The Importance of Construction Law for Building Professionals – an Address to Massey University Construction Management Students - October 2023

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Many human beings have an aversion to fine print. This poses a big problem in the building industry as building contracts after all contain a lot of fine print.

30 years of construction lawyering has impressed upon the speaker that an aversion to fine print has been the undoing of many of a contractor.

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Sign the contract - know your contract

You may say that it is a statement of the obvious to sign the contract and you would be right, it is.

But if I had a dollar for every time I've been involved in a building dispute where the contract wasn't signed, I'd be able to dine out at a very expensive restaurant with the finest of wines.

And I'm not just talking about low dollar value projects, projects that run into the hundreds of thousands of dollars come to mind.

Consequences of not signing a contract

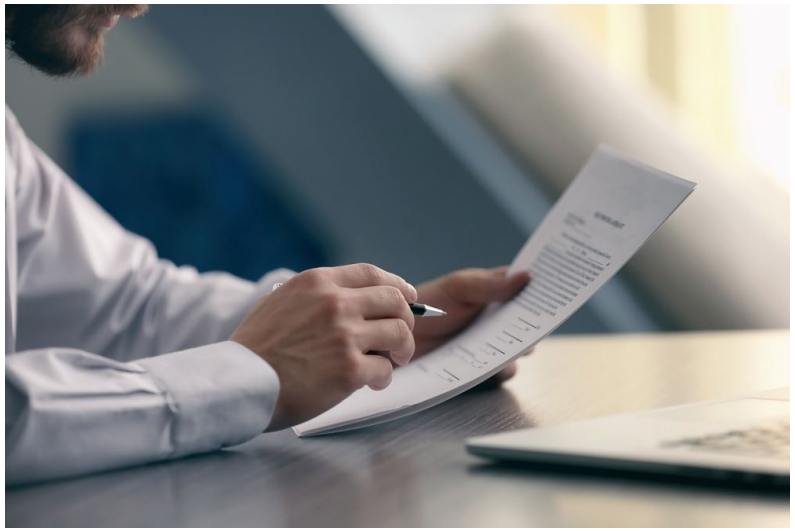
Lack of clarity of contractual dealings which can impact upon:-

- Price
- Time for completion
- Clarity with regards to scope of works
- The respective obligations of both parties
- The ability to complete the job
- Increasing the chances of ending up in court

Know the contract and know what you are getting into

The cause of many a building a dispute is:

- Not knowing the contract.
- Not being across key contractual conditions.
- Not being across the "deemer" clauses or the 'shut-out provisions.'
- So, administer it to the letter, even if its tedious and boring.



Be pedantic, to be a pedantic contract administrator is a virtue.

Time extensions

For instance, if the contract states that you have to lodge a time extension within 10 days and if you don't, you forfeit your ability to be able to do so.

Then for 'Gods' Sake' lodge the time extension on time otherwise there is every chance that you will forfeit your ability to claim lost time after the "deemer" has guillotined your ability to claim same.

This is a very common neglect, and it is as common

now as when I first started practicing as a construction lawyer in 1986.

A failure to lodge a time extension on time,

in accordance with the contract, correctly filled out, can be fatal.

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Time extensions

- Equally when you are on the receiving end of a time extension claim:-
  - Check the contract.
  - Check the claim.
  - If it's legitimate sanction it.
  - If not reject it in part or in full as long as you do so in accordance with the letter of the contract.

Time extensions

Don’t stand on your laurels and 'desert your post' as there may be a provision that states if the claim is not rejected within the contractually stipulated period of time, a deemed time extension is granted.

Don’t buy the job!

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The main cause of builders and subbies going ‘belly up’ is under-pricing the job, to get the job. This is regardless of the size of the builder or the sub-contractor.

Sometimes they think they can 'vary' their way out of trouble. This is not on and it is disingenuous.

Again, it is a statement of the obvious; price the job right, as underquoting can impact upon the solvency of the business.

To survive in this business, one must price right, one must ensure that there is a sound profit margin.

So, one must have a head for:-

- Numbers
- Labour costs
- Material costs
- Potential surprises.

And if there are likely to be factors that could impact upon labour and material costs then utilise:-

- Prime costs
- Provisional sums

And loss adjustment or rise and fall provisions if the legislation permits then use of the latter. For instance, in the Australian state of Victoria the Domestic Building Contracts Act 1995 does not permit contracts to contain rise and fall provisions.

Document your variations

Most projects will encounter variations at some stage, hence sound contracts have very well worded variation clauses.

Comply with them to the letter as variations are a common cause of building disputation.

Understand that clients don’t like variations that are visited upon them. It's different if the client requests a variation, but even then, take care.

Adopt the following rigour:

- Price it,
- agreed upon the clear scope of work
- agree upon the time impacts
- lodge the variation related time extension claim
- and then co-sign the variation claim

Don’t wing it

Don’t adopt a “she’ll be right” attitude. Don’t just rely upon verbal agreement.

Because if it’s not documented, often when ‘push comes to shove,’ there will be disputes caused by conflicting cost and time recollections.

Be very, very loathe to ever embark upon any varied works unless the variation form is filled out and signed before the varied work commences.

Try to only use standard industry building contracts

Standard industry contracts are tried and true, they are road tested.

Typically, they have been drafted by industry bodies where the authors of same know what they are doing. They know building contract ecology, so they include the appropriate conditions.

Be careful of special conditions

If you want to include them then make sure a construction lawyer drafts them as they must dance and calibrate with the rest of the contract.

Anticipate negotiation push back, for any deviation from the contractual norm will be treated with suspicion.

