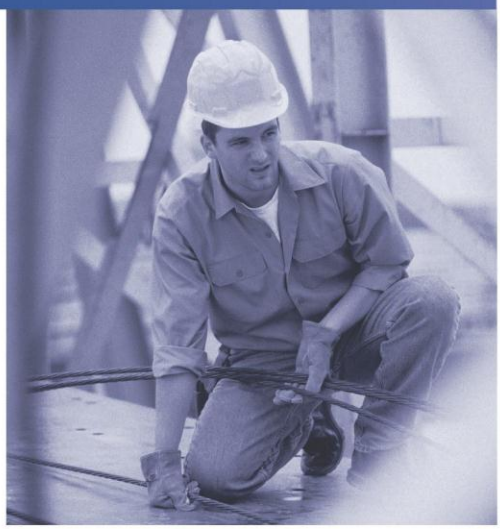
eBook

CONTACT US
Melbourne
03 9600 3522
Canberra
1300 662 869
Sydney
1300 662 869

LOVEGROVE & LORD

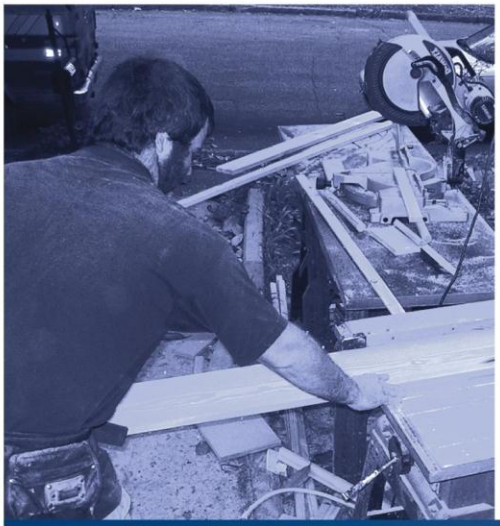
Commercial & Construction Lawyers
ABN 35 348 332 938



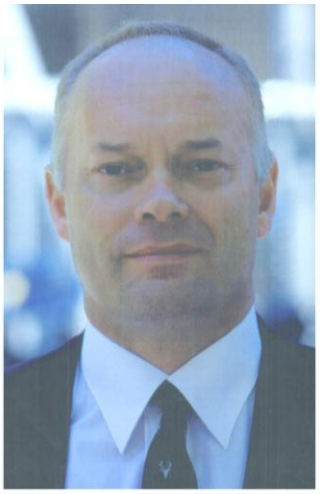
CIVIL CONTRACTING

A Booklet for Municipal Authorities on Building Contracts and Contract Administration; Staying Out of Trouble and Getting Out of Trouble

By Kim Lovegrove



About the author



Professor Kim Lovegrove is a Partner at Lovegrove & Lord, Commercial and Construction Lawyers. He has twenty years experience as a construction lawyer and has written numerous books on construction law. He has recently been appointed Chairman of the Building Practitioners Board.

Kim was also the lawyer that was engaged by the Victorian Government as the principal legal advisor on the development of the *Building Act* 1993. He was also a past Deputy Executive Director of the Australian Building Codes Board and in the early nineties was an Assistant Director of Building Control in Victoria.

The firm that he works for has considerable expertise in property and construction law and is happy to be consulted on point. To find out more about Kim log onto our website at www.lovegroveandlord.com.au.

TABLE OF CONTENTS

CAPITAL WORKS

Capital works programmes tie up a great deal of local government expenditure. It is paramount that the highest level of fiscal rigour is applied to construction project augmentation and the subsequent maintenance of the as built product.

To achieve this an intimate understanding of contract modelling is required. The standard industry contracts like AS400, AS4300 and ABIC are not easy creatures to work with. They have been designed to accommodate standard industry scenarios rather than being purpose built for given sectors that happen to harbour their own needs and requirements.

We have found ABIC particularly difficult to work with, some of the provisions take one down a rather cryptic contractual interpretation route that does not lend itself to a clear contractual outcome and this is disquieting. The other day we were grappling with the notion of how to lodge a variation claim on behalf of a builder in circumstances where the architect was unwilling to execute the required variation instruments. Alas it was nigh on impossible to figure out how to do it because the contract had not really been designed to deal with builder requested variations that were necessitated by design deficiencies. Rather there is a strong architectural flavour, which can be problematic if the architect has been remiss with regards to his or her own responsibilities, such as design detailing or accuracy.

As to the AS contracts they are probably the best around, but by no means perfect, many of the provisions are long winded and the dispute resolution clauses are cumbersome and involve a rather tortuous and lengthy set of dispute resolution processes. This can be a problem where time is of the essence and it invariably is when dispute resolution is in the mix.

Our legal practice has found that contractual amendments are invariably required to generate better contractual “workability” or functionality.

Contracts have to be clear, easy to understand and easy to apply. Ambiguity within a contractual setting is deadly. Why? Because it leads to uncertain interpretation and uncertain application which leads to disputation.

