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Implications of partnering for mining and construction

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(1996) 12 BCL 174

A successful tenderer on a partnering project asks the principal:
How does our partnering charter mesh with our construction contract?
The principal replies:
It does not. It stands separate and apart.
Thereafter, and indeed well into the project, the contractor makes a number of allegedly-unforeseeable cost fluctuation claims fin the nature of forces majeures) and allegedly-unforeseeable time-based claims including disruption, delay and acceleration. The contractor asserts that all these claims are made on the basis of a restitutionary quantum meruit and not under the construction contract.
What forum and procedures would the principal prefer?
What forum and procedures would the contractor prefer?

1. Projects "partnered" on contracts in the construction industry

Experience to date has shown that an essential issue has been the failure adequately to recognise whether it is the parties' relationships and conduct, as distinct from *contract*, which has been "partnered".
The salesmen of partnering have glibly claimed:
"Putting the handshake back into business"
"Trust"
"The way we used to do business"
"Plain common sense".
Be that as it may (or may not be) the plain fact is that not one project has been done on a handshake, trust or "a person's word being their bond" – to the abandonment of the normal contract. Fundamental and finally fatal is the failure to relate the "philosophy", "mind set" and "process" of partnering to the benefits, rights, obligations and liabilities of the parties under their contract. Captains of commerce have been quick to shout from the roof tops:
Partnering is not a contractual agreement nor does it create any legally enforceable rights or duties.
However, some slippage, and even cracks, are now appearing. Other champions of partnering assert:
A process of establishing a moral contract or charter ….
Others stray further into the quicksands, eg:
In partnership we will provide ….

Such "moral contracts" and "gentlemen's agreements" raise the spectre of those Claytons contracts, whereby each party hoped that the arrangement was a contract binding on the other party but not upon themselves.
Initially, partnered projects were generally successful. Rather than a new contract, there was a new culture of co-operation and even collaboration instead of confrontation. Admittedly there were a few which did not go well but generally the partners were not keen to tell outsiders.

(1996) 12 BCL 174 at 175

More recently, unfortunately, the honeymoon has been seen to be over. It is no longer just a question of a few "hiccups"; rather substantial defects are now both emerging and being exploited.
In at least three States (or two States and one Territory) and on an off-shore, Australian-based project, there have now emerged fundamental and serious problems in respect of the contracts, conduct and claims. Probably the most significant shortcoming lies in partnering's (and, for that matter, good faith's) promotion of the parties' expectations and other reasonable benefits. It is significant that in a number of the major failures the aggrieved party is complaining that the present partnered project has gone so badly differently from their previous, happy one.
This reversal of fortunes upon realisation of expectations and like benefits raises that everpertinent question:
Why is it so?
Of course, there are a number of reasons. Some are human and some are commercial. After something goes well, human nature is sadly often such that people relax their efforts and resources. Secondly, desires to achieve, including greed, lead people to exploit situations. Thirdly, selfish motives lead to some people taking benefits from up the chain but doing the opposite down the chain. Fourthly, sadly, trust and openness can be vulnerable to exploitation and even ambush. Fifthly, the partnering "spirit" can be relied upon as a weapon against contractual defences.
Underlying most of these more recent failures, or at least distressed, partnered projects is the fundamental failure to mesh the partnering charter, contract or like arrangement with the contract for the project itself. To take just one example, the "partnering clause" within the actual contract for the production of the project was based on:
Participation in the partnering relationship will be *voluntary*. Partnering is a pro-active, cooperative approach to transacting business. It *can* involve a commitment … understanding each other's individual expectations …. It also establishes guidelines
(Emphasis supplied.)
With all respect to those responsible for that drafting, one can fairly doubt whether it represents their proudest hour in crafting a statement of the parties' respective rights and obligations.

2. Structure and application of partnering – good faith

The quintessence is the bringing together of conduct and contract. True it is that one or two judges, following black letter law, are biased against doing so.
In fairness, there is the highest authority that the main bridge (in the form of a good faith clause) cannot be implied. Compare no less than Lord Ackner:
The concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations. To advance that interest he must be entitled, if he thinks it appropriate, to threaten to withdraw from further negotiations or to withdraw in fact, in the hope that the opposite party may seek to reopen the negotiations by offering him improved terms.

(Walford v Miles (1992) *2 AC 128*.)

With the greatest respect, there are some answers. His Lordship was speaking about negotiations. Secondly, the great Lord Mansfield said, as early as in 1766, that good faith was "applicable to all contracts and dealings". (Carter v Boehm (1766) *97 ER 1162*.) Yet again:
in contracts of all kinds, it is of the highest importance that courts of law should compel the observance of honesty and good faith.

(Mellish v Motteux (1792) *170 ER 113*.)

Yet again, moving across the Atlantic, there is powerful application of the doctrine of good faith in the United States of America, eg:
Every contract imposes upon each party a duty of *good faith* and *fair dealing* in its performance and its enforcement.

(Restatement of the Law, Contract (1981) s 205 .)

(Emphasis supplied.) Significant is the reference to both good faith and fair dealing. Whatever the readiness or reluctance of Australia's judges to hold that the doctrine has arrived in Australia (perhaps even in a compromise form similar to Canada's), Parliament has already

(1996) 12 BCL 174 at 176

done it – in respect of both good faith and fair dealing.
If those involved in the failed or distressed partnered projects can resort to the *Trade Practices Act* and the *Fair Trading Acts*, why should not those drafting contracts?
In fundamental form, such a contractual bridge is simply building upon fundamental implied terms of long standing, eg:

(a) in all things, to act reasonably, honestly and fairly;

(b) to do all things necessary so as to co-operate in achieving the contractual aim; and

(c) not to prevent, impede, fetter or hinder the other party in the performance of the contract.

As always, such fundamental issues must be followed through. The drafting team must remove or reduce "adversarial" clauses, such as time bars and Draconian forfeiture and "non-constructive" provisions.

3. Implications of AS 2124 type conditions

The base contract, AS 2124, is being used increasingly on some aspects of mining works – at least on the east coast. Nevertheless, one distinction which must be recognised is that many mining companies tend to use their own contracts, which are usually not administered according to the same structure and role of the superintendent as in AS 2124.
Although many mining companies do not go the full distance of a turnkey contract, there is evidence of a recent increase in use of design and construct. This increasing demand has already been met by the AS 2124 suite in the recent release of both AS 4300 design and construct contract, together with its companion subcontract AS 4303. Further contracts in the suite will include:

- project/construction management
- supply (with and without installation)
- asset/facilities maintenance.

Whether or not it be administered in a traditional way by a superintendent (who may or may not be the superintendent that the mining industry recognises), there is growing preference for someone to "drive" the contract, as distinct from the project or work under the contract. This trend is corroborated by the increasing number of parties taking a closer (and usually financial) interest in the contract and factors which may increase the price.
Probably the biggest concern for the project manager or contract administrator is time. This is especially so because the old adage is true: Time is money.
Not only does increased time generally produce increased cost but also contractors are becoming more astute with a whole armoury of a variety of ingenuous time-based claims.

4. General conditions and clauses to be considered

The requirements

One of the more fundamental factors is the contractual background of mutuality in reciprocal rights and obligations. Essentially, a construction contract is an exchange of promises to produce a project for a price within a period.
The Mackay v Dick *[1881] 6 App Cas 251* implied term is basic to nearly every construction contract, ie the principal and the contractor have each promised the other that he will do all that is necessary to be done on his part for the carrying out and achievement of the contractual aim. It

was applied by the High Court of Australia in Electronic Industries Limited v David Jones Limited (1954) *91 CLR 228* [PDF] and by Macfarlan J in Perini Corporation v Commonwealth of Australia (1969) *2 NSWR 530* (the Redfern Mail Exchange case).
Macfarlan J attached considerable importance to the basic aim of a construction contract:
It must in my opinion be assumed that the parties entered into this agreement and it must be assumed that when they did so they intended to achieve something. The definition of what they intended to achieve is to be found in the agreement itself.
And again:
In my opinion the plaintiff and the defendant, being the parties bound by this agreement, are bound to do all co-operative acts necessary to bring about the contractual result.
In following the Mackay v Dick implied term his Honour said:
I think I may safely say as a general rule that where in a written contract it appears that both

parties have agreed that something shall be done which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect.
A similar but different implied term is common in conveyancing contracts; viz "each party will do all such things as are necessary on his part to enable the other party to have the benefit of the contract". (Butt v McDonald (1896) *7 QLJ 68* and Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd (1979) *144 CLR 596* [PDF] (per Mason J, as his Honour then was).) This implied term is somewhat of a higher order than the Mackay v Dick implied term and it may be too high for the sophisticated and detailed provisions of a construction contract, as distinct from the fairly standard provisions of conveyancing contracts for the sale of land. Implied terms readily accepted by the courts in respect of routine and consumer-type sale of goods transactions are not always readily imported into sophisticated construction contracts. Nonetheless, this implied term has been upheld in respect of a contract lying somewhere between a sale of goods type contract and a construction contract; viz a contract for the completion of the loading of a vessel. (The Australian Coarse Grains Pool Pty Limited v The Barley Marketing Board *[1989] 1 Qd R 499*.) This implied term for the duty to co-operate in doing all that was reasonably necessary to enable performance of the contract was also upheld by Teague J in Document Process Pty Ltd v Andrew (unreported, Vic Sup Ct, 1 May 1991), applying Secured Income Real Estate (Australia) Ltd v St Martins Investment Pty Ltd *144 CLR 596 at 607*).
A promise to use one's best endeavours, albeit of a high order such that second best is not good enough, must still be construed reasonably. For example what is required is discharge of what the promisor can do to achieve the contractual aim within the bounds of reason, as distinct from acting in such a way that he is ruined. (Hawkins v Pender Bros Pty Ltd *[1990] 1 Qd R 135* (Full Court).)
Like most long term contracts for major projects other than just construction (eg joint ventures), there is a need for some mechanism to make those mutual promises work. In short it is the function of the contract administrator.
Against this contractual context and legal background the qualifications, or qualities, required of the contract administrator come close to professional ones.
It is not without significance that most major construction contracts in Australia for some time until recently, and their antecedents in the United Kingdom, specifically contemplated "the engineer" or "the architect" as distinct from "the superintendent". Indeed, thereafter and until recently, "the superintendent" was prima facie to be an engineer or architect.
The contract administrator generally needs to be able to apply organised knowledge and ability in serving the rights, duties and interests of the principal and contractor – with integrity, honesty, fairness and usually reasonably.
These qualities usually have to transcend commercial and monetary considerations.
The contract administrator's role is an invidious and almost impossible one. Apart from these duties to both principal and contractor, he or she has a duty to the achievement of the contractual aim. Although the principal and the contractor are supposed to be co-operating in that achievement, in practice they are very soon evidencing their competing commercial concerns. Yet he or she is required to try to hold the balance between those contenders.
Yet again, the superintendent usually has contractual and commercial concerns of his or her own. If he be an independent professional, their conditions of engagement or other contractual arrangements between themselves and their client will threaten that independence. The employment of such a professional's proprietary company (or indeed any company) will prima facie limit the quantum of any liability but will hardly avoid the professional's professional and ethical obligations. Indeed, even then the company still has to act through him or its staff.
Although it is true that the definitions of the "Superintendent" and "person" in both AS 4300 and NPWC 3 (and similarly JCC) make it clear that a firm or a body incorporate or unincorporate can be the superintendent; there is the commendable practice of such an organisation then appointing individuals as the Superintendent's Representative with appropriately delegated powers.

