INTRODUCTION
The purpose to this paper is to consider the duties of the certifier when ruling on claims for delay. Specifically, this paper examines:

- The scope of the certifier’s common law obligation to act ‘fairly and impartially’;
- A comparison of the certifier’s obligations in assessing delay claims under four standard form contracts: NZS 3910:2003, NZIA 2007, FIDIC and NEC; and
- Rights and remedies against the certifier for breach of the obligation to act fairly and impartially.

OBLIGATION TO ACT ‘FAIRLY AND IMPARTIALLY’

Dual Role of the Engineer
It is a well established common law rule that a professional engaged by a principal to superintend or administer a construction contract (‘contract administrator’) on the principal’s behalf has a dual role:

- as an agent of the principal in issuing directions and supervising the work (‘agency functions’); and
- as an independent certifier, valuer and assessor in respect of the assessment, valuation of claims and issuing certificates (‘certification functions’) (Perini Corporation v
The obligation to act ‘fairly and impartiality’ extends beyond ruling on delay claims and is likely to apply to any role in which the contract administrator must make a judgment call in favour of the principal or contractor.


In respect of the certification functions, the contract administrator is under a common law duty to act independently, fairly and impartially. This common law obligation is generally captured in most standard form construction contracts.

Most standard form contracts provide that the principal must ensure that at all times there is a third party to administer the contract. As the contract administrator is not itself a party to the construction contract, it is the principal’s obligation to ensure that the contract administrator acts fairly and impartially.

Functions to which the obligation applies

The obligation to act ‘fairly and impartiality’ in the role as contract administrator extends beyond ruling on delay claims and is likely to apply to any role in which the contract administrator must make a judgment call in favour of the principal or contractor. The assessments to be made include assessing claims for payment made by the builder, claims for extensions of time, the quality of materials and workmanship and claims for extra payments, whether for variations or for other site related issues.

Other certification functions in relation to which the contract administrator must act fairly and impartially include adjudicating on disputes or differences, issuing practical completion and defects liability certificates, approving the programme, quality management, as-buils and manuals and issuing default notices and suspension of works.

Extent of the contract administrator’s duty to act independently, fairly and impartially

The Courts have described the contract administrator’s duty to act independently, fairly and impartially in carrying out his certification functions in a number of ways:

• Holding the balance between the principal and the contractor
• Retaining independence, exercising judgment
• Being just and impartial, and conducting oneself in a reasonable manner
• Doing what is proper having regard to the interests of both parties
• Using one’s best endeavours to reach an honest view
• Using professional judgment
A contract administrator is generally engaged and paid by the principal either as an independent party or as an employee. This means that in exercising his/her certification functions, in respect of which he/she is obliged to act fairly and impartially, he/she is in a position of conflict.

• Making timely, reasoned decisions.

In exercising the agency functions, the contract administrator is acting purely as the ‘mouth-piece’ of the principal and is not obliged to act independently, fairly and impartially.

The leading case on the contract administrator’s obligation to act fairly is Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd [2002] NSWCA 211 (3 July 2002). The NSW Court of Appeal found that the superintendent had the power to extend time for the completion of a building contract and the power was able to be exercised in the interests of both the owner and the builder. Abigroup had not asked for the extension of time and clearly had not given the required notices under the contract. The Court gave the extension of time and added that a contract administrator ‘is obliged to act honestly and impartially in deciding whether to exercise this power’ in accordance with the express terms of the contract.

The decision was the subject of much criticism as it had generally been considered that the contract administrator’s power unilaterally to grant an extension of time was inserted into the contract for the benefit of the principal, safeguarding liquidated damages provisions.

**Balance of power in favour of principal**

A contract administrator is generally engaged and paid by the principal either as an independent party or as an employee. This means that in exercising his/her certification functions, in respect of which he/she is obliged to act fairly and impartially, he/she is in a position of conflict. That is, when the contract administrator exercises his/her certification functions in favour of the contractor, he/she may be seen as ‘biting the hand that feeds him/her’.