The purpose of this paper is to provide advice on how to get your contract model right and the ingredients of good contract management. If civic bodies are able to master this art then things can be built on time, within budget and the as built product

will prove fit for its purpose. Within the local government context this is important because the rate payer doesn't like to see cost blow outs that find their way into rate increases.

THE TENDER PROCESS

With major commercial projects the principal, whether it be the Government or a private party, invites contractors to tender for a project.

The tender may be open to the public; this allows any contractor to submit a price for the project. Alternatively, the system of selected tender may be used. In this instance only a limited number of contractors are invited to submit prices.

As a rule the tender package, (i.e. the documents that are submitted to the contractor to invite a price) consists of the following:

- Notice to tender conditions and form of tender;
- General conditions of contract;
- Specifications;
- Drawings;
- Bills of quantities, if applicable.

When a client accepts a builder's tender and makes acceptance known to the builder, all things being equal, the parties consider themselves bound and a binding contract is created. Obviously there are exceptions, such as any provision in a tender document that requires execution or agreement on further matters.

THE MODE OF CONTRACTING

Our recommendation is to always use standard industry building contracts with tailored contractual amendments. Standard industry contracts such as the AS`s are tried and true, they have been litigated and tested. They are also designed by committees in Australian Standards that are populated by practitioners and people from a broad spectrum of the building industry.

The main contract models are as follows:

- Lump-sum, fixed price construct only, such as AS400:
- Architect administered lump-sum such as ABIC;
- Design and Construct such as AS 4300 often referred to as D&C;
- Construction Management and Trade Contracting;
- Cost Plus Contracting; and
- Alliance Contracting.

The Lump-Sum Contract

The lump-sum or fixed price contract is probably the most traditional mode of contracting. The contractor contracts to build a fixed price building on the basis of tender documentation that will included fully augmented or evolved design documentation and a comprehensive set of specifications. More often than not the documentation will have been approved by the relevant statutory authorities such as the relevant building surveyor.

Advantages with the lump-sum

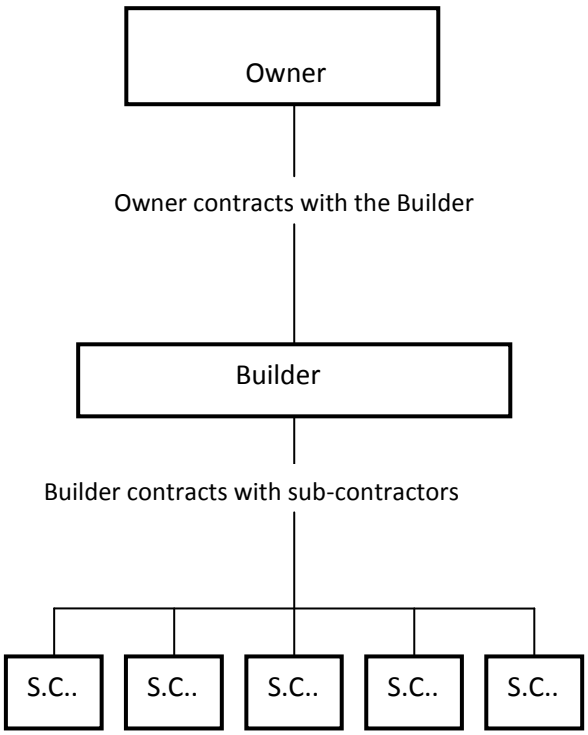
There shouldn't be any surprises, this is a tried and true contract, provided the tender documentation is up to scratch and the builder is of good repute the tender price should translate into the cost of the as built product.

Disadvantages with lump-sum

Hard to say and difficult to discern maybe the fact that this model works best when there is a highly evolved set of tender instruments and fully augmented design documents means that much time will be involved in ensuring that the tender documentation is up to speed in the first place. With D&C the contractor rather than the principal's design consultants will have responsibility for design augmentation.

From a risk management point of view and from a no surprises perspective this would have to be our favourite so we would score it as number 1 within the context of these particular “drivers”.

TYPICAL LUMP-SUM BUILDING CONTRACT



Design and Construct Contract

This is by far the most fashionable mode of contracting, yet it is the mode of contracting that we as a firm are most concerned about. If the relationship works well between the principal and the contractor D&C can be a delight but if things go off the rails it really can turn ugly.

The problem with D&C is that the level of design augmentation that forms part of the tender package directly impacts on the amount of risk that one party will bear. If the contractor is awarded the contract on the basis that the design documentation was embryonic, to be evolved and resolved at a later time then the contractor assumes huge risk and may be of a mind to cut back on cost and contractual offerings. If on the other hand the designs are highly evolved having been generated by the principal then it really is a case of a “*claytons D&C”* scenario. Contractors that

operate in this space have to be highly sophisticated because the assumption of risk on their part can be huge if the designs are only of the embryonic flavour.

