SUPREME COURT OF QUEENSLAND

CITATION:	*SHA Premier Constructions Pty Ltd v Niclin Constructions Pty Ltd* [2019] QCA 201
PARTIES:	**SHA PREMIER CONSTRUCTIONS PTY LTD** ACN 056 777 318 (appellant/applicant) **v** **NICLIN CONSTRUCTIONS PTY LTD** ACN 614 074 065 (respondent)
FILE NO/S:	Appeal No 4175 of 2019 Appeal No 4177 of 2019 Appeal No 4178 of 2019 DC No 762 of 2019 DC No 768 of 2019 DC No 769 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane – Unreported, 28 March 2019 (McGill SC DCJ)
DELIVERED ON:	27 September 2019
DELIVERED AT:	Brisbane
HEARING DATE:	22 August 2019
JUDGES:	Sofronoff P and Morrison JA and Flanagan J
ORDERS:	**1. In CA 4177 of 2019 and CA 4178 of 2019, grant leave to appeal.** **2. In each of CA 4175 of 2019, 4177 of 2019, and 4178 of 2019, allow the appeals.** **3. Set aside the orders made on 28 March 2019 in 762 of 2019, 768 of 2019, and 769 of 2019.** **4. In each of 762 of 2019, 768 of 2019, and 769 of 2019, dismiss the originating applications, and in each case the applicant is to pay the respondent's costs of and incidental to that application.** **5. In each of CA 4175 of 2019, 4177 of 2019, and 4178 of 2019 the respondent is to pay the appellant's costs of and incidental to the appeal.**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – THE CONTRACT –

CONSTRUCTION OF PARTICULAR CONTRACTS AND IMPLIED CONDITIONS – APPOINTMENT OF SUPERINTENDENT – where the appellant and the respondent entered into a design and construction contract – where a dispute arose regarding progress payment claims made by the respondent which were not paid by the appellant – where the question was raised in the first instance as to whether the payment claims were valid under the *Building and Construction Industry Payments Act* 2004 (Qld) – where the learned primary judge held in favour for the respondent – where the appellant appeals against the three orders made in the first instance – where the contract required the appointment of a superintendent – where it is contended by the respondent that the appellant, which was the principal of the contract, had nominated themselves as superintendent – where the matter below was decided on the basis that the appellant was the superintendent – where the validity of the payment claims hinged upon the standpoint that the appellant was the superintendent – where the question arose as to whether the appellant being the superintendent could be an implied term to the contract – whether the payment claims were valid – whether the appellant's status as the superintendent under the contract could be an implied term

BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266; [1977] UKPCHCA 1, cited
Devaugh Pty Ltd v Lamac Developments Pty Ltd [1999] WASCA 280, cited

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T Matthews QC, with C H Matthews, for the respondent

SOLICITORS: Thomson Geer for the appellant/applicant
CDI Lawyers for the respondent

[1] **SOFRONOFF P:** I agree with Morrison JA.

[2] **MORRISON JA:** The appellant (SHA Premier) entered into a design and construction contract with the respondent (Niclin), for the construction of some petrol stations. A dispute eventually arose about progress claims made by Niclin which were not paid by SHA Premier. A discrete question was raised in the District Court as to whether the claim was a valid payment claim under the *Building and Construction Industry Payments Act* 2004 (Qld).

[3] The issue turned on an interpretation of various clauses in the contract between SHA Premier and Niclin. The learned primary judge resolved that issue in favour of Niclin. SHA Premier appeals against the three orders which followed, under which SHA Premier was ordered to pay $399,894.06, together with interest totalling $13,630.35.[1]

The contract

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1 Appeal Book (**AB**) 20-22.

