduction, deliberately misapplied the provisions of the contract and thereby directly caused the principal’s non-performance of the contract in relation to payment of the interim certificates. Interestingly, his Lordship did not consider the arbitration provisions contained in the management contract to in any way affect the wrongful interference which was pleaded.

This cause of action was also relied upon by the builder against the superintendent in the John Holland case.

In noting the availability of the tort, Byrne J held that a bona fide belief, reasonably entertained by the architect, that its conduct would not have the consequence (i.e. of depriving the builder of the payments to which it was entitled), was fatal to this cause of action.

Accordingly, it seems clear that while this cause of action is open to an aggrieved contractor, it is usually pleaded as a secondary cause of action and is one which seems inevitably doomed to failure unless the Contractor can demonstrate something akin to bad faith on the part of the superintendent.

PART IV - TRADE PRACTICES ACT 1974 (CTH)

Overview of the relevant TPA provisions

In recent years there has been a dramatic increase in the number of claims brought pursuant to the Trade Practices Act 1974 (Cth) (“TPA”). The most commonly relied upon prohibition in the TPA is Section 52. It provides:

“A corporation shall not, in trade or commerce, engage in conduct which is misleading or deceptive or is likely to mislead or deceive.”

Section 52 principally relates to corporations and for the Section to have operation, the “conduct” must be in “trade or commerce”.

In Concrete Constructions (NSW) Pty Ltd v Nelson, the High Court said:

“It is plain that Section 52 is not intended to extend to all conduct, regardless of its nature, in which a corporation might engage in the course of, or for the purposes of, its overall trading or commercial business ...”

Accordingly, the reference to conduct “in trade or commerce” in Section 52 can be construed as referring only to conduct which is, itself, an aspect or element of activities or transactions which, of their nature, bear a trading or commercial character.

Section 4(2) of the TPA defines “engaging in conduct” as a “reference to doing or refusing to do any act, including the making of, or the giving effect to a provision of, a contract or arrangement, the arriving at, of giving effect to a provision of, an understanding”.

The central feature of the Section is its prohibition of “misleading or deceptive” conduct or conduct that is “likely” to mislead or deceive. Since Section 52 imposes a statutory code of conduct by prohibiting conduct which is misleading or deceptive, it is independent of any contractual nexus between the parties.

Even silence may be relied upon to show a breach of Section 52 when the circumstances give rise to an obligation to disclose relevant facts.

It was once considered that Section 52 was specifically limited to claims brought by “consumers”. This was the rationale behind the decision in Westham Dredging Company Pty Ltd v Woodside Petroleum Development Pty Ltd and Ors, where St John J held that Section 52 was concerned with consumer protection as distinct from a construction contract negotiated as a “one off” event.
Subsequent decisions however, such as that of the full Federal Court in *Bebanere Pty Ltd v Lubidineuse and Ors*148 and *Bond Corporation Pty Ltd v Thiess Contractors Pty Ltd and Ors*149 (in which it was held that the provision of services by a member of a profession was capable of being characterised as conduct in “trade or commerce” for the purposes of Section 52), suggest that it will be safe to proceed on the basis that there are no limitations upon Section 52, other than those arising from the language of the Section itself and that it is not necessary to limit its operation in light of the heading of Part V, “Consumer Protection”.

Under Section 74 of the Act, certain warranties are implied into contracts for supply by a corporation, of services to a consumer, including that services will be rendered with due care and skill. However, this implied warranty does not apply to services provided by an architect or engineer, due to the exclusion “other than services of a professional nature provided by a qualified architect or engineer”.148

**Damages**

Section 82(1) of the TPA provides that a person who suffers loss or damage as a consequence of the conduct of another person which was simply an interlocutory application but concerned completion could constitute conduct in contravention of Section 52 of the TPA. In that instance French J stated: “One can assume for the sake of argument that in some sense the issue of the certificate by the second respondent [the architect] can be characterised as conduct in contravention of s.52 of the Trade Practices Act. Indeed, there may be a serious question in that regard. ... These assumptions, of course, gloss over the difficulties that arise where s.52 conduct is said to be constituted by what is an evaluative judgment on facts which are plain for all to see. ... But even making those assumptions, there is on the materials presently before me no evidence of the kind of causal relationship between the conduct complained of and the exercise of the option necessary to establish a cause of action and an entitlement to relief under ss.82 or 87 of the Trade Practices Act.”154

