

Supreme Court of Victoria – 26 July 2005

## FACTS

Kane Constructions (“Kane”) entered into a contract with Sopov for the renovations and extensions to a former industrial building at 158-172 Oxford St, Collingwood in Melbourne. The works involved the internal construction and installation within the existing building of a gallery, office space, restaurant, basement car park and entrance areas. Clause 23 of the contract provided that “the Principal shall ensure that the Superintendent ... (a) acts honestly and fairly; (b) acts within the time prescribed under the contract; (c) arrives at a reasonable measure or value of work”. The works under the contract were to be completed in 130 days. However, a series of delays occurred such that, a year later, the works were incomplete. Kane, the builder, complained of a number of matters including the lack of a suitably qualified Superintendent and suspended the works. Kane contended that the Superintendent failed to resolve discrepancies in the contract drawings, refused to grant extensions of time and did not respond within the prescribed time and that the Superintendent was not independent and was at the whim of Sopov. Kane further contended that the Superintendent did not allow Kane to put its position forward on a number of items and the Superintendent was effectively “rubber stamping” Sopov’s position. Therefore, Kane submitted that the Principal was in fundamental breach of its obligations which were required to be discharged via an appropriate, competent, honest and fair Superintendent.

## ISSUE

Whether the Superintendent was appropriate, competent, honest and fair.

## FINDING

The Court considered that the relationship between Sopov and the Superintendent was “undesirably close” and found that the Superintendent failed to understand the obligations of his role and postponed making decisions he ought to have more promptly made as Superintendent, in all likelihood, because of the interference of Sopov. The Court held that the

Superintendent had failed to comprehend the need not only to be seen to be independent but actually to be independent. The Court concluded that the Superintendent did not act competently, or independently, in his role as Superintendent.

## QUOTE

Warren CJ said at paragraphs 622 to 624:

*“[622] There is a line of authorities where the courts have considered interference of the certifier or superintendent by the principal.*

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*[623 A set of indicia of interference of a superintendent may be extracted from the authorities. First of all, with respect to the role of the superintendent, interference leading to impartiality can arise in a series of circumstances.*

*These include when the superintendent allows judgment to be influenced; when the superintendent is in a position whereby the certificate is deprived of value; when the superintendent acts in the interests of one of the parties and by their direction; when the position is misconceived and the superintendent acts as mediator; when there is not sufficient firmness in order to decide questions based on his or her own opinion; where judgement and conduct are controlled by the principal; and where the superintendent considers the assent of the principal to be necessary, has ceased to be a free agent and does not give full disclosure of every communication between the superintendent and the principal. Finally, the superintendent may lose independence without actually intending to do so or even without knowledge they have done so.*

*[624] In relation to the principal, interference will arise where there is an attempt to lead the superintendent astray in the interests of the principal; and where there is correspondence and communication of an improper character between the principal and the superintendent. In relation to the contractor, interference will arise where the contractor has no knowledge of the interfering conduct so as to prevent the builder raising the point.”*

## **IMPACT**

Where the Superintendent does not act fairly and independently of the Principal the Courts may determine that the Superintendent is not acting fairly.