The contract administrator may face the threat of termination of his or her contract with the principal should he or she make a decision that goes in favour of the contractor. The contract administrator may also be aware of the financial constraints of the principal which may subconsciously affect any decision that is made. The contract administrator must put these conflicts aside in exercising the certification functions. Failure to do so may not only be in breach of the contract administrator’s duty to act fairly and impartially, but may also render the principal in breach of the contract.

**A COMPARISON UNDER NZS 3910:2003, NZIA 2007, FIDIC AND NEC**

Clause 6.2.1 sets out the common law principle regarding the dual role of the contract administrator (the ‘engineer’). The second limb of this clause, which captures the engineer’s obligation in respect of the certification function, states that the engineer must act independently of either contracting party, fairly and impartially to make the decisions entrusted to him or her under the Contract Documents, to value the work and to issue certificates.

Guideline notes to NZS 3910: 2003 provide that:

- This clause [6.2.1] is intended to reflect the common law and to record that while the Engineer is retained by the Principal and has certain duties owed exclusively to the Principal, the Engineer is also vested by both parties to the contract with the power to make certain decisions which become binding on them both, and in the latter role is bound to act fairly and impartially…

- In a number of matters the Engineer is called on to exercise his or her own professional judgment and must act independently of either party in the sense that his or her own professional decision must be made.

The test in relation to assessing whether a contractor is entitled to an extension of time is whether the contractor is fairly entitled to an extension (10.31, 10.34 and 10.3.5).

The guideline notes provide that:

...in each case a decision must be reached as to whether the Contractor ‘is fairly entitled to an extension’...

The engineer has the discretion under clause 10.3.2 to not grant an extension where the contractor fails to give adequate and timely notice of a claim for an extension of time, although it may still do so. The guideline notes for this clause provide that:

...The purpose of requiring adequate and timely notice is to ensure that the circumstances can be adequately investigated and a reliable judgment made. The discretion vested in the Engineer to
reject or allow a late claim recognises that there may be valid reasons for delay and there may be cases where the lateness of the claims does not prevent a proper investigation.iii

…

Importantly, the guideline notes go on to state:

The Engineer should not refuse to grant an extension on the ground of late application unless the lateness is such to cause real difficulty in then making of a proper assessment, and there are no special reasons such as might excuse the failure to give notice at the proper time.iv

In such a situation it is incumbent on the contractor to point to the lack of any ‘real difficulty’ and to provide special reason/s excusing the failure to give timely notice. But again, the engineer is to act fairly and impartially.

In applying his or her professional judgment the engineer must apply the facts against the provisions of the contract and then make an assessment. Any assessment will include applying the engineers own knowledge and experience and the standards of the engineering profession.


Clause 1.3 sets out the role of the architect under the NZIA 2007 Contract including representing the principal and administering the contract ‘impartially’ between the principal and the contractor.

In terms of the architect’s obligation to grant an extension of time, the NZIA 2007 Contract provides:

If after consideration of the Contractor’s claim the Architect *finds the claim to be justified*, the time for Practical Completion must be extended.

At point of difference with NZS3910:2003 is found at clause 11.8, which states:

The Architect may grant an extension of time to the Contractor for any of the reasons listed in Rule 11.5 Claim for extension of time, even though the Contractor has not made a claim.

While not placing a positive duty on the architect, so long as a justifiable claim exists, one would expect an impartial architect to
grant an extension notwithstanding a late claim or no claim at all, from the contractor.


Sub-clause 3.1, ‘The Engineer’s Duties and Authority’ makes it clear that:

…whenever carrying out duties or exercising authority, specified in or implied by the Contract, the Engineer shall be deemed to act for the Employer.