(1996) 12 BCL 174 at 178

There is an increasingly common practice of the principal appointing his or her own employee as superintendent. In the Perini case [1969] 2 NSWR 530 the superintendent was no less than the Director of Works. The contract was the forerunner of NPWC. The contractor's applications for extensions of time, especially in respect of wet weather, were rejected because of departmental policy. The court held that, although the Director was entitled to consider departmental policy, he was not entitled to be controlled by it; on the contrary he was subject to the implied term to exercise his discretion according to the rights and obligations of each party to the contract and the contract itself. Consequently the discretion was in fact a narrow one. Macfarlan J said at 536:

The characteristic of them is that there is a person appointed on behalf of the government or semi-government body to supervise the execution of the contract on behalf of his employer. He is generally a senior engineer or a Director of Works or a principal architect or some other officer who, because of his technical qualifications and experience, is competent to undertake that work. He is, as I have said, an employee of the body on whose behalf he undertakes this work, but, in addition, the same cases show that he is commonly charged with a duty either of resolving disputes between the contractor and the body which employs him or in certifying as to the quality of the work done or the whole or part of the cost of doing that work. In my opinion the cases make plain that throughout the period of performance of all these duties, the senior officer remains an employee of the government or semi-government body, but that in addition and while he continues as such an employee he becomes vested with duties which oblige him to act fairly and justly and with skill to both parties to the contract. The essence of such a relationship in my opinion is that the parties by the contract have agreed that this officer shall hold these dual functions and they have agreed to accept his opinion or certificate on the matters which he is required to decide. It has also been said, and in my opinion correctly said, that the agreement of the parties is that they have referred the decision of these matters to a person who by reason of his employment and why by reason of his other duties in supervising the execution of the contract is a person who has both bias and partiality. It is now in my opinion too late to hold that an appointment of this kind is not one for which the parties to a contract cannot provide.

Turning then to apply such characteristics and principles, his Honour went on to say in 536:

It is now necessary to consider the duties of the Director of Works. He, of course, has not bound himself by contract with either the plaintiff or the defendant. The plaintiff and the defendant are the only parties to the agreement but in it they have agreed that the Director of Works shall have the powers and duties stated in it. Many of these powers and duties are administrative and supervisory in their character and are performed by the Director of Works as the servant and agent of the Commonwealth. I have already expressed the opinion that in respect of the duties imposed upon him by cl 35 of the general conditions that he is a certifier. The word "certifier" does not have an exact meaning but is used to describe a function which is somewhere between those of a servant and those of an arbitrator.

More specifically, his Honour said at 538:

The kind of interest which must govern the exercise of the Director's discretion is the interest of each party as it appears from all the provisions of the agreement. The interest in this sense, in my opinion, is measured both by the rights and obligations of each as they appear from the various provisions of the contract. Indeed, in my opinion, the discretion is of a narrow scope…. In my opinion, though without attempting to embrace every case that could arise or perhaps has arisen in the course of the current disputes, the Director would be obliged to consider the contractual rights and duties of the plaintiff.

(At 538.)

Failure by principals sufficiently to reconcile the superintendent's powers and duties under the principal/superintendent contract with those under the construction contract has proved a major source of dispute. Quite often the contractor's complaints are justifiable and the modern trend is for him or her to look not just to the principal in contract but also to both the principal and the superintendent in tort or other remedies extra the contract.

(1996) 12 BCL 174 at 179

The fundamental obligation of the principal to provide the superintendent or other contract administrator carries over when the superintendent ceases to be superintendent. There is express confirmation of this principle in AS 4300, cl 23 :

The Principal shall ensure that at all times there is a Superintendent.

Commencement

It is a fundamental term and condition of construction contracts that the principal make the site available in a time sufficient for the contractor to perform his or her obligations. It is sufficiently fundamental to be implied but it is actually expressed to varying extents; viz:
in AS 4300:

27 SITE

27.1 Access to and Possession of the Site
By the time stated in Annexure Part A, the Principal shall give the Contractor access to the Site sufficient to enable the Contractor to commence and carry out the Contractor's Design Obligations in accordance with the Contract…. The Principal shall, on or before the expiration of the time stated in Annexure Part A, give the Contractor possession of the Site or sufficient of the Site to enable the Contractor to commence further work under the Contract. If the Principal has not given the Contractor possession of the *whole Site*, the Principal shall from time to time give the Contractor possession of such further parts of the Site as may be necessary to enable the Contractor to execute the work under the Contract in accordance with the requirements of the Contract.

(Emphasis supplied.)
Breach of this condition by the principal may entitle the contractor, at common law, to rescind on appropriate facts if these facts are such that the principal has repudiated the conditions. For example, a construction contract required the principal to excavate the site to a specified level and to give to the contractor possession of the site, duly excavated, not later than a specified date. The principal failed to excavate the site and did not give possession to the contractor by the specified date. The principal also gave to a third party a contract for the fabrication of steel work; notwithstanding a provision in the specification that such work was to be performed by the contractor. The contractor wrote to the employer advising that the contract was at an end. The High Court held that the principal by his conduct had evinced an intention no longer to be bound by the contract, so that the contractor was justified in acting as he did. (Carr v J A Berriman Pty Ltd (1953) *89 CLR 327* [PDF].)
In another case, the principal told the contractor that he would be given possession of the site on 11 July 1979. In fact possession was not given in time for the contractor to commence operations on the necessary date, viz 25 July 1979. On 28 July 1979 permission to start was given but it was not communicated until 30 July. Possession of the rest of the site was not given until 1 October 1979.
The judge held that the principal's behaviour went beyond what was contemplated by the parties in respect of "delay". He held that it was a disruption so different and so pre-emptive from anything that could have been contemplated as to differ from it in kind. He further held that the principal in fact refused to give possession of half the site to the contractor for what was an indeterminate period.
Accordingly the judge found that it was a breach of contract such as to set the time at large. H and S Alexander v Housing Commission (Vic) (1985) *4 ACLR 85* (Vic Sup Ct, Nicholson J, 17 May 1983); and as to the "time is at large" doctrine.
On such delays in respect of possession of the site, and the cases there referred to such as Perini Corporation v The Commonwealth of Australia (1969) *2 NSWR 530*.
Most major construction contracts therefore seek to reduce the principal's common law exposure by clearly expressing the contractor's remedy as an extension of time, together with, if the extent and degree of the delay becomes more serious, suspension or determination; eg:
in NPWC 3:

27.1 Possession of Site.
…
Should any delay take place in giving the Contractor such possession of the site the delay shall be deemed *not to constitute* a breach of contract but shall be a ground for an extension of the time for completion pursuant to sub-clause 35.4 .

(Emphasis supplied).

(1996) 12 BCL 174 at 180

AS 2124, perhaps rather unfortunately, dropped the previous and deliberate contracting out of what would otherwise be a fundamental breach (compare NPWC 3 cl 27.1 above) in that it is no longer expressly provided that delay shall be deemed not to constitute a breach of contract. Nevertheless a contractual code is still set up by way of compensation to the agreed contractor; albeit rather remotely, viz:

(a) if the principal has not given the contractor possession of the whole site, the principal must from time to time give the contractor possession of such further parts of the site as may be necessary to enable the contractor to execute the work under the contract in accordance with the requirements of the contract (cl 27.1);

(b) delay by the principal is of course generally a ground for an extension of time;

(c) delay costs will generally follow (provided of course cl 36 has not been deleted);

(d) additionally, the common law remedy of damages for breach of contract will be available; and

(e) even further, if the contractor considers that damages may not be an adequate remedy, the principal's failure to give sufficient of the site is deemed to be a substantial breach of contract such that, if the failure continues for longer than the period stated in the Annexure, the contractor can give notice to show cause leading to suspension and thereafter termination (cl 44.7 to 44.10).

Progress, programming and performance

The same philosophies about the principal's breach apply to the contractor's obligations as to time in carrying out and completing the works. The obligation of the contractor is, at common law, to do so within a reasonable time but AS 4300 is more specific, viz:

33 Progress and Programming of the Works

33.1 Rate of Progress

The Contractor shall proceed with the work under the Contract with due expedition and without delay.

"Diligently" has been held to mean not only the individual industriousness of the builder but also his or her efficiency and the efficiency of all those who are working with him or her. Hooker Constructions Pty Ltd v Chris's Engineering Contracting Company *[1970] ALR 821*.
More recently, "regularly and diligently" has been held to mean that the contractor must carry out the work in such a way as to achieve his or her contractual obligations, including planning, provision of sufficient and proper materials, employment of competent tradesmen, management of work force – all to the effect that he or she carries out his or her obligations under the contract to an acceptable standard and according to his or her time obligations. West Faulkner Associates v London Borough of Newham (1993) *61 BLR 81*, Judge John Newey QC, 1 October 1992, affirmed by the Court of Appeal (1995) 12 Building Law Monthly 1.
The contractor's obligation to proceed with the performance of the works regularly and diligently does not imply an obligation to programme his or her performance strictly so as, for example, to avoid delays. (Walter Lawrence & Son Ltd v Commercial Union Properties (UK) *[1986] 4 Con LR 37*). Accordingly that further obligation has to be expressed: that is the contractor is not to be entitled to an extension of time unless he or she shall have taken proper and reasonable steps both to preclude the occurrence of the cause of delay and/or to avoid or minimise the consequences thereof; and the contractor is constantly to use his or her best endeavours to avoid delay and to do all that may be reasonably required to expedite completion. AS 4300 does the former, albeit not the latter; viz:
In determining a reasonable extension of time for an event causing delay, the Superintendent shall have regard to whether the Contractor has taken all reasonable steps to preclude the occurrence of the cause and minimise the consequences of the delay.
On the contrary, the law is now fairly well settled that the programme is essentially the contractor's programme. It is suggested that the better view is that float belongs prima facie to the contractor; subject of course to clear and express provisions in the contract to the contrary. Accordingly some principals and superintendents try to have the best of both worlds by placing all the usual time obligations upon the contractor yet dictating and monopolising the management of his or her programme. Such contractual provisions need to be very carefully drawn because otherwise the consequences

(1996) 12 BCL 174 at 181

can be almost catastrophic for the principal by way of consequential claims for disruption, acceleration, prolongation etc.
The essential three factors of "programmesmanship" are:

(a) time;

(b) programme; and

(c) money.