[4] The contract between the parties incorporates the general conditions of contract for design and construction appearing in Australian Standard 4902-2000.[2] It also includes a Formal Instrument of Agreement which identified the "Principal" as "SHA Premier Constructions Pty Ltd (ACN 056 777 318)", and the "Contractor" as "Niclin Constructions Pty Ltd (ACN 614 074 065)".[3]

[5] By clause 3 of the Formal Instrument of Agreement, the contract was agreed to comprise:

(a) the Formal Instrument of Agreement;

(b) AS 4902-2000 General Conditions of Contract for Design and Construct; and

(c) the Construction Programme and documents listed in a schedule annexed to the contract.

[6] Clause 5 of the Formal Instrument of Agreement provides that if "a party discovers any ambiguity conflict, discrepancy or inconsistency in this Contract, it must notify the Superintendent and the other party as soon as possible". Similarly, clause 8.1 of the general conditions provides that "if either party discovers any inconsistency, ambiguity or discrepancy in any document prepared for the purpose of carrying out WUC, that party shall promptly give the Superintendent written notice of it". As can be seen, these clauses distinguish the Superintendent as someone other than the Contractor or the Principal. As will become apparent the contract itself is replete with clauses that proceed on the basis that the Superintendent will be an entity distinct from either the Principal or the Contractor.

[7] Clause 1 of the general conditions defines various terms for the purpose of the contract. The term "Principal" is defined to mean "the Principal stated in Item 1". In turn, Item 1 in Part A of the Annexure to the general conditions identifies the "Principal" as "S.H.A. Premier Constructions Pty Ltd ACN 056 777 318 ABN 62 031 586 582".[4]

[8] Clause 1 defines the term "Superintendent" to mean:[5]

> "the person stated in Item 5 as the Superintendent or other person from time to time appointed in writing by the Principal to be the Superintendent and notified as such in writing to the Contractor by the Principal and, so far as concerns the functions exercisable by a Superintendent's Representative, includes a Superintendent's Representative."

[9] The term "Superintendent's Representative" is then defined to mean "an individual appointed in writing by the Superintendent under clause 21.[6]

[10] Part A of the Annexure to the general conditions[7] identifies the "Contractor" as being "Niclin Constructions P/L ACN 614 074 065". Item 5 then identifies the Superintendent as follows:

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2 AB 47.

3 AB 44. In these reasons quoted clauses will omit the italicised words that appear in the contract, unless the case requires.

4 AB 57 and 108.

5 AB 58.

6 AB 58.

7 AB 108.

> "S.H.A. Premier Constructions Pty Ltd nominated person … ACN 056 077 318 ABN 62 031 586 582".

[11] Item 6 identifies the Superintendent's address as the same address as for the Principal.

[12] Clause 20 of the general conditions makes provision in respect of the Superintendent. As this clause assumed some significance in the hearing before this Court it is necessary to set out its full terms.[8]

> "The Principal shall ensure that at all times there is a Superintendent for the purpose of the Contract.
>
> The Principal shall endeavour to ensure that the Superintendent performs honestly and fairly its functions under clause 34.3 (assessment of EOTs), clause 34.6 (issue of the certificate of practical completion), clause 36.4 (pricing of variations), clause 37.2(a) (pricing of progress certificates), clause 37.4 (issue of final certificate) and in making cost assessments.
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> The Superintendent may carry out its functions under the Contract (other than those referred to in in the paragraph above):
>
> (a) as agent and representative of the Principal; and
>
> (b) in accordance with instructions given to it by the Principal (acting in its absolute discretion unless the Contract expressly requires otherwise).
>
> If, under the Contract, the Superintendent gives a direction, the Contractor shall comply with that direction,
>
> Except where the Contract otherwise provides, the Superintendent may give a direction orally but shall as soon as practicable confirm it in writing. If the Contractor in writing requests the Superintendent to confirm an oral direction, the Contractor shall not be bound to comply with the direction until the Superintendent does so.
>
> The Contractor agrees that the Principal and the Superintendent may exercise their discretions and rights under the Contract in whatever way the Principal or Superintendent decide in the Principal's interests only and without being under any obligation to do so.
>
> The Contractor acknowledges and agrees that, for the purposes of the *Payments Act* for the relevant State or Territory, the Superintendent has been appointed by the Principal to receive payment claims and provide payment schedules.
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> The Principal acknowledges and agrees that payment claims may be served on the Superintendent for the purpose of the *Payments Act* for the relevant State or Territory. The Contractor acknowledges and agrees that payment schedules may be provided by the Superintendent for the purposes of the *Payments Act* for the relevant State or Territory."