This requirement to have a causal nexus was emphasised in the decision of the Federal Court of South Australia in *Kaze Constructions Pty Ltd and Cain & Zechevich Pty Ltd v Housing Indemnity Australia Pty Ltd and Neil Francis McPeake (Kaze Constructions case).*155 That case did not involve a superintendent or architect but rather looked at the conduct of the HIA under Section 52 of the TPA and the causal link between the agency and the agent’s conduct and the applicant’s loss and damage.

At page 75 it was said: “... there are wrapped up in the language of s.82 concepts which the common law would describe by the terms “causation”, “remoteness”, and “measure of damages”. In the first instance it is necessary to consider the requirement of causation which is incorporated by the expression “by”: the suffering of loss and damage must be “by conduct of another person that was done in contravention of a provision of Part IV or V”. The section requires thereby that there be a sufficient causal link between a respondent’s conduct and the applicant’s loss and damage. Where damages are claimed for a contravention of s.52 the applicant must establish reliance upon the conduct complained of as supplying a sufficient causal connection: *Pappas v Soulac Pty Ltd* (1983) 50 ALR 231".

We will return to these considerations when examining whether or not the superintendent’s “wrongful” certification could be said to have “caused” the loss of the contractor or whether it is the principal’s reliance on the certificate which is the true cause of the loss.

In *Multiplex Constructions Pty Ltd v Amdel Ltd*156, the defendant was retained by an architect to prepare a report showing the asbestos content in some buildings to be demolished. The architects report contained representations concerning asbestos in the building which were false and misleading and was held to have breached Section 52 of the TPA. At page 139 it was said:
"I accept that the defendant’s reports contained representations. ... I also accept that ... the conduct of the defendant in publishing the reports was misleading and deceptive, that the plaintiff relied upon the reports, and that the plaintiff suffered loss “by” that conduct, within the meaning of s. 52 of the Act”.

In that instance, the defendant submitted that Section 52 deals with cases of “persuasion”, as distinct from “information”. In this regard the Court examined the decision of the full Federal Court in Global Sportsman Pty Ltd v Mirror Newspapers Ltd. In that case it was held that it is possible to conclude that the publication of incorrect information may constitute conduct which is misleading or deceptive within the meaning of Section 52 of the Act but will only do so if the conduct contains or conveys a misrepresentation.

In the present case, the court held that the reports in relation to the asbestos did contain information but that they also recorded an opinion, or a series of opinions, as to the presence of asbestos and asbestos related products in the buildings in question. The court also held that, aside from containing opinions (which were not based upon adequate foundation), the report also contained recommendations. In both regards the reports offended against Section 52.

These factors may also be relevant in characterising the nature of the architect’s role as certifier and exactly what it is that the certificate records.

In Jiawan Holdings Pty Ltd v Design Collaborative Pty Ltd (Jiawan Holdings) the proprietor appointed an architect pursuant to a special agreement, to issue progress certificates for delivery to the proprietor’s financier to enable the proprietor to recoup monies which had been paid on an uncertified basis to the builder under two lump sum fixed price contracts. The architect was not retained to act as supervising architect and was not asked to check the accuracy of the builder’s lump sum prices.

The court held that it was not for a number of reasons.

Firstly, the court doubted if it could be misleading or deceptive conduct or conduct likely to mislead or deceive to perform a contractual obligation in the precise terms in which it was agreed that obligation would be performed.

Secondly, the plaintiffs were not misled or deceived into making payments to the builder by the certificates; they made payments in advance of certificates and irrespective of them. The court held the plaintiffs had in mind the fixed price which they were to pay to the builder and, once they exceeded that sum (the finance company having required by requisition that there be a fixed price contract), they made no further payments under the contract but merely advanced monies to the builder by way of loan.