The contractual linchpin of the programmesmanship strategy is the contractor's obligations, confirmed by the courts, to honour two basic obligations, viz:

(a) carrying out and completing the work in accordance with the contract documents; and

(b) carrying out and completing the work in accordance with the directions of the contract administrator.

Accordingly, it does not take a very astute contracts person to remember that the reciprocal obligations under a contract render it a two-edged sword. Succinctly put, the obligation to perform in accordance with the contract administrator's directions can be turned around in order to use (or perhaps abuse) time and money. Contractual reinforcement for this tactic is even given by the contract itself with what is probably the widest definition in AS 4300, namely, viz in respect of a "direction" (or "instruction"):

"direction" includes agreement, approval, authorisation, certificate, decision, demand, determination, *explanation*, instruction, notice, order, *permission*, rejection, *request* or requirement.

(Emphasis supplied.)

The critical link in the programmesmanship strategy (and therefore where it is most vulnerable) is whether the revised, optimistic programme is given contractual force. Once the contractor extracts from the contract administrator that contractual force, he or she can choose between a number of options. Most contracts give him or her at least extra costs. Some are more generous with an express entitlement to delay and disruption. Yet again, some (albeit perhaps unwittingly) give an express entitlement to acceleration compensation. Even worse, very few contracts make such compensation exclusive and exhaustive; so that a claim for the more generous damages for breach of contract is often still available. How the contractor then exploits the situation is a matter for him or her and their advisers.

The other side of the ledger also contains options. Principals and contract administrators can:

(a) omit the programme clause (a decision deliberately taken in the drafting of JCC (MBW));

(b) ensure that, also by administration of the contract, the revised, over-ambitious programme is not accorded contractual force;

(c) draft a contractual code of compensation to the exclusion of the claims presently available; and

(d) generally improve both the drafting of the contracts and the administration of them.

Reciprocally, the contractors who engage in such "programmemanship" cannot have it all their way. Some contractors believe that, after they have entered into a contract fixing a date for practical completion, they can manipulate that by thereafter submitting a programme for a crashed or accelerated period with an earlier date for practical completion, with the result that the latter replaces the contractual date for practical completion. It is suggested that the better view is that that is not the consequence; rather the true result is that the contractual date for practical completion remains as it is until validly altered by the superintendent or the principal in accordance with the contract and the contractor has validly given himself or herself float between the programme date for practical completion and the contractual date. It is the contractor's choice, not obligation. Accordingly the Perini Perini Corp v Commonwealth (1969) *2 NSWR 530* implied term does not apply; especially is there no implied obligation on the principal to co-operate so as to enable the contractor to achieve his or her earlier completion date. (Glenlion Construction Ltd v The Guiness Trust (1987) *39 BLR 89* – Judge Fox-Andrews QC.)

"Programmesmanship" claims very much turn upon whether the particular, subject contract contains programme clauses, let alone appropriate ones. For example, doomed from the start was the claim pleading an implied term that work and operations would be available so as to enable them to be carried out in a manner which was not piecemeal nor uneconomic. That implied term was contrary to the express term to carry out the work under the contract at times and in manners as directed or required. (Martin Grant & Co Ltd v Sir Lindsay Parkinson & Co Ltd (1984) *29 BLR 31*.)

(1996) 12 BCL 174 at 182

Similarly the express contractual obligation to carry out work in accordance with instructions will prevail over any attempts to incorporate impliedly the programme: Kitsons Sheet Metal Ltd v Matthew Hall Mechanical and Electrical Engineers Ltd *[1989] 17 Con LR 116*.

In J & J Fee Ltd v The Express Lift Co Ltd *[1993] 34 Con LR 147*, it was held that in the absence of such contrary express terms there will be implied not only the Perini implied terms not to hinder and to co-operate, but also the implied term to provide correct information concerning the works in such a manner and at such times as was reasonably necessary in order for the contractor to fulfil any obligations under the contract. "Full and comprehensive" were too ambitious and were not allowed by the court.

The point is well made by comparing and contrasting the submission of a programme which showed not only a "programmesmanship", early completion date but also milestones for provision of drawings and other information to be supplied to the contractor. That had been done within the contractual terms for requests for information to the contractor, such that the failure then to provide him or her with those drawings and that information according to that programme constituted good grounds for his or her claim. (Leach v Merton London Borough Council (1985) *32 BLR 51*.)

Nevertheless a requirement or request for a direction, necessary drawings, information etc to be provided by the principal, the superintendent or other consultants must generally indicate, by words or other conventional signs:

(a) what it is that the contractor needs; and

(b) when he needs it.

AS 2124-1986 cl 33.1 simply obliged the contractor to give the superintendent reasonable advance notice of what he or she required. AS 4300 (and AS 2124-1992) commendably correct the situation by now expressing the contractor's obligation in terms of notice of "when" the contractor requires it. It must be communicated in sufficient time to enable the superintendent clearly to understand both (a) and (b).
AS 4300 (and AS 2124-1992) commendably also reinforce the defence against programmesmanship as to, on the one hand, disclaiming a responsibility upon the principal and superintendent and, on the other hand, not releasing the contractor from his; viz:

33 Progress and Programming of the Works

33.1 Rate of Progress

…

The Principal and the Superintendent shall not be obliged to furnish any information, materials, documents or instructions earlier than the Principal or the Superintendent, as the case may be, should reasonably have anticipated at the Date of Acceptance of Tender.

…

33.2 Contractor's Program

…

A Contractor's Program shall not affect rights or obligations in Clause 33.1 .

…

The furnishing of a Contractor's Program or of a further Contractor's Program shall not relieve the Contractor of any obligations under the Contract including the obligation not to depart, without reasonable cause, from an earlier Contractor's Program.

The contractor who engages in programmesmanship is entitled to the float under AS 4300 (but not under NPWC 3 and JCC). The difference turns on being delayed in reaching practical completion, as distinct from "… time fixed by the Contract for Practical Completion".
When the common law's reasonable time does apply the principal may desire some greater precision about what he or she regards as the contractor's delay. It is open to him or her then to make time of the essence ie an essential term and condition of the contract, if the delaying party evinces a disregard of the obligations for timely performance. Whereas the common law regarded time obligations as being essentially so to be performed strictly, equity relieved against such "sudden death" harshness by requiring, in the absence of express agreement between the parties that it be of the essence, a warning notice by the aggrieved party alerting the guilty party to the fact that, unless the delay be rectified, time will become of the essence and alerting him to the consequences likely to follow eg rescission and damages. In building projects such a situation is more common where the project is part of an overall conveyancing transaction to build and sell, because such notices

(1996) 12 BCL 174 at 183

are common in conveyancing. Just as in conveyancing the party giving the notice to complete must first carefully ensure that he or she comes with clean hands and must also decide what is a reasonable period of notice according to the facts and circumstances of the particular transaction, so the principal must not himself or herself be preventing the contractor's timely performance and the principal must have regard to all the circumstances of the project. (Bow v McGrath Builders Ltd *[1974] NZLR 443*.)
For these sorts of reasons it is dangerous for a construction contract itself (as some pro forma contracts and subcontracts do) initially to make time of the essence. Such a provision is a two-edged sword. Indeed, although the principal who does wish time to be of the essence may be rash in so providing initially in the construction contract, even the principal who thereafter gives a notice making time of the essence (see above) can find that he or she is met with dire repercussions. On one project the contractual date for completion had been overrun. The principal failed to give proper notices fixing a reasonable time for completion but unfortunately preferred to stop paying moneys due and to give a purported notice of rescission. The Full Court of the Supreme Court of Queensland held that, in the facts and circumstances, such conduct by the principal constituted waiver of their rights to the relevant completion date and, even worse, a repudiation by the principal of the contract. (McLachlan v Ryan unreported, Qld Sup Ct, Matthews, Thomas and Derrington JJ, 15 October 1987).

Extension of time

The combined effect of the principal's obligation to avoid infringing the contractor's rights in respect of his programme and the "penalties" which would otherwise be cast upon the contractor for failure to observe the time provisions is such that the principal is subject to what has been held to be a warranty, albeit impliedly, not to interfere with the progress of the work; for example by failing to obtain permits which the principal is required to obtain. (Ellis-Don Ltd v Parking Authority (Toronto) (1978) *28 BLR 99*.) Compare also the Perini Perini Corp v Commonwealth (1969) *2 NSWR 530* duty to co-operate in achieving the contractual result discussed below.

The principal who does not in fact have clean hands will jeopardise his remedies including any provision for liquidated damages, unless the contract protects him with an appropriate provision for an extension of time. The legal basis of this bar to his or her right to liquidated damages is best known as the "prevention principle". Its basis is perhaps an implied term (compare Aurel Forras Pty Ltd v Graham Karp Developments Pty Ltd *[1975] VR 202*, per Menhennitt J and see further Southern Foundries (1926) Ltd v Shirlaw *[1940] AC 701*, per Lord Atkin's "positive rule of the law of contract that conduct of either promiser or pomisee which can be said to amount to himself 'of his own motion' bringing about the impossibility of performance is in itself a breach" – applied by Stephen J in Commissioner for Main Roads v Reed & Stuart Pty Ltd (1974) *48 ALJR 461*). Alternatively the basis can be said to be an implied supplemental contract (Aurel Forras Pty Ltd v Graham Karp Developments Pty Ltd *above at 209*, per Menhennitt J). Alternatively, the basis can be said to be waiver (so held by the County Court judge in Dodd v Churton (1897) *1 QB 562*). It is submitted that the better basis is estoppel; although unfortunately estoppel was not raised on the pleadings before Menhennitt J in Aurel Forras above and his Honour accordingly declined to deal with it. Nevertheless, Williams AJ preferred estoppel as the basis in Santalucia Earth Moving Contractors v Zandonadi (unreported, Qld Sup Ct, Williams AJ, No 86 of 1978).

This is the correct limit of the so-called "Peak" principle, rather than the too wide proposition that time is at large if the proprietor (or architect) has caused any of the delay, eg by directing additional work. Despite Nicholson J's unfortunate reference to "time is set at large" in H & S Alexander v Housing Commission (Vic) (1985) *4 ACLR 85*, the better view, on balance, it is submitted is that the principal is prevented from further insisting upon strict, contractual times, which are replaced by whatever is a reasonable time in all the facts and circumstances. This preferred view is consistent with the foundation case of Dodd v Churton (1897) *1 QB 562* and Lord Pearson's explanation of the ratio recidendi of that case in Trollope & Colls v North West Metropolitan Regional Hospital Board *[1973] 2 All ER 260* (especially at 267–268).

The tug-of-war between the prevention principle and risk allocation has caused considerable concern about concurrent or overlapping delays. One short, simple solution is in AS 4300:

(1996) 12 BCL 174 at 184

Where more than one event causes concurrent delays and the cause of at least one of those events, but not all of them, is not a cause of delay listed in Clause 35.5(a) or (b) , then to the extent that the delays are concurrent, the Contractor shall not be entitled to an extension of time for Practical Completion.

However, is that truly fair and balanced?