D&C lends itself to variation claims because if a contractor finds that it has failed to appreciate the full extent of the design costing scenarios it will, to reiterate, either cut back on that which it provides or seek variations. Another risk for the contractor is the time it may take to get statutory approvals, time is money and if the time allocation was say based upon a six month scenario but it takes 12 months, then this will erode the profit in the job. Again if he contractor is bearing all this risk this may not bode well.

Advantages with Design & Construct

Flexibility, the council can outsource the design component along with the construct. In doing so the principal need not engage design consultants and the like and commit time to this endeavour.

Disadvantages with Design & Construct

More risk, more opportunity for surprises and if the contractor has underquoted certain aspects of the project maybe “undercooked”. Say for example one of the most significant tunnels on the planet was built under the D&C mode, and the allegation was made that the thickness of its walls was less than optimum thus lessening the optimum life of the tunnel. If for arguments sake the specifications had not sufficiently detailed the concrete thickness requirements by virtue of the contractor having assumed this risk then needless to say certain consequences would follow.

Construction Management Contracts

The contractor is appointed to manage the project on behalf of the principal but the principal contracts directly with all of the trade contractors and suppliers. For this the construction manager is paid a management fee but is not liable to pay the trade contractors rather the principal is.

With construction management the principal enters into a plethora of contracts with a plethora of contractors. Whereas with D&C or lump-sum contracting the principal only contracts with one party. CM was popular in the eighties but has fallen out of fashion and is rarely seen these days.

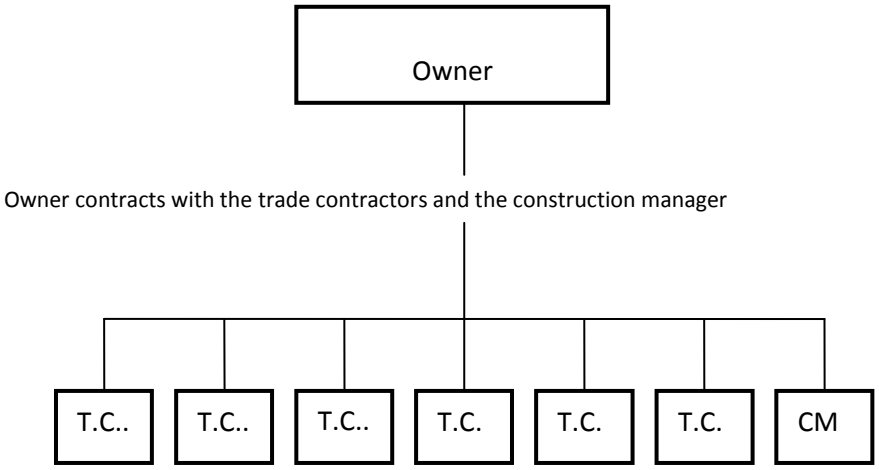
Advantages with Construction Management Contracts

None to speak of for the principal, it is however a good model for a builder in that the builder is not liable for payment of the subcontractors at law.

Disadvantages with Construction Management Contracts

Many, in that it is a cumbersome way of contracting, the principal takes on the risks of the builder in many respects as the principal is liable for payment of the contractors. This imposes a significant logistical and administrative burden on the principal which dictates greater human resource demands. It can also be difficult to fix a price under this model which tends to increase project manager risk and predictably lower the construction manager's risk.

CONSTRUCTION MANAGEMENT CONTRACT



The Cost Plus Contract

This is a type of contract where the builder is paid the cost of the project plus either a percentage or a lump-sum fee over and above the cost of the project. So, if the project ended up costing $750,000, the builder would either be paid the percentage or the fixed fee over and above total cost.

If the percentage were say 10%, then the builder would be entitled to be paid $75,000 by way of profit. If on the other hand the builder was paid by way of a fixed margin, say $50,000, then that is what the builder would be paid for profit regardless of the total cost of the project.

A common question is “What does cost mean or connote?” Ordinarily, costs will connote all labour and material, and costs of construction. In addition, any costs that are directly correlated with the provision of labour and material. This may include on and off site overheads such as insurance or a component of, power, water, stationery, phone expense and the like insofar as they are directly attributable to the project.

Cost Plus Contracts are a risky proposition for property owners because there is no price certainty. Accordingly, it is difficult to approach a bank with confidence because you cannot tell the bank precisely what the project will cost.

The builder on the other hand, when operating under a cost plus dynamic, is not hamstrung or corralled by a fixed price, so the builder has far more latitude and room to move, so to speak.

Alliance Contracts

They were flavour of the month a decade ago or so, they essentially operate as a partnership or joint venture of sorts. There are no industry standard contracts because invariably these types of contracts were generated by in-house lawyers or lawyers retained.

They are a bit of a “dark art” in that in the absence of any industry standard they remain a fairly fluid concept. They are based upon a principal and a contractor entering into a cooperative arrangement where there are key output or targets on price, time and so forth and incentives if the contractor comes in under budget or ahead of time.