Thirdly, there was no reliance by the plaintiff on the certificates. The certificates were issued for presentation to the lender to recover proportions of the lump sum building price. Payments to the builder were unrelated to the certificates.

Fourthly, the loss suffered by the plaintiff flowed from the irrecoverability of the loans made to the builder. The fact that the builder’s receivership or liquidation rendered the monies irrecoverable did not mean that the loss, suffered by the plaintiffs because of the builder’s costs overruns, flowed from any act or omission of the architect in circumstances where it was denied the position of supervising architect and was not asked to and did not certify progress payments to the builder or check the accuracy of the builders lump sum price or ask to estimate the cost to complete the works.

Can the Superintendent be liable for wrongfully certifying pursuant to the Trade Practices Act 1974? As there is no Australian authority determinative of the issue, it is necessary to apply the principles discussed to assess the likely success of such a claim.

The authorities suggest that it will be easier for a party to invoke the relevant provisions of the TPA in relation to an architect’s or engineer’s pre-contractual functions or representations, rather than when a contract is “on foot”, particularly when the contract contains comprehensive dispute resolution procedures. An example of recovery in the former instance arose in the case of Brian James Coleman v Gordon M Jenkins & Associates & Anor, where an architect’s pre-contractual cost estimate, which was wildly inaccurate, was held to constitute misleading and deceptive conduct and a false representation within the meaning of Sections 52 and 53 of the TPA.

Often the superintendent engaged on a project has been responsible for the design of the works and assisted the principal in the award of the tender. The writer was recently involved in a matter where at the time of tender, the superintendent allegedly represented that the design of the works was complete and that the quantum of work
was adequately represented in the documentation and provisional quantities allowed. The reality was that the design drawings did not reflect the work actually required and there was an extremely high level of variation, which in turn led to considerable disruption of the contractor’s performance and led to substantial cost overruns.

In the absence of an ability to claim these additional amounts under its contract, it would seem that the contractor may have a basis to proceed with a claim pursuant to Section 52.

Once a contract is “on foot”, there are obviously certain situations where both a principal or contractor may consider that they have suffered loss or damage due to a superintendent wrongfully certifying. However, in terms of successfully bringing an action to recover such costs pursuant to the TPA, there are a number of obstacles which would have to be overcome.

The first is whether, in acting in the role of certifier, the superintendent could be said to be engaging in conduct “in trade or commerce”?

While it was held, in Bond Corporation v Thiess Contractors Pty Ltd & Ors164, that the provision of services by a member of a profession was capable of being characterised as conduct in trade or commerce for the purposes of Section 52, it has been held that the relevant particular conduct must itself have a trading or commercial character.165

Can it really be said that the act of certifying (with duties to act with fairness to both parties) satisfies this requirement?

In Presta v Aknar166, Sexton J held that a particular professional activity need not be for profit or reward, if, in its context, it retains a commercial character.

In Yates Property Corporation Pty Ltd v Boland167, Branson J left open the question of whether Section 42 of the Fair Trading Act applied to all “professional” activity (on the part of a barrister in that case) or only on professional activity bearing a trading or commercial character.

In the recent case of Fasold & Anor v Roberts & Ano168, Sackville J held that assuming a lecture series was organised by an institution engaged in business, statements made by the lecturer were not in trade or commerce, since the object was not to promote the institution’s commercial interests but rather to promote his own ideas: the lecturer’s activities might have had a relationship to trade or commerce but they were not in trade or commerce.

Given that the superintendent’s only “stake” on the project arises from its pursuit of its business interest in being paid for the role, it might be thought that its individual acts pursuant to that role could be similarly categorised to those of the lecturer above.

The claimant’s answer to this contention may be to rely upon arguments considered in Meadow Gem Pty Ltd v ANZ Executor & Trustee Co Ltd & Ors169, in which it was suggested by Counsel (though not finally decided by the court) that it is sufficient that the conduct in question is engaged in for the purpose of promoting the business of another - there is no requirement that it be to promote the maker’s business.170

The superintendent is clearly engaged by the principal to “look after” and protect the principal’s interests (while acting fairly between the parties!) and arguably its administration of the contract could be categorised as being in trade or commerce on this basis.