This marks a fundamental change in the role of the engineer under the 1999 Red Book, compared with the fourth edition of the Red Book, as it makes it clear that the engineer acts as an agent of the employer at all times. The 1999 Red Book also removes the traditional requirement of impartiality from the engineer, and his role as quasi-arbitrator or adjudicator has been allocated to a Dispute Adjudication Board ('DAB'). However, of importance is clause 3.5, which provides:

Whenever these Conditions provide that the Engineer shall proceed in accordance with this Sub-Clause 3.5 to agree or determine any matter, the Engineer shall consult with each Party in an endeavour to reach agreement. If agreement is not achieved, the Engineer shall make a **fair determination** in accordance with the Contract, taking due regard of all relevant circumstances.

The requirement of ‘impartiality’ has given way to a ‘fair determination’. There are 25 sub-clauses where the engineer is required to comply with sub-clause 3.5 in agreeing or determining the matter after consulting with each party in an endeavour to reach agreement.

The risk is that without express reference to claim 3.5 the engineer is not bound to make a fair determination. This is cured in that clause 20.1 (Contractor’s claim) specifies clause 3.5 as applying to all claims by the contractor, including claims for any extension of time.

The Statutes and By-Laws of FIDIC refer to a Code of Ethics outlining the principles fundamental to the behaviour of a consulting engineer. These include a duty to act with complete
impartiality of judgment or decision in applying the terms of the contract between the employer and the contractor. It probably recognises that in performing his/her duties, the engineer is under an implied duty at common law to act with impartiality. The difficulty arises where the contract administrator (engineer) is not a member of FIDIC or otherwise bound by the Code of Ethics.

**New Engineering Contract, Engineering and Construction Contract, Third Edition (‘NEC3 ECC’)**

NEC3 ECC divides up the traditional ‘contract administrator’ role by splitting it three ways (between the project manager, the supervisor and the adjudicator). Presumably this is intended to avoid disputes where one person has a dual role, and may be an attempt to alter the common law position. Clause 10.1 of NEC3 ECC states that the employer, the contractor, the project manager and the supervisor ‘shall act in a spirit of mutual trust and co-operation’.

The guidance notes to NEC3 ECC state that the role of the project manager is to manage the contract for the employer with the intention of achieving the employer’s objectives for the completed project. The project manager has the authority to carry out the actions and make the decisions required of him. The project manager will normally maintain close contact with the employer so that his decisions reflect the employer’s business objectives.

The supervisor’s role is essentially to check that the works are constructed in accordance with the contract. Disputed actions by both the project manager and supervisor can be referred to the adjudicator.

Although the project manager’s primary role is to act as agent of the employer, the project manager does maintain certification functions traditionally undertaken by the contract administrator in assessing claims for delay. While there is no express requirement on the project manager to make a fair and impartial assessment, NEC3 ECC attempts to remedy this in the guidance notes which state that the project manager will be motivated to act fairly and reasonably in the knowledge that the contractor may refer the matter to the adjudicator. The more cynical contractor may question whether non-binding guidance notes and the threat of adjudication will achieve this result.

**Rights and remedies against the contract administrator for breach of duty of fairness and impartiality**

Most standard form contracts incorporate the common law
obligation on the contract administrator to act fairly and impartially when making assessments under the contract. What does this mean in terms of the remedies the contractor and principal may have should the contract administrator fail to meet his/her obligation?

**Contractual mechanisms**

All of the standard form contracts discussed above contain dispute resolution mechanisms for resolving differences under the contract. These differences will often arise out of a decision or valuation made by the contract administrator in exercising the certification functions.

Under NZS 3910:2003 either party can refer a dispute to the engineer and then if dissatisfied with the decision of the engineer require that the matter go to mediation and/or arbitration. Alternatively, at any stage an adjudication under the Construction Contracts Act 2002 (the ‘Act’) can be initiated.

Similar provisions exist in the NZIA 2007 Contract where disputes are to first be referred to the architect followed by a mediation. Only if mediation fails can arbitration be commenced.

While there is no provision for the contractor to require the engineer to be replaced under NZS 3910:2003, the contractor is entitled to a variation for the engineer’s failure to carry out its duties (clause 6.2.4). This would include failing to assess a claim for delay within a reasonable time, arising from his/her duty to act without undue delay (clause 6.2.2).