The essence of the creature is cooperation, harmony and goodwill. This is all very well provided things do not go off the rails, in which case it can be a disaster because the dispute resolution dynamic is never really in the original contractual mix. We should be forgiven for being a little bit vague when providing greater insight into this type of contract by virtue of the fact that not a great deal is known about this particular contractual beast.

Architect Administered Contracts

The most well known one is ABIC. Architect administered contracts are as the name suggests a contract where the architect to all intents and purposes steps into the shoes of the owner and administers the contract on behalf of the property owner. If the architect is a top operator then such a vehicle can relive a council of much of the tedium and resource and logistical demands that would otherwise reside with council personnel.

ABIC is the contract of preference and to reiterate our law firm has found it far from easy to deal with and to get the best utility out of it we have developed a number of special conditions that replace or add to the existing special conditions. It is however a fixed price contract.

Advantages

Fixed price is always a good thing, and if the council knows of architects experienced with municipal project development we recommend its use.

KEY TENETS FOR SUCCESSFUL CONTRACTING

Embarking upon a building project is, to state the obvious, a major financial commitment. A naive approach to contracting and careless choice of Builder can result in financial oblivion, and I'm saying that descriptively not metaphorically.

Choice of Contractor

The builder must by law be a registered builder and insured. Always ask for a copy of the builder's insurance. The polices should embrace the contractors risk, public liability, and commercial cover under the Building Act 1993. Having said this if per chance the council is effecting some of the insurances then make sure there is no doubling-up on insurance in respect of the same risk.

It is paramount to carry out due diligence with the view to identifying reputable and professional builders. Identify three or four builders that can provide written and photographic references that provide insight into the quality of the "as built product". Good builders are generally known to council superintendants and its best to stick to the tried and true. i.e. builders with form and track record.

Don't be fooled by the cheapest tender price. Remember, the cheapest tender does not necessarily translate into the cheapest "as built product"; all it means at face value is that it is the cheapest quote.

Know What You Are Getting and The Devils in The Detail

Great care must be taken in ensuring that the specifications and the drawings accurately depict what you think you are getting. The drawings need to marry perfectly with the specifications.

I have had firsthand experience in eliciting quotes from three or four builders where the prices differ and the scope of what one is getting differs. I remember we once had a renovation and the quotes ranged from $60,000-$120,000. The irony of it was that the $120,000 quote canvassed a more limited scope of work than the cheap quote. Needless to say we proceeded with the cheaper quote in light of the lesser cost and the greater scope.

Nominate One Person to Deal With The Contractor

There should always be a clerk of works or superintendant of works i.e. the person who is nominated by the principal to deal with the contractor's representative. If that person leaves or changes job then there needs to be a new party appointed and that should be communicated in writing.

Avoid Changes to The Scope of Works

Changes to design or specifications are called variations. Understand that if you vary the contract there will be a time impact and a cost impact. Variations cost money. The greater the number of variations, the greater the cost blowout which can prove embarrassing when fessing-up to a fiscally minded councillor.

It is for this reason that the drawings and the specifications should be prepared with great care and precision. The less ambiguity in terms of design documentation, the lower the potential for variations.

Ensure That The Builder Sticks to The "Leash of The Contract"

As the project gets constructed, carry out regular inspections to verify that what was represented in the drawings and specifications is seeing the light of day. If there is any deviation, meet with the builder immediately and insist upon specific performance of the contract. If a dispute ensues, seek advice from a lawyer immediately as it is critical that the problem be "nipped in the bud".

Pay on Time

If the quality of the work is sound and the builder is discharging the obligations under the contract then pay on time. Never, never, never, effect a payment in advance of the prescribed stages under the building contract. If a builder requires payment in advance it is a very good indication that the builder is experiencing cash-flow problems and could be heading towards insolvency.

KEY TERMS AND CONTRACTUAL JARGON

The building industry, like any industry, has evolved its own jargon and it is very important that a party to a contract understands the contractual jargon and vernacular because key terms have potent legal connotations. A number of these key terms will be discussed.

Liquidated damages

Liquidated damages, or LD's, are damages that can be sought in circumstances where the completion date under a contract is delayed. Typically they are levied against the builder, so that if the builder delays the progress of the works the owner will be able to lodge a claim for LD's.

At law LD's can only be a genuine estimate of the loss that will be sustained in the event of a delay. Furthermore, liquidated damages have to be negotiated and agreed upon before the contract is entered into. The agreed amount needs to be incorporated into the contract schedule. In the case of a house it would be reasonable to charge a rate that is commensurate with rent for a like home in a like suburb.

The entitlement to LD's, however, will only crystallise if it can be established that the builder, as a matter of fact, caused the delay.