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8 AB 79.

[13] Clause 37.1 deals with progress claims and clause 37.2 deals with certificates given in response to a progress claim. Under clause 37.1 the Contractor can make progressive claims on a monthly basis. The entitlement to lodge a progress claim arises on the last day of each month,[9] for work done to the 25th day of that month. The last day of the month is the "reference date" for the purpose of the *Payments Act*. Clause 37.1 sets out the various components which a progress claim must contain. There is no suggestion here that the progress claim was non-compliant.

[14] Clause 37.2 deals with the certificates given in response to a progress claim:[10]

> "The Superintendent shall, within 10 business days after receiving such a progress claim, issue to the Principal and the Contractor:
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> (a) a progress certificate evidencing the Superintendent's opinion of the moneys due from the Principal to the Contractor pursuant to the progress claim and reasons for any difference ('progress certificate'); and
>
> (b) a certificate evidencing the Superintendent's assessment of retention moneys and moneys due from the Contractor to the Principal pursuant to the Contract.
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> …
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> If a failure by the Superintendent to issue a progress certificate within the time prescribed in this clause results in payment to the Contractor which is later than 21 business days after the date of the progress claim then the Contractor will be entitled to interest on the amount certified at the rate stated at Item 14 until the date payment is made.
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> Subject to the preceding paragraph, the Principal shall within 15 business days after receiving both such certificates, or within 25 business days after the Superintendent receives the progress claim, pay to the Contractor the balance of the progress certificate after setting off such of the certificate in paragraph (b) as the Principal elects to set off. If that setting off produces a negative balance, the Contractor shall pay that balance to the Principal within 7 days of receiving written notice thereof."

Contextual provisions in the contract

[15] The contract contains numerous provisions which, on their face, draw a distinction between the Superintendent and the Principal, or impose obligations and duties on the Superintendent in a way which requires the Superintendent to act as a form of adjudicator as between the Contractor and the Principal. The following examples suffice to show the degree to which the contract draws relevant distinctions:

(a) the contract identifies a particular party as "the Principal" on the face of the Formal Instrument of Agreement, and in the definition of "Principal" which refers to Item 1 of the Annexure;

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9 Item 33 of Part A of the Annexure to the General Conditions.

10 AB 96.

(b) the Contractor is separately identified in the Formal Instrument of Agreement, in the definitions in clause 1 and in Item 3 of the Annexure;

(c) the Superintendent is the subject of a separate definition in clause 1, referring to the person stated in item 5 as the Superintendent, or other persons who are from time to time appointed by the Principal; that goes together with Item 5 which refers to the Superintendent as "S.H.A. Premier Constructions Pty Ltd nominated person";

(d) numerous clauses require the Superintendent to assess the cost of work or costs incurred by the Contractor, and whether it can be recovered against the Principal: for example, clauses 3, 11.2, 12, 13, 14.2, 16A, 19.2, 19.5(b), 20, 24.3, 25.2, 26.3, 27, 29.3, 32, 33, 34.3, 34.9, 37.1, 37.4, 39.6, 39.9 and 41.3;

(e) the Superintendent is also given contractual obligation to assess extensions of time, a function where the interests of the Contractor and the Principal may conflict: clauses 34.4 and 34.5;