It should also be appreciated that the superintendent’s certifying function does not occur in isolation but rather arises out of a sequence of events (often claims) under the contract which it is administering.

It is in the surrounding conduct and possibly the superintendent’s failure to certify, where the greatest scope for impugning its conduct arises.

For example, the superintendent may repeatedly reassure the contractor that all valid extension of time claims will be approved but that this will have to wait, as the principal requires the job to be completed urgently. It may subsequently advise the contractor (after the contractor has performed the work) that it is reluctant to certify any extensions of time, because to do so would be to expose the principal to acceleration or prolongation claims.

Such conduct could clearly be said to have been engaged in for the purpose of promoting “the business of another” - the principal’s (and arguably the Superintendent’s own interests) and as such provides a good example of circumstances where “...the relevant particular conduct [has a] ... trading or commercial character”.

In a similar vein, it has already been noted that silence may (if certain pre-conditions are satisfied) constitute misleading and deceptive conduct. Most recently in Yates Property Corporation Pty Ltd v Boland, Branson J ruled that the significance of silence as possible misleading and deceptive conduct depended on the “context, which may or may not include facts giving rise to a reasonable expectation, in the circumstances of the case, that if particular matters existed they will be disclosed”.

In the context of a construction project, such reasonable expectation may arise by nature of the construction project itself or may be given express force by the terms of the contract between contractor and principal or the project management agreement between principal and consultant.

For example, if there is an express obligation on the superintendent to advise the contractor “promptly” of any change in the character of the works, or of the revision of drawings etc and it fails to do so, remaining silent while the contractor continues to perform its work under the contract may constitute misleading conduct and may ultimately afford the contractor a right of recovery, if it is otherwise not entitled to recover these additional costs under the contract.

The next caveat is what was said in the Jiawan Holdings case171, to the effect that it was doubtful whether it could be misleading or deceptive conduct to perform a contractual obligation in the precise terms in which it was agreed that obligation would be performed. In the writer’s view, however, that statement, while no doubt correct in
the context of the facts for consideration before his Honour, should not, with respect, be adopted as a statement of general principle, as each circumstance must be viewed in its own factual matrix.

This does raise the important question, however, of whether the issue of the certificate by the superintendent in reality has the potential to mislead or deceive.

This issue recently arose in another context in the case of Yates v Property Corporation Pty Limited v Boland & Ors\textsuperscript{172}, in which the Federal Court made it clear that a claim for misleading or deceptive conduct (in that case under Section 42 of the \textit{Fair Trading Act 1987} (NSW)), was not an automatic statutory alternative to every common law claim alleging professional negligence. In that case, a developer brought proceedings against its legal representatives for allegedly failing to provide proper advice in a proceeding for compensation, following the resumption of land.

The Federal Court found that negligence had not been established against the legal representatives, whose views on the law were reasonably open to them. This finding resulted in a conclusion that the applicant failed to establish that the conduct had any potential to mislead or deceive.\textsuperscript{172} The Court further commented that, even if its views concerning negligence were otherwise, the authorities do not support the argument that professional negligence necessarily involves conduct that is misleading or deceptive, particularly where the conduct is inadvertent and constituted by the negligent failure to act or advise in certain ways.\textsuperscript{172} These same principles may be sought to be relied upon by the superintendent in resisting a TPA claim arising out of negligent certification.

It will be recalled that in the \textit{Western Mail Securities case}\textsuperscript{175}, French J considered that there could be a serious question as to whether the issue of a certificate by the architect would be characterised as conduct in contravention of Section 52 of the TPA and that further difficulties arise where the Section 52 conduct is said to be constituted by what is an evaluative judgment on facts which are plain for all to see. The writer has sought to demonstrate possible circumstances where the conduct could be so categorised but the second point raised by His Honour is worthy of further consideration.