One way of dealing with it is, yet again, to leave it to the superintendent. However, is it really sufficient to leave this difficult question of causation and contribution to the poor contract administrator? Those responsible for clearly identifying the risk and concisely allocating it have a duty to recognise the fundamental criterion of causation. Perhaps a better way is to give the superintendent contractual guidelines, for example:

Notwithstanding the other provisions of his clause, in the event that concurrent delays occur to the work under the Contract the Superintendent shall determine the Contractor's entitlement, if any, to an extension of time by apportioning the resulting delay by the Contractor in reaching Practical Completion to the various causes of the delays to the work under the Contract on the basis of their respective contributions to the delay by the Contractor in reaching Practical Completion. The validity and enforceability of the Date for Practical Completion as so extended shall not be affected by any negation or reduction which has occurred as a consequence of the Superintendent's apportionment in the entitlement the Contractor would otherwise have had to an extension of time for any particular cause of delay, including but not limited to the causes of delay set out in sub-provision (b)(i) above.

Mutuality and reciprocity in contracts should never be forgotten. There are often substantial and significant situations where it is in the principal's interests there be an extension of time. Strategic interests of the contractor, on the other hand, may depend upon there not being an extension of time. On balance, the interests of the contract and the project may be such that it be available and considered.

AS 2124 was unfortunate, in that the superintendent's independent, initiating discretion depended for its trigger upon:

…

Notwithstanding that the Contractor is *not entitled* to an extension of time.

(Emphasis supplied.)

Per contra, NPWC 3 commendably and correctly recognised the situation with:

…

Notwithstanding that the Contractor has not *given notice of a claim* for an extension of time.

(Emphasis supplied.)

AS 4300 tries to cover the field by now specifying both; viz:
…
Notwithstanding that the Contractor is not entitled to or has not claimed an extension of time.

Variations

Increased physical work under the contract is of course also another factor. Accordingly it needs to be dealt with by carefully crafted clauses. Such clauses should leave no doubt as to what is or is not a variation.
Such clauses should also require early "alert" and ongoing communication, including early notification of the likely "impact" as to both money and time.

Deemed variations

Perhaps the best illustration is the dreaded latent condition. Big claims and large amounts of money have been built on alleged latent conditions. Accordingly best practice in risk identification, risk allocation and risk management requires a good latent conditions clause.
The basic proposition used to be that the principal was in a better position to know his own property than the contractor, who simply comes upon it for the first time and for the limited purpose of doing some work on it. Accordingly it was the principal who should bear the responsibility for any special difficulties of the site. Departing from that proposition there evolved the practice of drawing contracts so as to impose upon the contractor, who was after all more expert in such matters relating to construction, the liability for all investigations, tests etc necessary for the purpose of carrying out

(1996) 12 BCL 174 at 185

the works the subject of his or her promise in the contract. That in turn was seen to be going too far the other way, so that the "latent condition" proviso (sometimes together with equitable adjustment) was often added. The modern philosophy is not unlike that in respect of the latent defect in conveyancing developed from the old cases like Flight v Booth *[1834] 1 Bing (NC) 370* and Torr v Harpur (1940) *57 WN 195*.
Resources exploration and exploitation is probably the highest risk industry. The industry is not far behind it in terms of risk. When the risks of both come together in subsurface situations, parties to a contract need to work harder at the risk identification, risk allocation and risk management.
For too long there has been widespread and long-standing concern in the industry with the difficulties involved in the preparation and provision of geotechnical site information; let alone the high incidence of claims and disputes over latent conditions.
These claims and disputes have become almost inevitable in the construction of bi-centennial highways, airports, earthworks reclamation, dams, shafts, tunnels, dredging wharves and other marine structures. Underground construction such as tunnelling is particularly problematic, due to the sensitivity of the process to ground conditions and the difficulty of obtaining accurate geotechnical information.
In summary, the industry would be guilty of perhaps the worst "tunnel vision" if it were to ignore the many facets and directions of the risks associated. (After all, a tunnel is only a long, skinny hole with an engineer at one end and a lawyer at the other.) One has to have regard to:

(a) the physical conditions themselves;

(b) any existing information about them;

(c) any and all investigations carried out and to be carried out;

(d) by whom those investigations are to be carried out;

(e) for whom those investigations are to be carried out;

(f) the duties in respect thereof;

(g) the contractual obligations between, not just the principal and the contractor, but in the total matrix of contracts, including the conditions of engagement etc for consultants, the superintendent and all other relevant entities;

(h) in connection with those contracts the:

(i) purpose;

(ii) standard of skill called for;

(iii) any disclaimer clauses; and

(iv) adjustment of the contract price; and

(i) the ingenuity of the pleader in how he or she can frame the claim.

Accordingly, the aim of the good contract should perhaps be:

(a) to provide bases for the realistic apportionment of responsibility and risk associated with subsurface soil/ground conditions between all relevant parties to the construction project;

(b) to establish and define broad categories of geotechnical data for the purposes of disclosure in tender and contract documents, and to define the differences between them;

(c) in terms of these categories, to realise what geotechnical data should be provided to tenderers and in what manner, if at all, they should be qualified;

(d) to establish principles and procedures in order to deal with conditions which vary significantly from those described, and especially for the apportionment of the consequences between the contractor and the principal;

(e) to minimise the risk to the contractor by enabling him to make as informed a decision as possible on construction methods, costs, rates of progress etc; and

(f) to minimise the risk to the principal, ie latent deemed variations, delays, ingenious claims from contractors for delay costs, prolongation, disruption, acceleration and equitable adjustment.

Allocation of responsibility

The approaches to contractual allocation of responsibility for site investigations, let alone for differences therefrom, can and do differ significantly. The approach chosen will depend upon a number of factors including:

(a) the economic state of the industry and the resultant cost benefits, or lack thereof, to the principal, including provision for relief for latent ground conditions;

(b) the commercial bargaining power of the parties;

(c) attitudes, perceptions and policies; and

(1996) 12 BCL 174 at 186

(d) the desire to set up the contract to avoid or at least reduce claims or actions about site investigations and latent conditions differing from them.

At one end of the spectrum there is the Utopian possibility that the principal may assume all of the responsibility in relation to the conditions encountered by the contractor. The logic behind this approach is of course that it is the principal's site and it is reasonable for the principal to assume responsibility in relation to the site's adequacy to support the design, or in relation to problems during construction. Furthermore, in many cases, the principal will have come to know the site well through the investigation programme and may know what to expect from other projects in the area. If the principal assumes such responsibility, he or she has an incentive to carry out the most appropriate level of investigation. The advantage of this approach is that the principal will, at least in theory, pay for only the conditions actually encountered, rather than automatically pay for substantial contingencies included in the tender price which may not actually be encountered during construction. Difficulties can occur in this approach in determining whether a condition encountered was within the original, reasonable foreseeability of the parties at the time of contract, or whether there should be some deemed variation on the basis that the condition differs sufficiently from those which should reasonably have been anticipated and allowed for in the tender price. For this reason it is important that the parties agree about both the conditions expected and the reliability of the data provided at the date of the invitation to tender, not at the date of the claim.
At the other end of the spectrum, the competent contractor is expected to take total responsibility for the site conditions and must find a solution to all problems impacting upon his or her construction, at his own expense and without concessions from the principal. The rationale for this approach is that the contractor has been chosen for his or her competence and should best know, and be able to make allowance for, the conditions likely to be encountered; and therefore the construction resources and methods required. In some circumstances, the contractor may be in a better position to know what to expect in terms of ground conditions. It is trite that this approach leads to ingenious and complex

claims, disputes and ill-will; especially if the market is tightly competitive at the time. The successful tenderer probably will not have included such contingencies in his or her price and may even have under-bid. Then the principal, in practice, often resists strenuously and emotionally, firmly feeling that the contractor should have taken the risk.

The latter generally represented the attitude of the courts until comparatively recent times. The fundamental doctrine of freedom of contract permitted the judges to assume that competent contractors made allowance in their tender prices for such risks. Even if the judge thought the contract was not a wise one, and one which he would not have entered into, then:

If that is the bed the parties made for themselves, let them lie in it.

Similarly, traditional contractual thinking led the contractor to plead his or her claim as an alleged warranty in the contract; albeit more often than not without success. For example, one contractor contracted with the City of London to take down an old bridge and build a new one. In inviting him to tender for that contract, the principal had supplied him with drawings and a specification prepared by the principal's engineer. When he was awarded the contract, he agreed to obey the directions of the engineer (contract administrator).

Descriptions of the work were expressed to be "believed to be correct" but not to be guaranteed.

Part of the work under the contract involved the use of caissons. When he was performing the work involving the caissons, the contractor found that they could not withstand the force and pressure of the stream flow, and the upper part of the caisson had to be abandoned. The lower part of the caisson remained in the river and the lower part of the pier had to be built inside it up to low water mark, but without it between low and high water. Consequentially he suffered considerable delay and expense. In pleading his claim the contractor alleged that the principal had given an implied warranty that the bridge could be built relatively inexpensively according to the drawings and specification.

The House of Lords held that such a warranty could not be implied into the contract. (Thorn v City of London (1876) *1 AC 120*.)

Similarly, site conditions relating to the elements and weather fared no better as the subject matter of alleged implied warranties. When a contractor alleged such an implied warranty to the effect that

the seashore on which he was to carry out the proposed works would remain in the same condition as at the date of the contract, the House of Lords again held that no such warranty was to be implied. (Jackson v Eastbourne Local Board *(1886) Hudson's BC (4th ed) 81*.)

In Australia, the attitude of the courts has been similar. A contractor entered into a contract, which included terms to the effect that all information, plans, etc supplied with the specification had been prepared in good faith and from information presently available to the principal. Nonetheless the contractor was to accept full responsibility for the use of such information and was to verify all information on the site. The preliminary design work indicated on the plans was the principal's suggestion only and the contractor was to accept full responsibility. The High Court of Australia held that, although these statements were representations by the principal, they were not so high as a warranty; because of the express statement about the full responsibility being undertaken by the contractor. (George Wimpey & Co Ltd v Territory Enterprises Pty Ltd (1971) *45 ALJR 38*.)

As the last case shows, the precise terms of the contract are of course critical. The plain fact that the principal generally seeks to keep the tenderer's price down is normally not reflected in the terms of the contract. Nevertheless, when one adds to that the principal's (usually by his or her consultants) desire to impress upon the contractor his or her particular wishes in respect of design, method of work etc, there are usually reflections of this in the terms of the contract.

Accordingly, the risk will often shift in contract documentation which tends to blur the strict demarcation between the respective roles of contractor, principal and principal's consultants. For example, when tenders were invited for a design and construct project, the principal's quantity surveyors told the successful tenderer that the design was to be prepared on the assumption that the soil conditions were as indicated on the bore hole data provided by the principal. On that assumption, the tenderer's design was adequate but, during the carrying out of the work, the presence of tufa was discovered and re-design of the foundations, together with additional work, was necessary. In the circumstances the contractor alleged an implied term or warranty by the principal that the ground conditions would be in accordance with the assumption put to him. The court upheld the implied term or warranty, essentially because the contract was one for a comprehensive development, whereby the contractor had to know the soil conditions in order properly to plan his programme for the carrying out of the work and to assess the resources he would need. (Bacal Construction (Midlands) Ltd v Northampton Development Corporation (1975) *8 BLR 88*.)