(f) given that the contract separately defines the "Principal" and the "Superintendent", the contract contains numerous provisions where a particular obligation falls to be performed by the Superintendent, but not the Principal; those provisions include: directing separable portions (clause 4); directing the provision of security (clause 5.1); receipt and checking of documents (clause 8.3); approval for subcontractors (clause 9.2); receipt of notice about subcontract work (clause 9.3); design obligations (clause 9.7); receipt of payment claims and provision of payment schedules (clause 20); directions to remove people from the site (clause 23); notification of latent conditions (clause 25.2); provision of data and survey marks (clause 26.1); notification about errors and setting out (clause 26.2); directions to clean up the site (clause 27); directions as to materials and labour and construction plant (clause 28); quality assurance and defective work (clauses 29.2 and 29.3); examination and testing (clause 30); programming (clause 32); suspension of work (clause 33); receipt of reports as to delay (clause 34.2); dealing with claims for extension of time (clause 34.3); dealing with notice of practical completion (clause 34.6); requesting further information on a progress claim and issuing certificates (clauses 37.1 and 37.2); receipt of final payment claims, and issuing final certificates (clause 37.4); dealing with communication of claims (clause 41.1);

(g) bearing in mind the separate identification and definition of the Principal, Contractor and Superintendent, the contract contains numerous clauses where requirements fall on or for the benefit of both the Superintendent and the Principal: availability of documents (clause 8.4); notification of compliance with legislative requirements (clause 11.1); discussion of replacement of key personnel (clause 22A); reasonable inspections organised by the Contractor (clause 28(b)); receipt of test results from the Contractor (clause 30.6); receipt of notice about delays (clause 34.2); prescribed notices of dispute (clause 41.2);

(h) bearing in mind the separate identification and definition of Principal, Contractor and Superintendent, the contract contains provisions which otherwise differentiate between them: if the Principal discovers an inconsistency, ambiguity or discrepancy in a document it must give the Superintendent written notice of it (clause 8.1); potential changes in design can be notified to the Principal or the Superintendent (clauses 9.7(d), (i)); warranties and indemnities

are not affected by directions by the Principal or the Superintendent (clause 10.1); the Principal can direct others to complete the Contractor's obligations but only after the Superintendent has given notice (clause 12); negligence, negligent acts or omissions by either the Superintendent or the Principal are excepted risks (clause 14.3(a)); acts or omissions by the Superintendent or the Principal affect indemnities (clause 15.1); the Contractor's insurance is to cover the Principal separately from the Superintendent (clause 17(b)); insurance certificates and notices are affected by acts of the Principal or the Superintendent (clauses 19.1 and 19.3(b)); the obligations of performance are different, with the Superintendent being required to perform honestly and fairly, and the Principal merely endeavouring to ensure that is so (clause 20); requests about key personnel and meetings (clause 22A(a) and (c)); the Principal can direct work such as cleaning up or rectification of defective work, but it is the Superintendent who certifies the cost (clauses 27 and 29.3); in respect of extensions of time the Superintendent is to exercise its discretion for the benefit of the Principal (clause 34.5); and the Superintendent has to issue a final certificate to both the Contractor and the Principal (clause 37.4).

[16] The foregoing is sufficient to demonstrate that the contract proceeds on the basis that the Superintendent will be a separate entity from the Principal. The obligations falling on the Superintendent, such as to assess costs, extensions of time and deal with progress claims, all require the Superintendent to exercise obligations where the rights of the Contractor and the rights of the Principal are distinct and may conflict. Hence there is a requirement that the Superintendent must perform its duties honestly and fairly in relation to extensions of time, the issuing of certificates of practical completion, the pricing of variations, the pricing of progress certificates, the issue of a final certificate, and assessing costs: clause 20. However, the contract expressly provides that apart from those functions, the Superintendent can carry out its duties as an agent and representative of the Principal, and in accordance with the Principal's instructions.

[17] Whilst it might be theoretically possible for the Principal to act in some capacity as a Superintendent, the contract clearly contemplates that the Superintendent will be a separate entity from the Principal as it is required to deal with issues where the interests and rights of the Contractor and Principal may be in conflict.