The reality is that in most instances where a superintendent certifies a claim, the parties affected by its views on the law were reasonably open to them. This finding resulted in a conclusion that the applicant failed to establish that the conduct had any potential to mislead or deceive.\textsuperscript{172} The Court further commented that, even if its views concerning negligence were otherwise, the authorities do not support the argument that professional negligence necessarily involves conduct that is misleading or deceptive, particularly where the conduct is inadvertent and constituted by the negligent failure to act or advise in certain ways.\textsuperscript{172} These same principles may be sought to be relied upon by the superintendent in resisting a TPA claim arising out of negligent certification.

It will be recalled that in the \textit{Western Mail Securities case}\textsuperscript{175}, French J considered that there could be a serious question as to whether the issue of a certificate by the architect would be characterised as conduct in contravention of Section 52 of the TPA and that further difficulties arise where the Section 52 conduct is said to be constituted by what is an evaluative judgment on facts which are plain for all to see. The writer has sought to demonstrate possible circumstances where the conduct could be so categorised but the second point raised by His Honour is worthy of further consideration.

The reality is that in most instances where a superintendent certifies a claim, the parties affected by its decision will no doubt have carried out their own calculations and will have formed their own view as to their correct entitlement.

If in fact the superintendent errs in its calculation of days, time, money, etc, it may be difficult for either the contractor or the principal to allege that it was misled. After all, the superintendent is making an “evaluative judgment” which the parties are free to disagree with.\textsuperscript{176}

However, this may not be a complete answer. In \textit{Australian Development Corporation Pty Ltd v White Constructions (ACF) Pty Ltd & Ors}\textsuperscript{177}, it was said of Section 52:

> “What is proscribed is conduct, and it is the conduct constituted by making the representation which must be considered. Unquestioning acceptance of the truth of a representation is not necessary in order that conduct constituted by the making of the representation be misleading or deceptive, still less that it be likely to mislead or deceive. It may be enough that the representative is caused to act by the making of the representation although without positive belief in the truth thereof ...”\textsuperscript{178}

These principles may apply to the case of a contractor who, though unsure of the correctness of the superintendent’s determination, nonetheless, is compelled to act in response to the certificate, either by invoking the dispute resolution procedures or otherwise complying with the certificate to its detriment.

Assuming all of these obstacles can be overcome, the parties may still face a problem in terms of causation. Cases such as \textit{Kaze Constructions}\textsuperscript{179} may have relevance in relation to a potential TPA claim, by a contractor, which alleges that it has suffered monetary loss as a result of a superintendent’s certification. This is because it may be argued that its loss flows from the principal’s reliance on the architect’s certification rather than the contractor’s own reliance. Once again, this will depend on the terms of the contract.\textsuperscript{180}

Finally, mention should be made of a recent overseas decision in the case of \textit{Balfour Beatty Civil Engineering Ltd v Docklands Light Railways Ltd.}\textsuperscript{181}

In that case the parties entered into a standard form construction contract but omitted the clause dealing with the settlement of disputes and the requirement for recourse to arbitration.

The Court held that it did not have a general power to open up, review and revise decisions of the employer and that there were no special circumstances justifying interference.

The Court said that only where a breach of the employer’s duty to act honestly, fairly and reasonably in arriving at its judgment, would the contractor be entitled to a remedy under the contract.

Ironically, while the case has been criticised in some quarters on the basis that the striking out of the arbitration clause had the unintended consequence of rendering the judgments of one party under the contract incapable of challenge in any forum, such a scenario would create an appropriate environment for the aggrieved party to demonstrate that the cause of its loss was that party’s determination and proceed immediately with a Section 52 claim.

Such a claim could itself be brought in arbitral proceedings. In the recent decision of the NSW Court of Appeal in \textit{Francis Travel Marketing Pty Limited v Virgin Atlantic Airways Limited}\textsuperscript{182}, the Court said that it was consistent with the modern policy of encouragement of various forms of alternative dispute resolution, including arbitration that the Courts should facilitate agreements for the resolution of all forms of disputes, including disputes involving claims under statutes including the TPA.\textsuperscript{183}
Conclusion

The writer has summarised the conclusions in relation to each of the different causes of action considered in the body of this article.