NZIA 2007 largely mirrors the concepts in NZS 3910:2003 with clause 4.5 providing compensation to the contractor arising from the architect’s failure to properly administer the contract.

Under the 1999 Red Book disputes are to be adjudicated by the DAB. This includes disputes as to any certificate, determination, instruction, opinion or valuation of the Engineer (clause 20.4). The DAB is made up of either a single person or a number of persons chosen with specific qualifications. An unsatisfactory decision of the DAB can be taken to arbitration provided the parties have first attempted to settle the dispute amicably.

NEC3 ECC provides for contractual adjudication which may be commenced at any time. If either party is dissatisfied with the adjudicator’s decision it can be referred to a tribunal. The tribunal is not tied to any decision or action of the project manager, supervisor or adjudicator. As to the precise dispute resolution procedure, this is largely or wholly dependent on the optional
clauses utilised in the particular contract.

All the standard form contracts include an ability for the principal to replace the contract administrator, leaving open the possibility of the contractor requesting a replacement for bias on the contract administrator’s behalf. Whether such a request is acceded to is of course far from certain.

Can the contract administrator be sued in contract by the contractor?

It was initially thought that in performing his/her certification functions, the contract administrator was effectively exercising arbitral functions and therefore immune from being sued for negligence. However, in *Sutcliffe v Thackrah* [1974] AC 727 it was made clear that, while the contract administrator in carrying out his/her certification functions was obliged to act fairly and impartially, this did not constitute him/her either as an arbitrator or quasi arbitrator. Hence, there is no blanket restriction on actions against the contract administrator in their certification capacity.

While this may be so, the contractor does not have a contract with the contract administrator. Therefore the contractor would need to look to a claim in negligence for recovery against the contract administrator.

Can the contract administrator be sued in contract by the principal?

The principal may have a claim against the contract administrator for breach of contract arising under the consultancy agreement. This contract is not the construction contract, but the agreement between the principal and contract administrator.

There may be included in the consultancy agreement an express duty of fairness and impartiality, or a more generalised duty to take reasonable care in the performance of its duties. Failure to comply with this duty may see the contract administrator being pursued by the principal for breach of the contract causing loss, for which damages may be recoverable.

Subject to the express terms of the consultancy agreement, the contract administrator generally has an obligation to act ‘fairly and impartially’ (*Pacific Associates Inc v Baxter* [1990] 1 QB 993). Whether this is an obligation implied into the consultancy agreement is dependent upon satisfaction of the business efficacy and officious bystander test articulated in *B P Refinery (Westport) Pty Limited v Shire of Hastings* [1978] 52 ALJR 20 PC.

Can the contract administrator be sued in tort by the
contractor? The Courts have left open the ability of the contractor to seek redress from the contract administrator by alleging a breach of duty owed and/or claiming an action in negligence for wrongful certification.

The author of Hudson’s suggests that there are ‘powerful’ factors against finding that a contract administrator owes a contractor a duty of care in exercising the certification functions, including:

- The contract administrator is employed (to the knowledge of the contractor) to protect the principal’s interests, not to provide a safeguard to the contractor.
- A duty of care is outside the contractual setting.
- Contract administrator’s should not be exposed to legal risk from both sides – the principal and the contractor. This would increase the cost through insurance of employing engineers and would introduce a clear conflict of interest impeding a wholehearted protection by the engineer of its client’s interests.
- If the contractor is unsuccessful in a dispute with the principal, the contractor would be able to re-litigate that dispute against the contract administrator.

The author of Hudson’s submits that, in principle, no duty of care is owed by a professional to a contractor to guard itself against economic loss.