Construction of item 5

[18] The definition of Superintendent is "the person stated in Item 5 as the Superintendent or other person from time to time appointed in writing by the Principal to be the Superintendent and notified as such in writing to the Contractor by the Principal". Item 5 identifies the Superintendent as "S.H.A. Premier Constructions Pty Ltd nominated person". Construction of the words in Item 5, in the context of the contract as a whole, admits of only two possibilities. First, the words should be read as though the word "or" appeared between the Principal's name and the words "nominated person". That is the construction found by the learned primary judge, with the consequence that the Principal nominated itself as the Superintendent at all times.[11] The second is that the phrase should be read as "S.H.A. Premier Constructions Pty Ltd's nominated person".

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[11] This followed because of a concession made at first instance, and maintained before this Court, that the Principal had never nominated someone else to be the Superintendent.

[19] In my respectful view, the first alternative to the construction of that phrase should not be adopted. To insert the word "or" in the middle of the phrase is to say no more than the definition of "Superintendent" does in any event. Further, it results in the highly unlikely presumed intention of these two commercial parties, that the Principal would be entitled to be appointed as its own Superintendent. Given the difficult obligations of a Superintendent in those respects where it stands between the competing interests of the Principal and the Contractor, and the need for it to perform those duties "honestly and fairly", it is in my respectful view, fanciful to conclude that the parties intended for the Principal to act as Superintendent.

[20] In my view, the preferred construction is that the identified Superintendent in Item 5 is the Principal's nominated person from time to time. In other words, the second alternative is the correct construction.

[21] The decision of the Full Court of Western Australia in *Devaugh Pty Ltd v Lamac Developments Pty Ltd*[12] supports the conclusion reached above as to the construction of Item 5 in the context of the contract, particularly that part which is AS 4902-2000, as a whole. The contract in that case[13] was not based solely on the then applicable Australian Standard contract, AS 2545. Rather, the parties proceeded on the basis of an offer in the form of a quotation, and a letter of acceptance, part of which specified that "Acceptance of this order will be deemed to imply acceptance by the Sub-contractor of the Conditions of Contract embodied in the latest issue of AS 2545 1993" and "Any terms or conditions normally imposed by the Sub-contractor which are at variance with this form will be deemed to be deleted".[14] The letter of acceptance listed a number of documents which were said to "form the basis of the Subcontract", but none of the documents identified AS 2545 as being included in those documents which formed the basis of the subcontract. Ultimately, no formal contract was executed by the parties.[15]

[22] Moreover, when one had reference to AS 2545, there were other difficulties. AS 2545 contained a number of annexures which mirror those in AS 4902-2000. Specifically, the annexures include those which identified specific persons and various pieces of information so that operative clauses would be efficacious. One of those was the person to be specified as the "Main Contractor's Representative" (MCR), the equivalent of the Superintendent in this case. In *Devaugh* one of the annexures to AS 2545 were completed by the parties,[16] and there were a number of other matters the subject of express agreement between the parties as terms of their subcontract, which differed from and were inconsistent with the express provisions of AS 2545.[17]

[23] The court was therefore faced with competing contentions as to how to construe the subcontract. On one side it was contended that the rights of the parties fell to be determined entirely or substantially in accordance with the true construction of AS 2545. However, as Malcolm CJ observed[18] whilst AS 2545 was included within

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12 [1999] WASCA 280.

13 Relevantly a subcontract, with the consequent adjustment of terms such as main contractor and subcontractor.

14 *Devaugh* at [6].

15 *Devaugh* at [13].

16 *Devaugh* at [30].

17 *Devaugh* at [31].

18 *Devaugh* at [33].

the contract documents "it could only apply to the extent that it was incorporated by reference and was not inconsistent with the terms expressly agreed between the parties".