As a general overview, while the law in the area lends itself to a number of potential claims against the superintendent in its role as certifier, in practice, many of the factors which would be necessary for a contractor or principal to succeed may not exist in the particular case. Moreover, in the absence of a limitation problem (which seems unlikely to arise in this context), it is difficult to envisage that there would be many instances in which an employer would feel the need to resort to pleading either a tortious or TPA claim, when contractual remedies are available.

The same could equally be said of a contractor, who will normally be able to avail itself of its rights against the principal or utilise the dispute resolution procedures applicable under the contract.

Notwithstanding this, the superintendent would be ill-advised to assume that it will be immune from such action, particularly in circumstances where one or other of the parties to the building contract goes into liquidation owing monies to the other. In particular, it is likely that there will be an increase in the number of claims brought against the superintendent pursuant to the TPA, given that the conduct sought to be impugned will be judged at the time it occurs, rather than by reference to the antecedent contractual structure, which may otherwise preclude recovery on a tortious basis.

The prospect of being “shot at by both sides” remains a real possibility.

Footnotes

1. Jackson v Barry Railway Co [1893] 1 Ch 238 at 245, 247 per Bowen LJ.
3. Ibid at p3512/1.
4. See for e.g. Wessex Regional Health Authority v HLM Design & Ors (1994) 40 Con LR 1. See also Lubenham v South Pembrokeshire District Council [1986] BLR 39.
5. [1969] 2 NSW 530.
7. Arenson v Arenson [1973] Ch 346 at 370 per Buckley LJ.
9. Ibid at pp744-753.
11. (1992) 7 WAR 549 at 554.
20. Ibid at pp521-522.
22. [1993] 1 VR 27.
23. (1963) 110 CLR 74.
25. BG Checo International Ltd v British Colombia Hydro and Power Authority [1993] ISCR 12.
27. Ibid at p84 (see also the dicta of Windewyer J at p603 in Florida Hotels Pty Ltd v Mayo (1965) 113 CLR 588, which confirmed this approach).
32. Ibid at p652.
34. Ibid at pp 62,056 - 62,057.
37. Ibid at p73.
39. Ibid at p230.
40. Ibid at p250.
41. It seems likely that in Australia, economic loss (hence damage) will only be sustained when the defect or

43. (1994) 40 CON LR 1.

44. [1983] 1 All ER 65.

45. [1990] 1 All ER 568.

Wessex Regional Health Authority v HLM Design Ltd (1994) 40 CON LR 1 at pp33-34.

Ibid at p33.

Ibid at pp33-34.

Ibid at p12-13.

(1997) 13 BCL 262.

Ibid at p272.

Ibid at pp273-274.

Wessex Regional Health Authority v HLM Design (1994) 40 CON LR 1.

BG Checo International Ltd v British Columbia Hydro & Power Authority (1993) 1 CSR 12.


Lancashire and Cheshire Association of Baptist Churches Inc v Howard & Seddon Partnership (a firm) [1993] 3 All ER 567; Pullen v Gutteridge Huskins & Davey Pty Ltd [1993] 1 VR 27.

(1997) 13 BCL 262.

In this regard, see also William Hill Organisation Ltd v Bernard Sunley & Sons Ltd (1983) 22 BLR 1 at p29.


Hedley Byrne & Co Ltd v Heller & Partners Ltd (1964) AC 465.


See generally, Sutherland Shire Council v Heyman (1985) 157 CLR 424 at 443-449, 466-468, 501-502; Hawkins v Clayton (1988) 164 CLR 539 at 576. See also San Sebastian Pty Ltd v Minister Administering the Environmental Planning Act (1986) 162 CLR 340, where the High Court identified the difficulty in deciding whether a sufficient relationship of proximity exists to enable a plaintiff to recover economic loss in situations outside the realm of negligent mis-statement where the element of reliance may not be present.

See Hill (t/as RF Hill & Associates) v Van Erp (1996-97) 142 ALR 687; Northern Sandblasting Pty Ltd v Harris (1997) 146 ALR 572.

See John Holland Construction & Engineering Pty Ltd v Majorca Projects Pty Ltd; Bruce Henderson Pty Ltd (1997) 13 BCL 235.

John Holland Construction & Engineering Pty Ltd v Majorca Projects Pty Ltd; Bruce Henderson Pty Ltd (1997) 13 BCL 235.