However, the case law in the UK and Australia suggests that the possibility of a successful claim by a contractor against a contract administrator cannot be discounted. This seems even more open in New Zealand where the approach to recovery for pure economic loss is not as restrictive as it is in the UK. The factors relevant to the success of such a claim are as follows:

- Whether the contract administrator assumed a legal responsibility to the contractor in the performance of its certifying functions.
- The contractual framework and whether it would be fair and just to impose on the contract administrator by way of tort liability, rights in favour of the contractor in excess of those rights which the contractor was content to acquire against the principal under the contract. vi
- Whether a link can be established between the contract...
administrator’s breach and the contractor’s loss.\footnote{vii}

- Whether a remedy is available against the principal.
- Whether there are special policy considerations.\footnote{viii}

The leading Australian case on this point is \textit{John Holland Construction & Engineering Pty Ltd v Majorca Projects Pty Ltd and Bruce Henderson Pty Ltd} (1997) 13 BCL 235. This case concerned the refurbishment and conversion of an apartment building. After completion of the building the contract administrator was asked to review the contractor’s entitlements under the contract. Before the review was completed, the principal went into liquidation. The builder claimed against the contract administrator in negligence alleging three factors existed at the time of entering into the contract which gave rise to a duty of care:

- The builder was obliged to abide by the decisions of the contract administrator.
- By the terms of the contract, the builder was necessarily depending on the contract administrator to carry out his functions fairly and impartially.
- The builder would not have entered into the contract otherwise.

Byrne J said that the circumstances surrounding the relationship between the parties were to be found in the terms of the contract. It was reasonably foreseeable that the decisions of a contract administrator might cause economic loss to a contractor in a conventional building project if made negligently, and foreseeability is not removed by a right to review the decision by arbitration. In assessing the policy considerations, Byrne J concluded that the contractor was clearly an identifiable member of a limited class of persons who must have been in contemplation of the contract administrator as being directly affected by his or her decisions. Byrne J did not consider it an affront to the standards expected of a professional person that he or she should exercise the onerous responsibilities of contract administrator with due care and without partiality or unfairness.

Although the Court did not hold that, in general, engineers owe no duty of care to contractors, His Honour did state that in this particular case no duty existed because both the principal and the contractor were entitled to review the contract administrator’s
decision through arbitration, the contract administrator acted as the principal’s agent except when acting as contract administrator, and the principal was liable to the contractor for the acts of the contract administrator. Accordingly, the contract was found to have taken into account and dealt with circumstances where the contract administrator might cause the contractor to suffer loss.

Tómas Kennedy-Grant describes the position regarding the liability of a contract administrator to a contractor in New Zealand as ‘uncertain’. He states that while there are no New Zealand authorities on the point, the principles in Day v Ost [1973] 2 NZLR 385 could be applied by analogy. In Day v Ost, a subcontractor claimed amounts unpaid under a construction contract against the engineer, the principal having gone into liquidation. It was established that the subcontractor had stopped work, having not received payment, and was subsequently assured by the defendant engineer that there were ample funds to complete the works and that he would be paid if work continued. It was on this basis that the subcontractor recommenced work, only to be paid $1,000 of the $4,888 owing to him.

The Supreme Court held that the facts of the case satisfied the test of Hedley Byrne and that a duty of care had been made out. The Court stated that there was no doubt that the plaintiff subcontractor was entitled to assume, and indeed was meant by the defendant to assume, that in assuring the plaintiff of the availability of funds there was no need to worry that the defendant possessed the necessary skill and competence and had exercised the necessary diligence to make his advice reliable.

**Can the contract administrator be sued in tort by the principal?**

It is settled law that a contract administrator, exercising its functions pursuant to its terms of engagement with a principal, may be liable to the principal in both tort and contract. It is clear, however, that the terms of the contract between the principal and contract administrator (either express or implied) can modify or even exclude liability in certain circumstances.

The contract administrator was found to hold a tortious duty of care to the principal in Wessex Regional Health Authority v HLM Design Limited (1994) 40 Con LR 1. In that case, the principal issued a writ against the contract administrator claiming breach of contract and/or for 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 to it.

**Fair Trading Act 1986**

The Australian courts have considered whether a principal may be able to bring a claim against a contract administrator for misleading or deceptive conduct in contravention of section 52 of the Trade Practices Act 1974 (which is equivalent to section 9 of our Fair Trading Act, 1986) which provides:

> No person shall, in trade, engage in conduct that is misleading or deceptive, or likely to mislead or deceive.