[24] In *Devaugh* the court held that if AS 2545 was read as a whole and standing on its own as the contractual document, the result was that the failure to appoint an MCR was a breach of the clause requiring the Main Contractor to "ensure that at all times there was a Main Contractor's Representative", and that failure to appoint such a person would constitute a substantial breach of contract by the Main Contractor.[19] The relevant passage from the reasons of Parker J bear repeating:[20]

> "[99] The reasons of the Master make it clear that he was persuaded, in particular, that the relevant portions of cl 42.1 applied as between the parties to the subcontract and that, on the true construction of the subcontract, where an MCR had not been appointed by Devaugh the references to MCR were to be read as, or including, references to Devaugh itself. In my respectful view, the precise basis for his reasoning for this conclusion is, however, not altogether clear.
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> [100] One possible approach is that AS2545 1993 on the true construction of its terms, had this effect. The validity of such an approach was strongly resisted by the appellant. If that was in truth the basis for the Master's reasoning, in my respectful view there are difficulties in the way of its acceptance. If AS2545 1993 is considered alone, as a complete document, given that the term main contractor's representative is expressly and exhaustively defined in cl 2, I am not persuaded that as a matter of construction of the document itself, the view taken by the Master can be sustained. Indeed, when considering as a complete document and in isolation, the preferable view would appear to be that its operation depended critically upon the appointment of an MCR who, despite the word 'representative', has functions under the conditions which are to be performed with a measure of independence from the main contractor so that fairness is done both to the subcontractor and the main contractor. The functions of the MCR appear to be intended, on the true construction of AS2545 1993 as a complete document in isolation, to be essential to many critical stages of the performance of the works. I am unable to see in the language of AS2545 1993, when read in isolation as a complete document, adequate scope for a construction which would allow reference to the MCR to be references to the main contractor. No discernible object of cl 42.1, or of the document as a whole, would appear to support such a construction. None of the decisions which have been sought to construe AS2545 1993, or substantially similar forms of conditions of contract, provide support for such a construction: see, for example, *Blue Chip Pty Ltd v Concrete Constructions Group Pty Ltd* (1996) 13 BCL 31 (Queensland Court of Appeal), *Algons Engineering Pty Ltd v*

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19 *Devaugh* at [47] per Malcolm CJ and Parker J at [99]-[101]; Murray J concurring with each.

20 *Devaugh* at [99]-[101].

Abigroup Contractors Pty Ltd (1997) 14 BCL 215 (NSW Supreme Court, Rolfe J).

> [101] Under AS2545 1993, read as a complete document and in isolation, it would appear that the failure of Devaugh to appoint an MCR was a clear breach of cl 23 by which it was expressly required to 'ensure that at all times there was a Main Contractor's Representative …". Clause 44.7 – substantial breaches of contract by the Main Contractor – and cl 44.9 – notice of subcontractor of suspension of work, followed by notice of termination with entitlement to recover damages (as in repudiation at common law, see cl 44.10) would appear to be available as remedies to a subcontractor where there was a failure to appoint an MCR."

[25] At first instance the parties in the present case proceeded on the basis that if the Principal was nominated as Superintendent in Item 5, then the response to Niclin's payment claims was effective, and the monies claimed were due and payable. However, if the Principal was not nominated as Superintendent, nothing was due and payable.

[26] The conclusion reached above as to the construction of Item 5 has the consequence that the appeal must be allowed and the orders set aside.

Implied term

[27] In the course of argument before this Court a question arose as to whether a term might be implied into the contract, to the effect that where the Principal has not nominated a Superintendent, the Principal itself must perform that obligation. Such a term was implied in *Devaugh Pty Ltd v Lamac Developments Pty Ltd*. That decision was distinguished by the learned primary judge because of the particular circumstances applying to the contract in that case, which were inconsistent with some of the provisions in a standard form contract such as the one under consideration in this case.[21] As to that his Honour said:[22]

> "The implied term depended, really, on the specific agreements in various respects outside the form of contract, rather than the terms of the form of contract. Indeed, it seems to me that the analysis in paragraph 47 was that, if one looked at the standard form contract on its own, the result was a failure to appoint a person who filled, under that contract, the role of superintendent, though under that form a different term was used for it, was a breach of contract which would have entitled the other party to terminate the contract if that was persisted in, and paying damages for breach. Such an analysis is inconsistent with the notion that in that context there was an implied term that, in the absence of exercising the power of appointment, the principal was treated as having appointed itself, or treated itself filling the role of superintendent, because of course in that situation there was an effective superintendent, and the contract was able to continue.