A contract will normally spell out the grounds by which a builder can make a claim for time extensions, and if a delay occurs and one of these grounds applies, then LD's could not be levied against the builder. That is provided that the builder has indeed made a claim for time extension. If the builder has not done so, the position is "moot".

Prolongation costs

These are similar to LD's except they are the damages or delay costs that the builder can visit upon the owner if the owner, through its actions, delays the timely completion of the works. Again, an agreed and negotiated amount should be incorporated into the contract.

Bonus for Early Completion

An early completion bonus is in some respects the opposite of liquidated damages. It is a bonus that the builder will be paid if the builder completes construction before the date of practical completion.

Frequently the early completion bonus equals the amount set for liquidated damages.

Great Care Should be Taken in Calculating Liquidated Damages

A compliant contract will always have a component in the contract schedule that permits one to incorporate the LD's. If for arguments sake the word 'Nil' were inserted and the contract was signed, then LD's could not be claimed, period. I have seen an instance where this has occurred and the net effect of this is that time is not of the essence under the contract. Likewise, one cannot be overly zealous as regards the quantum of LD's because the courts will not enforce any component of the LD's that could be construed as a penalty.

Prime Costs and Provisional Sums

These are construction components or facets that are very difficult to cost at the time that the contract is entered into. Contractual specifications will ordinarily have a Prime Cost (PC) and Provisional Sum (PS) schedule where the PC's and PS's are identified individually.

Where there is a PC for an item such as gold taps, the parties have to calculate a reasonable allowance for that item. The DBCA states that the allowance must be reasonable. If the actual item as installed costs less than the allowance, then the owner is reimbursed the difference. Or to put it in another way the owner pays the actual cost. If on the other hand the as built component costs more than the allowance, the owner will pay the crystallised amount, i.e. the allowance plus the difference.

In addition the builder will ordinarily be able to charge a percentage over and above the allowance as its profit margin.

By way of example:

The prime cost for the gold taps is $800 and the builder's profit margin is 10% for any PC overrun.

By the time the taps become available to be installed the actual purchase cost is $1000 hence the builder gets paid $1100.

Caution

The greater the number of PC's and PS's under a contract the greater the opportunity for cost blowouts. It is thus important for an owner to minimise the amount of PC's and PS's under a contract for fear of rendering the fixed contract price notional or illusionary. In fact, one could virtually turn a Fixed Price Contract into a Cost Plus Contract if one were to PC all material components of a project and PS all labour components.

Inclement Weather

In plain English inclement weather means particularly bad weather where the magnitude of the climatic malaise is such that it makes it exceedingly difficult for the builder to carry out contract work. Typically, inclement weather will be in the guise of very wet weather.

Occupancy Permit

This is the permit that a building surveyor issues when, after having carried out a final inspection, s/he deems that the work is fit for occupation. The issue of an occupancy permit is not to be confused with contractual completion. Contractual completion is considered to be the stage when:

> The work has been completed in accordance with the plan and specifications
>
> AND
>
> The occupancy permit has been issued.

It is illegal to occupy newly constructed premises if an occupancy permit has not been issued and it is a prosecutable offence.

Retention Facility

Contracts generally contain retention fund provisions. The fund gives the client some security for the rectification of defective workmanship.

A typical retention clause will have a provision for 10% of any progress payment to be deducted and placed into a retention account. The deductions continue until the fund equals 5% of the contract sum.

When the work is complete the client must release 50% of the fund. The remaining 50% must be released at the end of the defects liability period or upon issue of the final certificate.

Contract Administration

Before a council enters into a contract a highly experienced contract administrator should read the document thoroughly, and ensure that those involved with the contract administration understand it. If you don't, for God's sake go and see a construction lawyer. Even though it will cost you a few hundred dollars it will be money well spent.

It is also critical to ensure that there are no last minute amendments; that nothing is "snuck in" at the last minute by way of an amendment. We have had experienced in two multimillion dollar disputes where there were last minute amendments to contracts, they only involved a few lines, but there was a multi- million dollar impact. Both matters ended in the courts although a deal was struck on both matters early in proceedings.

Be vitally aware of what your obligations are under the contract. The contractor has to have full access to the site, and council staff are well advised to stay away from the builder's employees and sub-contractors. Stay away in the sense that only the builder is entitled to give them directions and instructions.

Pay on time, familiarise yourself with key contractual definitions like base stage, lock-up and so forth. This is very important because payment need only be forthcoming when these stages have been completed as per the definitions of same.

Intimately apprise yourself of the details on the drawings and the specifications to ensure that the building is constructed in accordance with these key instruments.

When the project is completed ensure that an occupancy permit is issued and the work is completed in accordance with the plans and the specifications. Once you are satisfied that this has occurred then the builder can and must be paid.

If the contract has to be terminated have regard to the comments and the "when things go off the rails" chapter.