Ibid.


Ibid at p42.

Ibid at p58.

(1987) 13 CON LR 68.

Ibid at p78.

[1990] 1 QB 993.
128. Ibid at p179.
130. Ibid at p45.
131. Ibid.
133. Ibid at p127.
134. Ibid.
135. Ibid at p142.
136. Ibid.
138. Ibid.
139. For a statutory “equivalent” of such a claim, see White Industries Ltd v Trammel & Ors (1983) 51 ALR 779, in which the applicant had complained that the respondent employees of the superintendent had engaged in conduct that hindered or prevented the supply of “services” by the proprietor to the builder in contravention of Section 45D(1)(b)(i) of the Trade Practices Act 1974 (Cth). The court in dismissing the strike out application held that although the Section 45D claim was made, it manifestly admitted of reasonable argument and was not so clearly untenable that it could not possibly succeed.

140. Liability may also be based upon the equivalent sections of the respective States’ Fair Trading Acts.
142. Ibid at pp603-4. See also Barto v GPR Management Services Pty Ltd (1992) ATPR 41-162, where it was held by Wilcox J that conduct which is trading or commercial in character will fall within Section 52 if it is encompassed within the corporation’s total activities, even though the particular conduct does not directly yield income.

143. The Credit Tribunal: ex parte GMAC (1977) 137 CLR 545.
144. See also Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (1988) 79 ALR 83; Rhone-Poulenc-Agrochimie SA v UIM Chemical Services Pty Ltd (1986) 68 ALR 77 and most recently Yates Corporation Pty Ltd v Boland (1997) 145 ALR 169; Software Integrators Pty Ltd v Roadrunner Couriers Pty Ltd (1997) ATPR (Digest) 46-177.
148. Section 74(2).
151. Section 82. See Wardley Australia Ltd v Western Australia (1992) ATPR 41-189.
152. Western Mail Securities Pty Ltd v Forest Plaza Developments Pty Ltd and Anor (1987) 3 BCL 360; see also Australian Protective Electronics Pty Ltd v Palsflow Pty Ltd (1996) ATPR 41-524.
154. Ibid at pp365-366.
159. Query whether this statement is correct as a general principle. This would certainly be no answer to a claim by a third party who was misled. Even in respect of the party which engaged the architect, the conduct complained of would surely have to be viewed having regard to the particular surrounding facts and circumstances.

164. (1996) 40 NSWLR 165 at p184 (an application for leave to appeal to the New South Wales Court of Appeal was dismissed).
168. Ibid at p53, 631.
170. Ibid.
173. Ibid at p54, 396.
174. Ibid. See also Morling J of the Federal Court of Australia in Gloria v Western Australia Chip & Paper Pulp Co Pty Ltd (1984) 55 FLR 310, where, at 328, His Honour expressed the view that a professional opinion will not constitute “misleading or deceptive conduct” if it is an opinion honestly held on rational grounds and after applying the relevant expertise to the subject matter.

175. Western Mail Securities Pty Ltd v Forest Plaza Developments Pty Ltd (1987) 3 BCL 360.
176. Query whether this is the case where a special degree of expertise is applied by the superintendent such that the parties are unlikely themselves to be aware of any error.

178. Ibid at p369.
180. The point is well illustrated by the case of Pacific Associates v Baxter (1990) 1 QB 993.

Although not concerned with the TPA, this problem of causation was highlighted by the decision in Lubenham Fidelines & Investments Co Ltd v South Pembrokeshire District Council & Anor (1986) 33 BLR 46 considered previously.

Similar considerations arose in P. & E. Phontos Pty Ltd v McConnel Smith & Johnson Pty Ltd (1993) 9 BCL 259. To the extent that reliance is an element both in an action in Section 52 under the Trade Practices Act and as the basis for founding sufficient proximity to give rise to a duty of care in tort, the case is instructive.

181. (1996) 78 BLR 42.
182. Unreported decision of Gleeson CJ, Meagher JA, Sheller JA of the Supreme Court of New South Wales Court of Appeal given on 7 May 1996.