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21 AB 16-17.

22 AB 17 lines 13-32.

> I would say that that approach appears to be consistent with the way that decision was dealt with in the Full Court of South Australia in *Karalis v Archonstruct Pty Ltd* [2008] SASC 368. Accordingly, if I had taken the view that the clause and item 5 of the annexure did not identify the respondent as the superintendent, with the result that there had never been a superintendent under this contract – at least so far as the evidence before me reveals – the result would have been that there was necessarily no valid payment certificate."

[28] The implication of such a term is governed by principles which are well settled. The conditions which must be satisfied are that:

(a) the term must be reasonable and equitable;

(b) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effected without it;

(c) it must be so obvious that it 'goes without saying';

(d) it must be capable of clear expression; and

(e) it must not contradict any express term of the contract.[23]

[29] It is unnecessary to canvass more than the condition that before a term can be implied it must be necessary to give business efficacy to the contract. In the contract between SHA Premier and Niclin, clause 20 obligated the Principal to "ensure that at all times there is a Superintendent for the purpose of the contract". If the Principal failed to nominate a Superintendent, as is conceded to be the case here, then the Principal has always been in breach of clause 20. That breach entitles the Contractor (Niclin) to pursue a claim for damages.

[30] The failure of the Principal to nominate the Superintendent has the direct consequence that the Contractor's payment of progress claims under clause 37.1 could not be the subject of a proper response by the Superintendent in terms of issuing a progress certificate and a certificate as to retention monies, under clause 37.2. The direct consequence of the failure to appoint a Superintendent, in those circumstances, is that the requisite progress certificates were not issued therefore the obligation on the Principal to pay under clause 37.2 did not arise. The Contractor would be entitled to such damages as were caused by that breach.

[31] Further, because of the impact upon the rights of the Contractor by the absence of a Superintendent, it is likely that such a breach would be a substantial breach under clause 39.7, entitling the Contractor to suspend work and terminate the contract.

[32] The contract is therefore efficacious without the necessity to imply a term that in the absence of nomination of a Superintendent the role must be performed by the Principal.

[33] The implication of the term in *Devaugh* occurred in circumstances where the contract was quite dissimilar to that which applies in this case, particularly where the parties contemplated terms and conditions which were in a number of respects quite different from AS 2545 1993, and where the parties contemplated a much more direct relationship between them than that standard contract would provide.[24]

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23 *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266, at 283.

24 *Devaugh* per Parker J at [104].

Further, the implication occurred in circumstances where the relevant item in the annexure had not been completed at all; in other words, nothing had been inserted in the equivalent of Item 5 in the present case.

[34] Those factors are sufficient to indicate, as it did to the learned primary judge, that *Devaugh* is not compelling authority on the question of the implication of a term in this case. Indeed, the passages referred to above (see paragraph [24]) would indicate that had the contract in *Devaugh* been in the same terms as that in the present case, the term would not have been implied.[25]

[35] Finally, even if there were similarities between the contract in *Devaugh* and that in the present case, I would hesitate to reach a conclusion that a term should be implied such as happened in that case. That is because the current case has proceeded upon a concession which, in my respectful view, is not soundly based. The concession at first instance, and maintained before this Court, was that the Principal had never appointed a Superintendent. There are reasons to doubt that is so.

[36] The definition of "Superintendent" is the person stated in Item 5 "or other person from time to time appointed in writing by the Principal to be the Superintendent and notified as such in writing to the Contractor by the Principal".[26] The learned primary judge took the view that the nomination of another person involved a two-step process, the first the appointment in writing, and the second the notification of that appointment, in writing to the contractor.