Security of Payment Issues

It has been more than five years since the Building and Construction Industry Security of Payment Act 2002 ("the Act") came into operation in Victoria. During this period many issues concerning the application of the Act have surfaced and prompted the Government to ultimately undertake a review of the Act. As a result in July 2006 the Government passed the Building and Construction Industry Security of Payment (Amendment) Act 2006. The amendments introduced by this Act were supposedly designed to strengthen and extend the Act and make it more effective to ensure that payments were fair and received on time.

The Act endeavours to reduce payment delays for subcontractors (suppliers) and contractors by offering an entitlement to receive and to recover progress payments (fast-track) in circumstances where the relevant construction contract fails to specify how the progress payments are to be made. The Act has established a procedure that enables a person to recover a progress payment. The procedure involves:

- the making of a payment claim by the person claiming payment (the "Claimant");
- the provision of a payment schedule by the person by whom the payment is payable (the "Respondent");
- the referral of any disputed claim to an adjudicator for determination;
- the payment of the amount of the progress payment determined by the adjudicator; and
- the recovery of the progress payment in the event of a failure to pay.

The Act applies to any construction contract, written or oral where construction work is carried out in Victoria and related goods and services are supplied in respect of construction work that is carried out in Victoria.

The Act, by incorporating the latest amendments, has created new rules for construction contracts entered in Victoria on or after 30 March 2007. It has in turn become more complex in its application since it first came into effect on 31 January 2003. Accordingly, the latest amendments to the Act will require all participants to familiarise themselves with all intricacies of the Act before they decide to avail themselves of it and be particularly aware of the different rules which exist for pre and post 30 March 2007 construction contracts.

WHEN THINGS GO OFF THE RAILS

Sometimes projects don't go according to plan. In my experience the greatest cause of building disputes concern the following problems:

- Lack of rapport between contracting parties;
- Defective workmanship;
- Not carrying out work in accordance with the plans;
- Too many variations;
- Variations that were neither costed correctly, nor accurately described, nor documented, nor signed;
- Tardy payment;
- Advance payments;
- Part payment.

Where any one or more of these things occur, the project can be placed in jeopardy. Once a problem occurs you must, at the earliest opportunity, seek the services of a construction lawyer. A construction lawyer is paramount because s/he has been inducted in the peculiar niceties of building disputation. It is not an area of law that sits comfortably with the generalist.

The construction lawyer will examine your options and will make recommendations as regards the best course of action. In dire circumstances it may be necessary to terminate the contract.

DO NOT invoke the termination procedure without resort to a construction lawyer. Most contracts contain very comprehensive default and termination protocols. Ordinarily a notice of default will have to be issued. The notice will reference specific default grounds that are specified in the contractual menu of defaults.

The grounds need to be stated and the period of time that the contract nominates for the rectification of a default needs to be stated. Service then has to be effected in accordance with the contractual provision.

If the default is not rectified within the designated number of days then the aggrieved party is at liberty to terminate the contract, in accordance with the methodology enunciated under the contract.

This whole area is fraught with risk for the uninitiated. "For starters", the grounds that one relies upon to terminate the contract must be legally "bullet-proof". The grounds must be reconcilable with the menu of defaults under the contract. Finally, the way

by which the contract is terminated must evidence impeccable discipleship and allegiance to the termination procedure.

If the contract is wrongfully terminated then the contract is repudiated. The repudiator can then expect to be sued for repudiation and the cost flowing from that dire act.

To graphically illustrate how things can go terribly wrong I will tell the story of a lay couple who took the matter of contractual termination into their own hands. I had firsthand experience of the matter as I acted for the builder.

In the late 80's, I acted for a builder who's contract had been terminated. The owner had become frustrated with the builder because the owner had formed a view that the builder had under-quoted on the job and was cutting corners. The notion of whether or not this was a correct contention was never tested because legally the issue was not on point.

What was on point was the fact that on a particular day the owner screamed at the builder "get the f*#% off the building site and don't f*#%ing well come back, and if you don't do it immediately, we'll get the police to evict you".

The owner then engaged another builder to finish the job and the project cost a good deal more to complete, in fact, many tens of thousands more. The owner engaged a reputable law firm to sue the builder and two years later the matter went to trial. The law firm at trial deployed an instructing lawyer and a highly experienced barrister. The builder chose to represent himself in person.

The builder's legal point was a simple one. He said that by the owner emphatically directing the builder to get off the building site and by making it clear that she did not want the builder back, the owner had wrongfully terminated the contract. The contract contained the normal default provisions. These provisions required the articulation of the default, written notification of same, along with a period of time to be afforded to the builder to rectify the default. Finally, the contract provided that once that period of time expired the contract could be terminated, if the default could not be rectified.

As the owner had unequivocally and vitriolicly aborted the services of the builder in a fashion that could not be reconciled with the contractual procedure, the contract had been repudiated and the builder was exonerated.

The net effect of all this was the owner had to pay for the additional completion costs plus a bill for two years litigation, which would have been nigh on $150,000. The

moral of the story is don't even consider terminating a contract unless you deploy an experienced construction lawyer.