Ultimately the welfare of the contract, of the project and of the parties is best served by a balanced and equitable contract. In modern times, a number of practical measures can certainly reduce the risk; viz:

Preliminary works

In some situations it may be appropriate to have the contractor carry out such preliminary measures as stripping overburden, foundation preparation, curtain grouting, tunnel portal construction, initial borrow area development etc as a preparatory stage of construction yet before

finalising designs. This has obvious advantages over the introduction of other parties to carry out, let alone co-ordinate, such work separately from the construction contract. It enables the foundation conditions to be exposed and design solutions reached before the construction contract is let.

Use of schedule of rates and contingent items

The use of pre-stated rates and prices for work associated with uncertain ground conditions can reduce risks for both parties to a construction contract by allowing contract payments to be related to conditions actually encountered. The rates and prices can be obtained at the time of tendering through use of a schedule of rates for the work items in respect of which quantities are uncertain.
An extension of the normal schedule of rates approach involves the inclusion of clauses, prices and rates for contingency methods and techniques for coping with a variety of possible ground conditions. These include categories of work not expected but which may arise. They also include categories of work which will certainly be encountered but for which it is not possible to estimate quantities with any accuracy.
Furthermore the draftsman can reduce the risk of windfall profits or substantial claims upon the contingent conditions actually being encountered by:

(1996) 12 BCL 174 at 188

(a) a stepped schedule for a particular type of work, so that the unit rate used for payment is dependent on the quantity encountered; eg:

(i) a series of schedule items to form a sliding scale for a particular work item. This approach allows economies or diseconomies of scale to be taken into account progressively; or

(ii) two-part schedule items. The rate for the first part is applicable to the anticipated minimum quantity of work that the contractor will be required to perform. All fixed costs are to be recovered under this part, with provision for adjustment if the quantity specified is not achieved. The rate for the second part is applicable for quantities in excess of that covered by the first part up to a specified maximum value. Only non-fixed costs are to be included in this rate, with no provisions for adjustment; and

(b) the one operation being subdivided into several parts, so as to reduce risk where there is uncertainty; eg grouting is to have separate items for set-up of equipment, for hook-up of lines, for water testing, for drilling and the grouting itself. In cases where it is not practicable to provide for all uncertainty through the provision of contingent rates, the documents can provide for dayworks (plant and labour) as a provisional item.

Admittedly there are dangers in the scheduling of contingent items. A great deal of care, knowledge and skill is often required in order to ensure that the contingencies are adequately considered. There is the potential for a claim that the conditions encountered are not the same as those provided for, so that the contract contingent rates and prices do not apply; or that they do not apply to the scale of the condition encountered.
A further difficulty is the need to ensure that the rates tendered against contingent items are subject to competitive market forces and reflect the actual cost to the contractor of carrying out the work. Although the approach of listing and using nominal quantities for tender evaluation is often adopted, it is not altogether satisfactory because the tenderer's rate for the nominal quantity can be understated or overstated with little impact on the overall tender price after extending and totalling the schedule. A preferable approach is to state in the conditions of tendering that in evaluating tenders the principal may have regard to the possible cost outcomes over the full range of quantities that could reasonably be encountered for the various contingent items.

Definition of materials for excavation

Where a contract with a schedule of rates involves excavation, the risks to both parties can often be reduced if the schedule of pay items separates excavation into various categories of difficulty. It is common to make a separation into "rock" and "OTR"; and further to subdivide rock into "soft rock" (eg "rippable" or "borable") and "hard rock". Provision for separate rates for various classes of excavation is particularly applicable where a detailed site exploration is not feasible; eg a long, buried pipeline project.
The distinction between "other than rock" and "soft rock" can similarly be defined as material that cannot reasonably be excavated by a certain type and size of machine. Whilst this method is widely used there are often arguments and claims when large excavating plant is involved.

Commonly there arises the issue of whether the superintendent should reasonably be satisfied that the plant operator is skilled and is using his or her best endeavours to excavate the material in question.

Representation of information about ground conditions

Many of the relevant consultants often divide geotechnical data generally into the categories of fact, interpretation and opinion. For the hopeful purpose of trying to avoid the potential for misrepresentation and misinterpretation it is often thought important that any documents produced for information to tenderers should make a clear distinction between these categories.
Sometimes principals and their consultants believe it safest to disclose to tenderers as little as possible about site information. They think that vulnerability to claims will increase proportionally with the amount of information provided. However, it is a mistake to believe that liability can be avoided by withholding information; indeed the potential for liability will almost certainly be increased thereby.
For similar reasons, a common practice exists of providing some information on a contractual basis

(1996) 12 BCL 174 at 189

and other information on an allegedly non-contractual basis, viz "For information only". This practice results from a mistaken understanding of the legal remedies potentially available. Any attempt to negate the contractual significance of information provided usually induces the contractor to plead his or her claim extra the contract, whereby there are much wider ranging ramifications for the principal and his or her consultants.
Another common reason for withholding site information (which is often subsequently shown to be mistaken) is that the information is not relevant, or not sufficiently relevant to justify provision to tenderers. Relevance and reliance are usually proven to be matters for the tenderers. It must be seriously considered that anything less than full disclosure can leave the principal and his or her consultants exposed to a claim for alleged negligent mis-statement, misrepresentation or negligent information or advice; let alone allegations of fraud. There is also potential liability under legislation such as the Trade Practices Act 1974 (Cth) , the Contracts Review Act (1980) (NSW) and the Fair Trading Acts; see Fair Trading Act 1987 (NSW) ; Fair Trading Act 1985 (Vic) .
In summary, risks can be identified and reduced if the presentation of the geotechnical data adopts a sense of responsibility in following some or all of the following steps, depending on the circumstances and nature of the project involved:
Re-appraisal of Reports The geotechnical investigations undertaken as the project has evolved may have included preliminary evaluations, feasibility studies, assessment of alternative sites subsequently discarded, supplementary studies of specific aspects. Much of the work done may have been with design questions in mind and the reports will have been written accordingly. Preliminary opinions may have been expressed based on limited information. These may later be considered to be incorrect or misleading or liable to be misconstrued by tenderers. For important projects the principal may deem it worthwhile to obtain a second opinion on the manner of the presentation of the data from consultants experienced in tender information. Even lawyers may be worthwhile.
Qualifications Following such re-appraisal of reports, appropriate qualifications should be made in respect of each of them. It will often be the case that the principal's investigators or designers will express, for design purposes, such opinions as those relating to ease of excavation; although they should readily acknowledge that in this field they are far less experienced than most contractors. Qualifying statements should make such situations clear to tenderers.
Each report should be prefaced by a clear statement as to purposes for which it was prepared.
Uncertainty The assessment of ground conditions is often made in respect of discrete and perhaps widely separated locations. It sometimes even involves various indirect techniques. Interpolation and interpretation of this information being correct is a question of probabilities. Where areas of significant uncertainty or doubt exist, they should be disclosed to tenderers.
Site meeting A mandatory site meeting of the principal and all tenderers to discuss the site conditions information can often do much for disclosure, clarification, communication and consensus. Minutes of such meetings are often as useful as site minutes. Similarly they should be circulated to all tenderers.
Disclaimers, exclusions and limitations of liability The perfect, total clause probably results in no contract at all – for lack of consideration. Such clauses have no guarantee of their efficacy until after the arbitration and litigation. Indeed they often provoke it.
Traditionally the courts have construed disclaimers contra proferentem and have even further lent against them. During the hearing of Dillingham Constructions Pty Ltd v Downs (1972) *2 NSWLR 49* [PDF] virtually dismissed attempts to rely upon them on the basis that they were only "lawyers clauses". Similarly, and more recently, Pincus J in the Full Federal Court of Australia held that general disclaimers of liability should be of little weight in determining whether information supplied is misleading (for the purposes of the *Trade Practices Act*). He said that such disclaimers are so common in commercial documents that a reader is not likely to take their presence as a particular indication that information supplied is not thought to be reliable. (Phillip & Anton Homes Pty Ltd v The Commonwealth of Australia (1988) *7 ACLR 39*.)

In the Tullamarine case (Morrison-Knudsen International Co Inc v Commonwealth of Australia (1972) *46 ALJR 265*) the contractor was aggrieved

(1996) 12 BCL 174 at 190

by the condition of the site in that the substrata contained large quantities of cobbles, which made the work more difficult and which were contrary to the site information provided by the principal. The contractor alleged therefore that that information had been false, inaccurate and misleading. He had to do so in the face of what were prima facie foreboding exclusion clauses:

(a) he was deemed to have examined the … contract documents carefully and also to have informed himself about the site and local conditions affecting the carrying out of the contract;

(b) he acknowledged that he had satisfied himself about the nature and location of the work, the general and local conditions, including … physical conditions of the site, the structure and condition of the ground;

(c) he further acknowledged that any failure to acquaint himself with the available information would not relieve him from responsibility for estimating properly any difficulty for the cost of successfully performing the work; and

(d) the principal assumed no responsibility for any conclusions or interpretations made by the contractor on the basis of the information made available by the principal.

Although the claim was thereafter settled (on a quite reasonable basis for the contractor) the High Court of Australia first held that the contractor was not excluded from his cause of action. The court held that the factors cast upon the contractor for him to inform himself on (and compare AS 2124 and NPWC 3) were not restricted to what he might investigate and discover by his own, independent endeavours and efforts to the exclusion of the information which the principal had made available. Accordingly principals, and their consultants, should carefully remember Texas Tunnelling Company v City of Chattanooga, Tennessee *204 F Supp 821 (1964)*:
This information is furnished for the convenience of bidders and is not part of the contract. The information is not guaranteed and any bids submitted must be based on the bidders own investigations and determinations.
The High Court of Australia held that the Commonwealth's disclaimers did not achieve the exclusion of liability which the Texas Tunnelling clause did.
Several members of the court attached significance to the facts that the site information provided by the principal clearly conveyed essential, basic, site information. The principal's disclaimer about the contractor's interpretations and conclusions clearly evidenced the principal's realisation that the contractor would rely on the separate matter of the very information itself.
The Supreme Court of Queensland has declined to imply a term such as that upheld in Bacal Construction (Midlands) Ltd v The Northampton Development Corporation (1975) *8 BLR 88* in a NPWC (albeit NPWC 2) form of contract. Citra, as contractor, had contracted with the Commonwealth as principal for the erection of a beef cattle research facility. The Commonwealth had supplied tenderers with a site investigation report, which had been prepared for the Commonwealth by an independent firm of soil consultants.
Citra's drainage and plumbing subcontractor alleged that the site investigation report showed that the major portion of the excavation for the building foundation and pipe drenches would be carried out in clay and shale containing rock fragments, whereas a uniform sub-stratum of solid rock was encountered. Of course this involved more costly methods of removal. The subcontractor claimed against Citra, who in turn claimed against the Commonwealth.
The arbitrator held that the following term should be implied into the contract:
That the information contained in the site investigation report would, with reasonable accuracy, represent and describe the nature of the soil and sub-surface strata at the site of the bore holes.
Campbell J held that no such term should be implied. In his brief comments on this aspect of the case, Campbell J referred to the decision of the High Court in Codelfa Construction Pty Ltd v State Rail Authority of New South Wales (1982) *56 ALJR 459*, and quoted with approval the following words of Lord Atkin in Bell v Lever Brothers Ltd *[1932] AC 161*:
Nothing is more dangerous than to allow oneself liberty to construct for the parties contracts which they have not in terms made by importing