The law is not conclusive in this area but in **Proprietors Units Plan No. 95/98 v Jiniess Pty Ltd** [2000] NTSC 89 a contract administrator was held to be liable under section 52 of the TPA for negligently issuing a certificate.

Unlike actions in negligence, as discussed above, it is not necessary to establish that a relationship of proximity exists sufficient to give rise to a duty of care, nor does it require that there be any intent to mislead or deceive. What is required is the production of evidence establishing the causal link between the conduct complained of and the loss suffered.

The most likely situation in which such a claim will arise may be in a situation where a contract administrator assures the contractor that all valid extension of time claims will be approved, but subsequently declines to certify any valid extensions of time (after the contractor has carried out the works).

However, it is important to note that there has not, as yet, been any Australian authority determinative of the issue. In addition, there are likely to be a number of difficulties in successfully mounting such a cause of action. One such example is whether the contract administrator can properly be said to be acting ‘in trade’ in the act of certifying, as is required under the Fair Trading Act. In addition, there is an issue as to whether the issue of a certificate by a contract administrator, in reality, has the potential to mislead or deceive. The reality is that, in most instances, where a contract administrator certifies a claim, the parties affected 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 contract administrator errs in its calculation, it may be
difficult for the contractor or principal to allege that it was misled. After all, the contract administrator is making an evaluative judgment with which the parties are free to disagree.

The parties may also face a problem with causation. This is because it may be argued that the contractor’s loss flows from the principal’s reliance on the contract administrator’s certification, rather than the contractor’s own reliance.

**Can the contractor sue the principal for the contract administrator’s breach?**

The principal is generally not liable for the contract administrator’s failure to carry out functions fairly and impartially unless the principal is aware of it and does nothing about it (*Panamena Europea Navigacion v Leyland* [1943] 76 Lloyd’s reports 43). Accordingly, the contractor should notify the principal promptly of a breach by the contract administrator.

However, in one form or another, each of the standard form contracts have provisions that compensate the contractor for the failure of the contract administrator to act properly in his/her duties. Such compensation is payable by the principal.

Clauses 6.1.1 and 6.2.4 of NZS 3910:2003 go beyond the common law position and renders the principal liable for the contract administrator’s failure. It provides:

The Principal shall ensure that at all times there is an Engineer, and that the Engineer fulfils all aspects of the role and functions **reasonably and in good faith**.

If the Contractor suffers delay in the completion of the Contract Works or incurs additional Cost by reason of the failure or inability of the Engineer to carry out properly his or her duties as described in the Contract Documents, that failure shall be treated as if it was a Variation.

The obligation of ‘good faith’ (in clause 6.1.1) has a different meaning at law to the obligation to act ‘fairly and impartially’, and is arguably a higher standard.

NZIA provides similar remedies to the contractor in clause 4.5. Indeed this provision may provide better compensation than under NZS 3910:2003.

NEC3 ECC and the 1999 Red Book do not specifically address the principal’s liability for the acts/omissions of the contract administrator.
administrator. However, the compensation events in NEC3 ECC clause 60.1 would appear to substantially cover most situations and provide an avenue for the contractor to seek compensation from the employer. The 1999 Red Book does not have a similar clause.

In addition to the above contractual provisions for compensation, each of the standard form contracts expressly provides procedures for default and termination. It is therefore unlikely that a contract administrator’s breach of duties would found a basis for a claim of repudiation by the principal.

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1 Unless expressly excluded the guideline notes have contractual status.
2 Page 111.
3 Page 111.
4 Page 111.
5 Unlike the guideline notes to NZS 3910:2003, the guidance notes do not have contractual status.
7 Lubenham Fidelities & Investments Co Ltd v South Pembroke Shire District Council (1986) 33 BLR 39; Michael Salliss & Co Ltd v Calii (87) 13 Con LR 68.