Dispute Resolution

The best thing is to avoid getting into disputes in the first place, but if it can't be avoided it is paramount to try and obtain a mediated outcome at the earliest opportunity.

Once matters end up in the Courts or in arbitration the ability of the parties to control the dispute resolution process deteriorates. Sadly under the adversarial system a great many lawyers serve to escalate the dispute because litigation is an adversarial system and all this does is destroy relationships, poor petrol on the fire and escalate legal costs to a degree that can be quite frightening. The well worn cliché only lawyers win in litigation has not been coined for no reason because that is a fact.

Having been a lawyer for over twenty years I can vouch for the fact that the disputants are always the casualties of war, the only thing that differentiates the winner from the loser is that the winner loses less. Little wonder that the Japanese hate litigation so much, in a society where relationships are entered into, to last, adversarialism is an anathema, because it repudiates relationships.

Mediation

Mediation well run and augmented early on is the most civilised and cost effective way of resolving a dispute. Any contract worth its salt should have a mediation clause and the contract should provide that this is the first port of call in the vent of dispute. Furthermore the contract should provide that the parties cannot resort to other dispute resolution vehicles unless mediation has at first instance been utilised.

A mediator is ordinarily a qualified lawyer, although s/he may present as building consultant, builder or engineer. Indeed my father, the late Dr. Malcolm Lovegrove, was a mediator and a retired educationalist, having obtained his doctorate in Child Psychology.

Mediators are trained in the art of facilitation and the brokering of compromise. They endeavour to impress upon disputants the virtues of early settlement and by the same token the dangers of protracted litigation. They are not permitted to provide a dissertation on the law or the likely winner. Rather their *raison d'êtr*e is to encourage through conciliation settlement.

They will ordinarily impress upon the parties that respective positions and stances may need to be moderated and in the main matters only settle where both parties are prepared to compromise.

The mediator will also be at pains to impress upon the parties that what is said at mediation is confidential and without prejudice. If a matter settles the mediator will ensure that the terms of settlement document is entered into and executed. It is the responsibility of the parties to adhere to the terms of settlement. Once a matter has settled the mediator notifies the registrar and the matter is at an end. If the mediation is unsuccessful the case is referred back to the registrar to be listed for a further directions hearing.

How to Approach Mediation

- Go in very well prepared;
- Be represented by a construction lawyer;
- Be prepared to compromise;
- Be prepared to listen and take cognisance of the other side's view of matters;
- When the opposing advocate presents his client's case have the good courtesy not to interrupt;
- Don't be hostile and belligerent as an intemperate disposition may sabotage settlement;
- Do your mathematics and factor in the cost of trial visa vie the cost of an early mediated outcome;
- Never be motivated by vengeance or "the principle of the matter" and if you are, be mindful of the old Italian adage, "if you want revenge dig two graves";
- In my experience financial settlements are normally the best ones. Sometimes matters settle on the basis that the builder will come back to rectify alleged defects. Frequently when this occurs further disputes ensue and the terms of settlement go off the rails.

My strongest of counsel is to use very best endeavours to settle at mediation, the economies are generally compelling because a great deal of legal expense can be saved. That is not to say that one should capitulate in circumstances where one has a very strong case, save for one important caveat, which is that always ensure that the opponent is "a man of means" not "a man of straw". There is little to be gained and much to be lost if one invests significant legal revenue in pursuing financially defunct parties.

Mediation is the most cost effective way of settling disputes. It requires the co-operation of both parties to the dispute and can be frustrated if either side is not motivated by either cost effective concerns or the desire to maintain site harmony.

Opposite is an example of a Mediation Clause taken from the then Victorian Law Institute of Victoria Home Renovations and Extensions Contract:

The parties must mediate disputes.

A party must use the mediation procedure to resolve a dispute before commencing legal proceedings.

The mediation procedure is:

- The party who wishes to resolve a dispute must give a notice of dispute to the other party, and to the selected mediator, or, if that mediator is not available, to a mediator appointed by the President of the Law Institute.
- The notice of dispute must state that a dispute has arisen, and state the matters in dispute.
- The parties must co-operate with the mediator in an effort to resolve the dispute.
- The mediator may engage an appropriately qualified expert to give an opinion on technical matters. Each party must pay a half share of the cost of the opinion.
- If the dispute is settled, the parties must sign a copy of the terms of settlement.
- If the dispute is not resolved in 14 days after the mediator has been given notice, or within any extended time that the parties agreed to in writing, the mediation must cease.
- Each party must pay a half share of the costs of the mediator to the mediator.

The terms of settlement are binding on the parties and override the terms of the contract if there is any conflict.

Either party may commence legal proceedings when mediation ceases.

The terms of settlement may be tendered in evidence in any mediation or legal proceedings.

The parties agree that written statements given to the mediator or to one another, and any discussions between the parties or between the parties and the mediator

during the mediation period are not admissible by the recipient in any legal proceedings.