(1996) 12 BCL 174 at 191

implications which would appear to make the contract more businesslike or more just.
Campbell J held that cl 12 did not constitute a disclaimer of liability for negligent mis-statement of technical information; rather it simply described Citra's obligation to perform and complete the contract. On the contrary, the judge held that the site investigation report was

negligently prepared, was incorporated in the subcontract and was proffered by the principal as its own document, for which it accordingly must accept liability. That liability was not disclaimed by either cl 12 nor the fact that the contract:

(a) required each tenderer "to acquaint himself with all matters relating to the proposed contract prior to submitting his tender";

(b) precluded claims "for extra payment or extensions of time arising from a failure to ascertain and provide for site conditions";

(c) stated that the data contained in the site investigation report was "a faithful record of investigations and tests carried out" and was "for information only";

(d) excluded responsibility on the part of the Commonwealth "for any interpretation or conclusions drawn" from that data by others;

(e) excluded any representation by the Commonwealth that the information made available showed "completely the existing site or subsurface conditions";

(f) required Citra to make its "own interpretations deductions and conclusions from the information" and accept full responsibility therefor;

(g) required the tender price to "include for excavation in all materials as found" and precluded "extra payment for variation in material";

(h) required tenderers to satisfy themselves as to the nature of materials to be excavated and make due allowance in their tender price; and

(i) stated that the results of the soil investigation were supplied for the information of tenderers and did not form part of the contract.

In summary, the courts require very specific and clear, express disclaimer of liability for negligence. The better clause is the one of limitation. A contractual code for compensation will generally be upheld. Compare AS 2124-1986 cl 36 and JCC.

The contract clauses

The elements of a good latent conditions clause are probably:

(a) a definition of "latent conditions";

(b) provision for the parties to agree in advance what shall constitute latent conditions;

(c) a condition precedent that the contractor has inspected the site and examined all information made available to tenderers, together with all other information relevant to the risks, contingencies and circumstances obtainable on reasonable enquiries;

(d) restriction of entitlement to the situation where site conditions differ substantially from those which should have been anticipated by a competent contractor, who has satisfied the obligation to inform himself in (c);

(e) an obligation to notify the superintendent forthwith upon becoming aware of a latent site condition, and where possible before the conditions are disturbed;

(f) a contractual code of the range of remedies which the "latent condition" may justify under the contract, so as to avoid dispute about the nature and extent of ingenious claims; and

(g) perhaps (albeit contentious) a time bar on recovery more than some specified period before the date when notice of the physical conditions should have been given; ie in order to bar latent conditions claims anything up to years after the event (with all of the consequent difficulties in relation to records and investigations to establish or defend the claim).

AS 2124

Clause 12
As 2124-1986 is the best and most equitable and balance: viz:

12.1 Definition
Latent Conditions are:

(a)

physical conditions on the Site or its surroundings, including artificial things but excluding weather conditions at the Site, which differ materially from the physical conditions, which should reasonably have been anticipated by the Contractor at the time of the Contractor's tender if the Contractor had:

(1996) 12 BCL 174 at 192

(i) examined all information made available in writing to the Principal to the Contractor for the purpose of tendering; and

(ii) examined all information relevant to the risks, contingencies and other circumstances having an effect on the tender and obtainable by the making of reasonable enquiries; and

(iii) inspected the Site and its surroundings; and

(b) any other conditions which the Contract specifies to be Latent Conditions.

12.2 Notification

If during the execution of the work under the Contract, the Contractor becomes aware of a Latent Condition the Contractor shall forthwith and where possible before the physical conditions are disturbed, give written notice thereof to the Superintendent.
If required by the Superintendent, the Contractor shall provide to the Superintendent a statement in writing specifying –

(a) the physical conditions encountered and in what respects they differ materially;

(b) the additional work and additional resources which the Contractor estimates to be necessary to deal with the physical conditions;

(c) the time the Contractor anticipates will be required to deal with the physical conditions and the expected delay in achieving Practical Completion;

(d) the Contractor's estimate of the cost of the measures necessary to deal with the physical conditions; and

(e) other details reasonably required by the Superintendent.

12.3 Extension of Time and Costs

Delay caused by a Latent Condition may justify an extension of time under Clause 35.5 . If a Latent Condition causes the Contractor to:

(a) carry out additional work;

(b) use additional Constructional Plant; or

(c) incur extra cost (including but not limited to the cost of delay or disruption);

which the Contractor could not reasonably have anticipated at the time of tendering, a valuation shall be made under Clause 40.2 .

12.4 Time Bar

In making a valuation pursuant to Clause 12.3 regard shall not be had to the value of additional work carried out, additional Constructional Plant used or extra cost incurred more than 28 days before the date on which the Contractor gives the written notice required by the first paragraph of Clause 12.2 .

Significant changes from 1981 include:

(a) the definition of "Latent Conditions". Without such a definition the courts sought one in the common law. They looked particularly to those valuable cases in construction contract law, viz the shipping cases. For example:
The only question is whether by "latent" is meant that you have to use every possible method to discover whether it exists, or whether you must use reasonable methods … I think it means such an examination as a reasonably careful man skilled in that matter would make

(Charles Brown & Co v Nitrate Producers' Steamship Company *[1977] 58 Lloyd's Rep 188*)

Again:
A defect which could not be discovered by person of competent skill and using ordinary care.

(The Dimitrios N Rallias *(1922) 13 L1 LR 363 at 366 per Lord Atkin*, borrowing from the American authorities.)

Yet again, by applying the negative test:
If it could be discovered by the exercise of ordinary care, it cannot be said to be latent.

(The Dimitrios *at 365 per Lord Sterndale*.)

(b) "physical conditions" clearly include man-made conditions but in practice the greater argument is created by abnormal conditions of nature;

(c) "weather conditions at the Site" being expressly excluded is very significant. It is consistent with the basic proposition that the well-known fickleness and hazards of sea and wind are within the risk of the contractor. (See Jackson v Eastbourne Local Board *(1886) Hudson's BC (4th ed) 81* and Dillingham Constructions Pty Ltd v Downs (1972) *2 NSWLR 49* [PDF].) Many of the decided cases held that physical conditions

(1996) 12 BCL 174 at 193

on the site due to weather conditions off the site were not latent conditions but those cases depend very much on the precise words used in the contract; eg the ICE contract 4th ed, cl 12 expressly states "physical conditions (other than weather conditions or conditions due to weather conditions)". Accordingly, a contractor failed in a claim for a latent condition in that he encountered abnormal flow in a sewer. (Tersons Ltd v Stevenage Development Corporation *[1963] 2 Lloyd's Rep 333*.) Therefore, it is now critical to identify the condition itself which gives rise to the matters under subcl 12.2 ; ie whether they are weather conditions at the site or physical conditions on the site as a consequence of weather conditions off site. By way of illustration, the mere fact that the subsoil turns out to be much wetter than either party expected will not give the contractor any remedy; even though the difference was so significant that the substrata were muddy and spongey, and the contractor was forced to add substantial timbering and reinforcement. (Bottoms v Lord Mayor, etc of the City of York *(1892) Hudson's BC (4th ed) 208* (CA, Lord Esher MR, Bowen and Kay LJJ). Even a condition a little more remote in its source from both the site itself and from the reasonable investigation of the contractor will generally not be laid at the feet of the principal. The added factor of the principal being the public instrumentality with statutory responsibility generally for the site will not overcome the basic proposition that the contractor has assumed responsibility for the events and matters cast upon him or her by cl 12.1 to the extent that such matters should be within the reasonable and ordinary contemplation of the average contractor;

(d) the obligation of the contractor to examine all information made available in writing by the principal is qualified by the test of what should reasonably have been anticipated by the contractor at the time of his or her tender. The High Court of Australia emphasised that
the basic information in the site information document appears to have been the result of much highly technical effort on the part of the (principal). It was information which the (contractors) had neither the time nor the opportunity to obtain for themselves. It might even be doubted whether they could be expected to obtain it by their own efforts as a potential or actual tenderer.

(Morrison-Knudsen International Co Inc v Commonwealth of Australia (1972) *46 ALJR 265*);

(e) "examined all information relevant to the risks, contingencies … effect on the tender" is not so wide as the deleted, further items which were in the 1981 edition. They were properly deleted, because nature of work, necessary materials, access, facilities, transport facilities and availability of labour and accommodation, are all not properly latent (site) conditions. Secondly, the deeming is again qualified by the test of what should reasonably have been anticipated by the contractor, coupled with the test of "obtainable by the making of reasonable enquiries". Accordingly there is a practice of linking this aspect with (i), whereby

the tenderer specifically inquires of the principal whether he has any further information. Such tenderers do well to make the same inquiry of the relevant consultants. This tactic opens up several avenues of potential claim in the future if the supply, or non-supply, of such information can be shown to be false, negligent, misleading etc.
If the further information which is supplied increases the risks for the tenderer, such that he or she wishes to increase the contingency in his or her tender, one technique in practice is to request the principal to supply the further information also to all other tenderers;

(f) "inspected the Site and its surroundings" is of a lesser order than the previous requirements for "examined". Again it is qualified by the test of what should reasonably have been anticipated by the contractor at the time of the tender. For example, a contractor who had seen two trial holes on the site was held to have acted reasonably in not searching and examining the site in sufficient detail where it was overgrown with grass and three further holes (which did evidence rock) were concealed from the contractor. (Bryant & Sons Ltd v Birmingham Hospital Saturday Fund *[1938] 1 All ER 503*);

(g) the cl 12.2 requirement for notification cannot be taken lightly. The contractor is to give written notice to the superintendent of a latent condition "forthwith" after becoming aware of the latent condition, rather than 1981's "as soon as practicable"; although "where possible

(1996) 12 BCL 174 at 194

before the physical conditions are disturbed". Although "forthwith" does strictly mean "immediately" that can rebound against the principal. The better view is that notice provisions are construed contra proferentem if alleged to be a condition precedent to the right to the entitlement. Such a bar needs to be drawn in express and clear language as a condition precedent. (Commonwealth of Australia v Jennings Construction Ltd (1985) *4 ACLR 19*), and Monmouthshire County Council v Costelloe & Kemple Ltd (1965) *63 LGR 429*; but cf The Cairns-Mulgrave Water Supply Board v Watts Construction Division Pty Ltd (unreported, Qld Sup Ct, Connolly J, 29 April 1983); Re an Arbitration between Pioneer Clough Pty Ltd and Gold Coast City Council (unreported, Qld Sup Ct, Connolly J, 5 March 1986).) Reinforcement for this view is to be found in the English cases requiring the contractor to comply as a condition precedent once the ICE clause expressly specifies the condition:
if he intends to make any claim for additional payment.
(See Blackford & Sons (Calne) Ltd v Christchurch Corporation (1962) *60 LGR 214*; Monmouthshire County Council v Costelloe & Kemple Ltd (1964) *63 LGR 131*; Monmouth County Council v Costelloe and Kemple Ltd (1965) *63 LGR 429*; Humber Oils Terminal Trustees Ltd v Hersent Offshore Ltd (1981) *20 BLR 16*;
The arguments available to a contractor who has failed to give notice "forthwith" are several. They include:

(i) the implied term that the contractor must first have available all the subject matter of such a notice;

(ii) the provision being a term (as distinct from a condition) such that the consequence is such damages as the principal may suffer;

(iii) the acknowledgment in cl 12.4 that non-compliance is not an absolute bar; and

(iv) communication should be the test, rather than technical time bars. In one case the latent conditions clause in the contract required the contractor, promptly and before the subject conditions were disturbed, to notify the principal in writing of:

A. subsurface or latent physical conditions at the site differing materially from those indicated in the contract; or

B. unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognised as inherent in work of the character provided for in the contract.