Likewise, if the other party wants to visit special conditions upon you, tread warily and understand that the conditions might be designed to disadvantage you.

However special conditions in many instances will be necessary, but they should be fair and sensible. Draconian special conditions can destroy the viability of a contractual relationship.

Beware the Take It or Leave It Contract

Some large contractors leverage off their size and market share to impose unfair contracting arrangements upon sub-contractors.

These are called 'take it or leave it contracts.' Contractors desperate for work sign up contracts that contain the most draconian and unconscionable of terms.

It is a given that no construction lawyer will ever advise a client to enter into such a contract, but alas that advice is not always adhered to.

Just understand that if you ever sign up such a contract, you will be at the mercy of the client, and it could culminate in your ruin.

Beware the drip feed.

- The most common traditional cause of insolvency is tardy payment and or part payment. There are some actors that have developed a business model where they pay late, part pay or don't pay.
- I have witnessed such dealings from time to time in my career. Payment is promised, or a typical line that I heard even recently "I'll pay you when we get paid" or "I'm just waiting for a big cheque".
- Such a narrative is ominous. A sound building contract will have a suspension provision that can be invoked upon payment default. Such a facility can be vital should be drafted by a construction lawyer.
- In a worst-case scenario the contractual termination remedy can be invoked. But again, advice should from a construction lawyer, such are the consequences of wrongful termination.

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Contract Termination - treat it like 'sweating dynamite'

- When the other party breaches a building contract there will be a variety of contractual remedies.
- One of them will be contractual suspension but the other will be contractual termination.
- Standard industry building contracts contain well-crafted termination provisions. Apply them to the letter.
- Typically, there will be a notice provision of 10 days or so to remedy the default:
  - The default will be specified in the contract.
  - It will need to be pleaded.
  - And then only if the default is not remedied within the contractually stipulated time will the aggrieved have the ability to formally terminate the contract.

Again, for fear of repeating myself use a construction lawyer, emphasis upon construction lawyer to draft the contract termination instruments.

The consequences of wrongful termination can be serious:

-A wrongful termination is called a contractual repudiation, legal vernacular for evincing an intention to no longer be bound by the contract.

-If there is a repudiation of contract, damages can be visited upon the repudiator. Damages meaning the losses sustained. Typically, expensive litigation will ensue.

A telling case study

Years ago, the speaker acted for a builder whose contract was terminated. The circumstances were:-

- The owner was ill-disposed to him – wrong chemistry.
- The owner was emotional and prone to using foul language.
- On one occasion she said, "get the @@#%% off the building site and never come back and if you don't I'll call the police".
- The builder obliged, promptly picked up his tools and left the site.

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A telling case study

- The owner then engaged a lawyer to sue the builder. The lawsuit claimed an additional $200,000 over the original contract sum.
- We defended the claim and pleaded that the owner had repudiated the building contract and that the repudiation had been accepted.
- The builder chose not to be legally represented at the three-week hearing.
- The other side briefed a barrister and a solicitor, and the barrister appeared for the duration of the trial accompanied by the instructing solicitor.

The other side were very confident that they would win.

They lost.

Why did they lose?

Because there was a very simple defence – the owner repudiated the contract.

The contract provided that:-

- A notice of default had to be served on the builder.
- Specifying the default under the contract.
- 10 days to remedy the default.
- And after expiration of the ten days a further notice of termination had to be sent in accordance with the contract.

The finding

The owner repudiated because the owner did not follow the contractual termination procedure.

By hurling invective at the builder and demanding that he never return to the site in an unambiguous expletive laden directive, she made it quite clear that his services were immediately terminated.

This was found to be a repudiation of contract.

By all accounts, the owners legal bill was sizeable.

Without wishing to seem arrogant we knew he was going to win because the owner had not followed the termination procedure in the contract.

Key take-outs

Going back to where we started, treat contractual termination like sweating dynamite. It has to be 'done right.' Use a construction lawyer to ensure that the 'i's' are dotted and the 't's' are crossed.

- Check your email inbox at least twice a day.
- Building is dynamic, lots of 'balls in the air' sometimes lots of moving parts.
- Sometimes the characters that one deals with are not the kinds of people in hindsight that one would have wished to deal with.
- Email can be used to slip something under one's guard.

Key take-outs

There is one matter that comes to mind

- A contractor was flat out close to Christmas and another contractor served a winding up notice to his personal email address not the business email address. Serving it on the personal email address as one would suspect was strategic to get under the radar.
- In Victoria one has 21 days to comply with a statutory demand i.e., to apply to the court for an order setting aside the demand served on the company.
- Provided that there is a genuine dispute between the company and the respondent or the company has an offsetting claim, it is not difficult to get the winding up notice set aside if one submits the appropriate response within the 21 days.
- A failure to comply with a statutory demand creates a presumption of insolvency in Victoria and the other side can then apply to the court for the company to be wound up in insolvency

Key take-outs

- Conversely if one does not respond within the statutory period of 21 days a very protracted and expensive battle will ensue to annul an application.
- Because the respondent did not comply or make an application within the 21 days the matter ended up in the Supreme Court and took months, and a great deal of money was spent on legal fees to annul the winding up proceedings.
- Just because of a failure to respond within the statutory time frame.

Key take-outs

- Don’t drop your guard.
- Be across all key communications.
- Respond in timely fashion.
- Stay on the front foot.
- Check all your email inboxes.

Rounding up

These are some of the main areas the speaker observes that contractors have 'come a cropper' in his last 30 years of construction lawyering.

Pay heed to the case studies, pay heed to the take outs and you will avoid some of the well-known 'trips and snares.'