Arbitration

Most standard industry building contracts have an arbitration clause. Where this clause exists, and a dispute occurs, the parties must arbitrate. The contracts generally have a facility for either the Trade Association or the Institute of Arbitrators to nominate the arbitrator.

The Process

One of the disputants lodges a notice of dispute with the other disputant and with the Trade Association or the Institute.

If the dispute does not resolve within the period prescribed in the contract, the nominating body is requested to appoint an arbitrator.

The arbitrator then usually arranges a preliminary conference to determine, amongst other things, whether:

- legal representation is required, or/and,
- formal legal proceedings such as statements of claim, statements of defence and a formal hearing, is required by parties.

Unless the matter is resolved in the interim, the dispute proceeds to hearing. At the hearing, the arbitrator presides, hears both parties' submissions and, ultimately, makes an award which is imposed on the parties if they do not settle the dispute. The award is binding. Unless there is some mistake of law, appeal to a court is very difficult.

Advantages of arbitration

It tends to be faster than the normal courts.

There are some benefits in having a technically qualified person presiding as arbitrator to hear a building dispute as opposed to a judge who has to rely upon expert evidence.

It is relatively informal.

Disadvantages of arbitration

It costs a fortune. The disputants generally have to pay for room time which runs up to $150.00 a day. They also have to share the costs of the arbitrator. Arbitrators are generally paid at a rate of not less than $900.00 a day.

As the parties frequently agree upon legal representation and expert opinion, before long there is “a cost of thousands” and the legal and consultancy costs become enormous. It is not unusual for arbitrator’s costs, lawyers and consultancy costs to run at a rate of $3,000.00 - $5,000.00 a day for each disputant.

Litigation

Advantages of litigation

Judges and courtrooms are provided free to the litigants.

If the matter involves less than $100,000.00, it is dealt with in the Magistrates’ Court and the scale fees are considerably less than courts of higher jurisdiction.

If a dispute involves between $100,000.00 and $200,000.00 it is dealt with in the County Court and, although the scale legal fees are higher than the Magistrates’ Court, they are still considerably less than the Supreme Court or, for that matter, arbitration.

With minor disputes, many would argue that it is more cost effective to resolve these in a jurisdiction such as the Small Claims Tribunal or the Magistrates’ Court as distinct from arbitration.

Disadvantages of litigation

It takes time. Cases take months, sometimes years, to resolve in the courts. It is not unusual for a case to take 15 to 18 months to be heard after initial legal proceedings are instituted.

The court system is very formal and can be very intimidating for the parties concerned.

Expert Determination (ED)

ED is a process where the parties, prior to entering into a contract, agree upon the name of a person to be engaged as a dispute resolution expert.

If a dispute arises the expert will request submissions from the parties, analyse the dispute, and issue binding directives.

Like the arbitration system, the procedure must be locked into a Contract, it is thus important that a well worded adjudication procedure is comprised in the contractual provisions.

Another alternative is for the expert to deliver a decision that cannot be challenged by the parties until the project is completed. This pays homage to a very important construction tenet, i.e. time is of the essence.

It is a mechanism for the parties to avail themselves of a “fast track” decision. Adjudication is an excellent form of dispute resolution where the parties are both responsible and co-operative and where the dictates of early completion necessitate rapid dispute resolution.

Below is an example of an ED Clause:

If any dispute arises concerning this contract or the works dispute must be adjudicated.

The party who wishes to resolve the dispute must give a Notice of Dispute to the other party and expert.

The Notice of Dispute must:

- state that a dispute has arisen;
- state the matters in dispute;
- request the expert to commence adjudication forthwith.

The parties must co-operate with the expert to facilitate resolution.

The expert will have ten days to resolve the dispute unless the parties otherwise agree in writing to an extension of the period of adjudication.

Whilst the dispute is being adjudicated the Contractor must continue with the works to achieve completion by the date of completion.

The expert at the end of the ten (10) days or the extended period will make an award which will be binding upon the parties.

The expert may engage an expert with technical expertise to give an opinion on matters of technical import.

Each party must pay a half share of the costs of the adjudication and a half share of the costs of any expert engaged.

Any notice given to the expert must be sent by fax or hand delivery.

GOLDEN RULES OF DISPUTE RESOLUTION

Before signing a contract, look at the dispute resolution clause.

- If a contract contains an arbitration clause, this will be the sole method of dispute resolution. A choice about which method of dispute resolution to use only exists until the contract is signed.
- Keep communication channels open; keep talking.
- When there is a premonition of a dispute, should seek the advice of an appropriate lawyer as soon as possible to “nip it in the bud”. If in the wrong, back down immediately to avoid unnecessary litigation.
- If a dispute is anticipated, do not ignore the warning signs; act early. In many situations timely intervention will prevent building disputes.
- Get everything in writing. Whatever is written is less likely to cause confusion than what is said.