The relevant facts were that, although the contractor had not given prompt formal written notice, representatives of the principal were on the site, were aware of the problems and had abundant opportunity to inspect and investigate the claim. On such facts the United States Court of Appeals for the full circuit held that the requirements on the clause were satisfied. (Brinderson Corp v Hampton Roads Sanitation District *No 36–3949 (4th Circuit, 1987)*.)
Nonetheless the prudent contractor should always give the earliest possible "alert" notification, followed by the formal notice pleading with particularity as soon as he can. (For example, a general letter is not sufficient. (Z & T

Constructions Pty Ltd v Council of The City of Logan (unreported, Qld Sup Ct, Thomas J, 10 November 1986)); and

(v) in the second paragraph of cl 12.2 a requirement has been added that, if required by the superintendent, the contractor must provide to the superintendent a statement setting out certain information and estimates concerning the nature of the latent condition, and the likely delay and cost effects thereof. It is significant that no time-limit is specified for the contractor to provide this written statement to the superintendent beyond the common law's reasonable time;

(h) in subcl 12.3 there is now both an express acknowledgment that a delay caused by a latent condition may justify an extension of time and express acknowledgment that, given the

(1996) 12 BCL 174 at 195

occurrence of the specified contingencies, a variation valuation must be made;

(i) subcl 12.4 's "time bar" for the contractor to give his "alert" notice is just what it says, viz a bar. In practical terms, contractors who are aware of this now have to maintain a barrage of paper warfare. Consequently the superintendent also has had to increase his administration and records.

Secondly, there are certain latent conditions which are of a continuing or otherwise ongoing occurrence eg tunnelling and road works. This is even more fundamental than the ripple effect referred to above in connection with the time of crystallisation for the purposes of the subcl 12.2 notice.

Overall, and on balance, there is much to be said in many major contracts for subcl 12.4 being deleted. If it is not, the regular instalments of formal notification are the prudent way for the contractor. Otherwise he or she and his or her advisers need to remember the general principles of legal interpretation and construction. More particularly, although "forthwith" does mean "immediately", there will be implied some factual flexibility according to the context.

Where it is alleged that failure to observe such time provisions results in a bar of the substantive right, the general principle is that the subject clause is to be construed contra proferentem and the bar needs to be drawn in express and clear language as a condition precedent. For example in Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Aust) Pty Ltd the time provision was expressed to be a limitation (and indeed an exemption thereafter) in respect of liability, viz:

shall be discharged from all liability in respect of … unless suit is brought within one year after.

Both the Privy Council and the High Court of Australia held that the clause meant what it said but Barwick CJ confirmed that exemption clauses, and such limitation clauses, should be construed contra proferentem; viz:

they are of course enforceable according to their terms unless their application according to those terms should lead to an absurdity or defeat the main object of the contract, or for some other reason, justify the cutting down of their scope.

(Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Aust) Pty Ltd (1978) *139 CLR 231* [PDF].)

The importance of the purpose of the particular clause should not be forgotten; according to both the clause's content and context. By way of illustration, time provisions occur in the major construction contracts in different clauses for different purposes and in different degree; eg:

- latent conditions claims (AS 2124 cl 12.2 notification "forthwith")
- extensions of time (AS 2124 cl 35.5 notify "promptly", claim "within 28 days", number of days claimed "as soon as practical", grant "within 28 days"; NPWC 3 cl 35.4 notice "not later than 28 days", notify grant or refusal "as soon as practicable")
- progress payment claims, certificates and payments (AS 2124 cl 42.1 claim "at the times stated", certificate issue "within 14 days", payment … days"; NPWC 3 cl 42.1 claim "every month", progress certificate "within 21 days", payment "within 14 days")
- differences and disputes (AS 2124 cl 46 decision "within 28 days", arbitration "within 28 days"; NPWC 3 cl 45 submission "not later than 14 days", decision "as soon as practicable", (appeal) submission "not later than 14 days", arbitration "not later than 28 days … and if not … shall not be subject to arbitration", and cl 48 "shall not be liable … unless … not later than 28 days").

The standard contracts could be clearer on the interdependence, if any, and indeed the inter-relation, if any, between a limitation such as NPWC 3 cl 48 and time limits for claims for time and money. What is clear, it is submitted, is that the respective contexts and contents as to purpose

are different. For example in Jennings Construction Ltd v QH & M Birt Pty Ltd (1987) *2 BCL 189*, the subject time provision was SCNPWC 3, cl 47 which is to all intents and purposes identical with NPWC 3 cl 48 . Smart J held that it did not apply to progress claims. He said that its purpose was to ensure that notice be given at an early stage

(1996) 12 BCL 174 at 196

so that there could be inspection and investigation promptly of the events or circumstances, and so that the position could be considered eg perhaps a variation might be issued. Nonetheless his Honour found the clause to be a troublesome one. He said it was in the nature of a residual clause, which imposes the obligation to give notice where money is claimed for work over and above the minimum work if optimum conditions exist and there is no other clause specifically dealing with the procedures to be followed in relation to the particular matter in question.

Nonetheless the clause does impose a condition precedent to liability in respect of claims to which it does apply. (Jennings Construction Ltd v QH & M Birt Pty Ltd (1987) *2 BCL 189*.) Accordingly, where the purpose of the clause is not a general limitation, let alone exemption, but rather a constructive or deemed variation such as by way of latent condition, the above principles will prefer that interpretation and construction which results in non-compliance being a bar. For example in Pioneer Clough Pty Ltd and Council of the City of the Gold Coast the latent conditions clause required the contractor to give notice immediately and before the conditions were disturbed. Connolly J held that the expressed purpose was plainly that of enabling the engineer (superintendent) to investigate and, if he so decided, to order an appropriate variation. He said:

The notice is not required to do more than advance a claim of latent conditions and give the contractor's opinion as to the action required and the likely time and cost involved. It does not resemble the provision considered in Corporation of Trustees of The Order of The Sisters of Mercy in Queensland v Wormald International (Aust) Pty Ltd , which the requirement that a fully detailed claim be submitted within a specified time could fairly be held to run from the time when the complete loss had materialised.

(The subject clause in that case contained a forfeiture of all rights for non-compliance, similar to the limitation on liability in NPWC 3 cl 48 .) (Re Arbitration Act, 1973 and an Arbitration between Pioneer Clough Pty Ltd and Council of the City of the Gold Coast (unreported, Qld Sup Ct, Connolly J, 5 March 1986).)

The precise content of the particular clause is very important. For example, the latent conditions clauses in other contracts such as the ICE contract do go further and, particularly, are prefaced by the express condition "if he intends to make any claim for additional payment". The 4th edition of the ICE contract contained words to that effect ("if he wished to claim additional payment for additional work" and a further limitation "no claim for payment for any such work will be considered which has not been included in such particulars" (which particulars were to be sent once in every month). Where the contractor failed to comply the arbitrator accordingly rejected the claim under cl 12 , although he held that a claim could be made aliunde under a different, general and residual clause 52(4)). Sachs J held that the arbitrator had erred in law in respect of the latter, residual provision for a claim but did not disturb the arbitrator's funding on the failure to comply with the requirements of the latent conditions clause. (Blackford & Sons (Calne) Ltd v Christchurch Corporation (1962) *60 LGR 214*.)

It is likewise with latent conditions clauses (also ICE clauses) prefaced with the similar condition precedent "if he intends to make any claim for additional payment" and enabling "all claims made under a notice given under the clause" to be referred to arbitration. Mocatta J distinguished Blackford & Sons (Calne) Ltd v Christchurch Corporation in that the parties had agreed that the arbitrator should have jurisdiction. Accordingly Mocatta J held that, unless proper notice was given under the latent conditions clause, an arbitrator would have no jurisdiction. (Monmouth County Council v Costelloe & Kemple Ltd (1964) *63 LGR 131*.)

Mocatta J's decision about strict compliance with the latent conditions clause's requirements of the contractor was followed by Goff J (as his Lordship then was) in Humber Oils Terminal Trustees v Hersent Offshore Ltd (1981) *20 BLR 16*. However, the further consequence of loss of rights to pursue the claim to arbitration was reversed by the Court of Appeal (Lord Denning MR, Harman and Wynn LJJ). The Court of Appeal held that, on the stricter

(1996) 12 BCL 174 at 197

approach of the courts to the loss of rights to pursue the claim, and on the evidence, there had not been a decision on a dispute or difference such as to have triggered earlier the time bar against the contractor. Compare:

The other consideration which moves me is this. This is a process by which the contractors can be deprived of their general rights at law and therefore must be construed with some strictness as having a forfeiting effect. It is not a penal clause, but it must be construed against the person putting it forward, who is, after all, trying to shut out the ordinary citizen's right to go to the courts to have his grievances ventilated. Therefore, I think it would require very clear words and a very clear decision by the appointed person, namely the engineer (superintendent), to shut the contractors out of their rights.

(Monmouth County Council v Costelloe & Kemple Ltd (1965) *63 LGR 429*)

Such contra proferentem interpretation and reluctance to uphold forfeiture of the contractor's rights to pursue claims has also permeated the Australian contracts.
The rule therefore is, it is submitted, that such principles of construction are to be applied to each step in the notification of claims and disputes.

Claims and dispute resolution

Sadly claims and disputes are too common. Perverse is it that the relevant courses so often get so little attention; admittedly because they tend to be at the end of the contract and when the negotiating and drafting teams have run out of time and related resources.