[37] In the material before the learned primary judge was an affidavit by Mr Traynor, the Development Project Manager of SHA Premier. He deposed, based on an examination of SHA Premier's books and records, that individual persons were nominated by SHA Premier to be the superintendent.[27] His affidavit revealed a continuous sequence of appointed Superintendents under the contract with Niclin: first, Mr Szczepaniak between 27 November 2017 and 29 January 2018; then Mr Bretterecker between 29 January 2018 and 17 June 2018; then Mr Crow between 14 June 2018 and 11 October 2018; and lastly Mr Malge between 11 October 2018 and 30 November 2018, when his employment with SHA Premier ceased.

[38] The appointment of Mr Szczepaniak was notified to Niclin by email on SHA Premier letterhead, the recipients including Niclin and Mr Szczepaniak himself.[28] That email also notified Niclin that upon the completion of the design aspect Mr Bretterecker would take over the duties of Superintendent.

[39] In my view, it is arguable that the email was an appointment in writing by SHA Premier of Mr Szczepaniak and Mr Bretterecker, as well as the notification to Niclin of those appointments. The assumption of the duties of Superintendent by Mr Crow from Mr Bretterecker was notified to Niclin by email on 17 June 2018. It was an email on SHA Premier letterhead by Mr Crow and advised that Mr Crow was "in the process of taking over from" Mr Bretterecker.[29] In my view, it is arguable that

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25 See also *Karalis v Archonstruct Pty Ltd* [2008] SASC 368 at [125]-[130].
26 AB 58.
27 AB 317-319 paras 23-29.
28 AB 379.
29 AB 422.

that email would also constitute a document appointing Mr Crow as Superintendent, and notifying the Contractor of that fact.

[40] Finally, on 11 October 2018 there was an email exchange in which Niclin asked SHA Premier who their nominated "Project Manager" was, and received a reply that it was Mr Malge.[30] Whilst the phrase "Superintendent" was not used, the use of the term "Project Manager" was routine in SHA Premier and one of the responsibilities of the Project Manager was to assume the role of Superintendent.[31]

[41] The payment schedule, the efficacy of which is at the heart of the issues on this appeal, was given by SHA Premier's internal counsel on 14 November 2018.[32] It was therefore given before Mr Malge ceased to be employed, and ceased his work as Superintendent.

[42] It is unnecessary to reach a final conclusion on whether the Superintendents were validly appointed. It is sufficient to note that there is, in my view, a substantial basis to doubt the correctness of the concession upon which the learned primary judge was invited to proceed.

Conclusion

[43] The parties were agreed that if the conclusion of this Court was that SHA Premier did not nominate itself as Superintendent, then the response to the payment claim was not efficacious and as a result the judgments below could not be sustained. As will be evident from the reasons above, my conclusion is that SHA Premier as Principal did not nominate itself as Superintendent, but Item 5, on its proper construction, should be read as identifying the Superintendent as being the person nominated by SHA Premier from time to time. The consequence is that the appeal must be allowed and the orders set aside.

[44] I would propose the following orders:

1. In CA 4177 of 2019 and CA 4178 of 2019, grant leave to appeal.
2. In each of CA 4175 of 2019, 4177 of 2019, and 4178 of 2019, allow the appeals.
3. Set aside the orders made on 28 March 2019 in 762 of 2019, 768 of 2019, and 769 of 2019.
4. In each of 762 of 2019, 768 of 2019, and 769 of 2019, dismiss the originating applications, and in each case the applicant is to pay the respondent's costs of and incidental to that application.
5. In each of CA 4175 of 2019, 4177 of 2019, and 4178 of 2019 the respondent is to pay the appellant's costs of and incidental to the appeal.

[45] **FLANAGAN J:** I agree with the orders proposed by Morrison JA and with his Honour's reasons.

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30 AB 439.
31 Affidavit of Mr Traynor, para 19, AB 316.
32 AB 247.