Traditional contracts and their limitations

AS 2124-1992

47 Dispute resolution

47.1 Notice of Dispute
If a dispute … arises out of or in connection with the Contract.

Such subtle but significant distinctions invite the pleader of claims simply to take advantage of the distinctions and differences in the decided cases on the various scope phrases. Most disputes clauses use wide terms. Nonetheless the precise words used are important; viz:

(a) "under this agreement" is not so wide as the following;

(b) "touching the rights and liabilities of the parties hereunder";

(c) "touching this agreement";

(d) "anything arising out of this agreement";

(e) "in respect of, or with regard to, this agreement"; and

(f) "in connection with this agreement".

Even those of wide import such as "in respect of" will depend upon their context for their precise scope. True it is that there are authorities to the effect that "in respect of" is so wide as to be virtually synonymous with "in connection with". (Trustee's Executors and Agency Co Ltd v Riley *[1941] VLR 110*, per Mann CJ (although possibly obiter); followed in Paterson v Chadwick *[1974] 2 All ER 772*.) However, there is also authority to the contrary. (Ackbar v CF Green & Co Ltd (1975) *1 QB 582*.)
The answer is to be found according to the context. (Compare Butler v Johnston, Guild and Somes (1984) *55 ALR 265*.)
Similarly, it is a question of nexus. In the absence of express provision to the contrary, there is little argument that the scope includes not just issues of fact but also questions of law. (Allwright v Queensland Insurance Co Ltd (1966) *2 NSWR 256* and John Churcher Pty Ltd v Mitsui & Co (Australia) Ltd (1974) *2 NSWLR 179* [PDF] and Pridham Holdings Ltd v Smorgon Consolidated Industries Pty Ltd *[1974] VR 231*.)
Given a sufficiently wide arbitration clause, the subject matter is not limited to claims under the overall contract but has a very generous nexus with most related matters, for example:

(a) whether the contract itself has been frustrated (Codelfa Construction Pty Ltd v State Rail Authority (NSW) (1982) *149 CLR 337* [PDF]);

(b) whether the contract has been rescinded in futuro (Grason Homes Pty Ltd v Murdoch *[1974] VR 745*);

(c) rectification of the contract (Roose Industries Ltd v Ready Mixed Concrete Ltd (1974) *2 NZLR 246*; Dowell Australia v Triden Contractors (1982) *1 NSWLR 6* [PDF]; Drennan v Pickett *[1983] 1 Qd R 445*. The principle is that the

(1996) 12 BCL 174 at 198

nexus must be with the contract as distinct from a party's performance. More particularly, "in respect of this (contract)" has been held to be wide enough to embrace a claim for rectification (Overseas Union Insurance Ltd v AA Mutual International Insurance Co Ltd *[1988] 2 Lloyd's Rep 63*). Similarly "under or out of" has been held to be sufficiently wide to include a claim for rectification of the contract (and indeed all disputes other than those as to the very existence of the contract itself). Hirst J said that the court should presume that the parties did not intend there to be two sets of proceedings running either concurrently or consecutively in respect of the same dispute. (Although his Honour therefore favoured a wide interpretation and application of the arbitration clause, unfortunately there are some judges in Australia who would say this argument supported all the claims, intra and extra a narrow interpretation clause, being brought into court. (Ethiopean Oilseeds and Pulses Export Corp v Rio Del Mar Foods Inc The Times *11 August 1989*)). Similarly, the clauses "arising out of or in connection with the provisions of this agreement" and "the construction of such provisions" have been held to be wide enough to include a claim for rectification. (State Electricity Commission (Vic) v Alcoa (Aust) Limited (unreported, Vic Sup Ct, Marks J, 24 November 1986).) Similarly, "in connection with" the contract will encompass a claim for rectification, despite the argument that the issue was allegedly what the contract itself was. (Ashville Investments Ltd v Elmer Contractors Ltd (1987) *37 BLR 55*.) Contra a claim for rectification where the agreement to arbitrate comprised "all disputes or differences arising out of the contract or concerning the performance or the non-performance by either party of his obligations under the contract" (AS 2124) supplemented by a confirmatory agreement at the preliminary conference "to submit the matters in dispute between us". (Mir Bros Developments Pty Ltd v Atlantic Constructions Pty Ltd (1985) *1 BCL 50*); although it is important to distinguish from rectification the issue of what the contract is. The latter issue was held to be within NPWC 3's "arising out of the contract": New South Wales v Coya (Constructions) Pty Ltd (1994) *10 BCL 152*;

(d) related claims on quantum meruit (Government of Gibraltar v Kenney (1956) *2 QB 410*) – sed quaere in Australia since the High Court of Australia held that the basis of quantum meruit is more restitution than quasi-contract (Pavey and Matthews Pty Limited v Paul (1987) *69 ALR 577*). A relatively narrow arbitration clause, "arising out of the Contract" had previously been held by the High Court of Australia to be sufficient to ground an arbitrator's jurisdiction in quantum meruit. (Codelfa Construction Pty Ltd v The State Rail Authority (NSW) (1982) *149 CLR 337* [PDF].) Mason and Wilson JJ said:
it is a short step in circumstances such as these to find the claim for a quantum meruit consequent on a finding of frustration within the contemplation of the arbitration clause.
Avoidance of a contract by frustration, semble, still has sufficient nexus for the arbitration clause; especially if the underlying rationale of the doctrine of frustration is the implied term. Contra the dispute about whether the contract was ever concluded at all, such that a claim in quantum meruit in that situation is, since Pavey and Matthews Pty Limited v Paul above, beyond the arbitration clause; eg "all disputes, controversies or differences which may arise between the parties, out of or in relation to or in connection with the Contract" was probably still not able to embrace a claim in quantum meruit where the contract itself had not been made. (Bliss Corp Ltd v Kobe Steel Ltd (unreported, NSW Sup Ct, Smart J, 29 September 1989).) Codelfa's modern judicial philosophy towards a broad interpretation and construction of arbitration clauses is reflected in the disagreement with Smart J by both Angel J and Ambrose J in Transaustralian Constructions Pty Ltd v Northern Territory of Australia (unreported, NT Sup Ct, 31 July 1991) and Rheem Australia Ltd v Federal Airports Corp (unreported, Qld Sup Ct, 16 March 1992 – affirmed by Full Court);

(e) even claims in tort which have a sufficiently close nexus with the contract (Woolf v Collis Removal Service (1948) *1 KB 11*; The Damianos (1971) *2 QB 588*; Commonwealth v Citra Constructions Ltd

(1996) 12 BCL 174 at 199

(unreported, Qld Sup Ct, McPherson J, OS 469 of 1982); The Playa Larga and Marble Islands *[1983] 2 Lloyd's Rep 171* (conversion). Furthermore, an arbitration clause drawn as widely as "arising in any way whatsoever out of this" was held sufficient to allow closely related claims in contract and in the tort of conversion to be within the scope of the arbitration. (Ulysses Compania Naviera SA v Huntingdon Petroleum Services Ltd (The Ermoupolis) *[1990] 1 Lloyd's LR 160*.) Contra again if the distinction is that noted above in respect of rectification, viz between the nexus with the contract and the nexus with a party's performance extra the contract. For example, the clause "concerning the performance" of one party of its obligations under the contract has been held not to be wide enough to encompass a claim in negligence in the preparation of the tender documents.

(TNT Bulkships Ltd v Hopkins and Interstate Constructions Pty Ltd (NT Sup Ct, Asche J, 17 December 1987).) Asche J distinguished Commonwealth v Citra Constructions Ltd in that McPherson J was determining a different question. Asche J said that he would agree that a claim of negligence in connection with a party's performance could be within a clause to that effect where it was properly and relevantly connected with the actual performance (as distinct from the preparation of documents *for* the contract). The distinction is well illustrated where the claim in negligence was that a negligent mis-statement induced the party to enter into the contract. The clause was "arising … in connection with" the contract. The court held that such a claim in negligence was within such a clause; albeit having to follow the dicta of Purchas LJ in Blue Circle Industries Plc v Holland Dredging Co (UK) Ltd (1987) *37 BLR 40*. (Ashville Investments Ltd v Elmer Contractors Ltd (1987) *37 BLR 55*.) May LJ said that courts should look to "the natural and ordinary meaning of such words without being bound by previous courts' interpretation of similar words": viz Blue Circle Industries Plc v Holland Dredging Co (UK) Ltd . He said that such earlier decisions about similar words were of no more than persuasive value.

Both nexus and the precise drafting are important. The narrower "arising under" will generally not embrace claims in tort. Compare Chimimport PLC v G D'Alesio SAS (The Paola D'Alesio) *[1994] 2 Lloyd's LR 366*.

The modern trend, it is submitted, is towards favouring a liberal and generous construction of most arbitration clauses so as to include claims in negligence. Compare Reed Constructions Pty Ltd v Federal Airport Corp (unreported, NSW Sup Ct, Brownie J, 23 December 1988).

In quite recent times the courts have evidenced a more generous attitude to the required nexus, for example, so as to include subsequent to the contract;

(f) a supplemental contract (Graham v Seagoe *[1964] 2 Lloyd's Rep 564*); contra if the clause is only "arising out of the contract" or "under the contract" and what is actually claimed is a *collateral* contract. The distinction is important because a collateral contract, as distinct from a supplemental contract, has an independent existence (Heilbut Symons Co v Buckleton *[1913] AC 30*; applied in TNT Bulkships Ltd v Hopkins and Interstate Constructions Pty Ltd (NT Sup Ct, Asche J, 17 December 1987)). Similarly, "arising under (this contract)" is not wide enough to include counts for misrepresentation, negligent misstatement, collateral warranty or collateral contract. (Fillite (Runcorn) v Aqua-Lift (1989) *45 BLR 27*.) Nevertheless, similarly to the distinction in respect of rectification above, the wider terms "in respect of this (contract)", have been held to be sufficient to embrace an issue of a collateral contract (and rectification). (Overseas Union Insurance Ltd v AA Mutual International Insurance Co Ltd *[1988] 2 Lloyd's Rep 63*.) Evans J, following Ashville Investments Ltd v Elmer Contractors Ltd *[1988] 2 All ER 577*, relied upon commercial common sense;

(g) a dispute about whether a contractual claim has been settled. (James Wallace Pty Ltd v Abbey Orchard Property Investments Pty Ltd (unreported, NSW Sup Ct, CA, 21 October 1980; followed in Construction Planning and Management Pty Ltd v J & P Nikolaou (1988) *4 BCL 255* (Vic Sup Ct, Fullagar J).);

(1996) 12 BCL 174 at 200

Contra the narrow nexus of "arising under" coupled with an express term of the settlement agreement that the arbitration cease and that there be no claims whatsoever. (The party applying to avoid the settlement agreement had failed to put on points of claim in the arbitration and only sought to do so when it sought to avoid the settlement agreement it had already entered into: Chimimport PLC v G D'Alesio SAS (The Paola D'Alesio) *[1994] 2 Lloyd's LR 366*.)

(h) estoppel and waiver (Kathmer Investments Pty Ltd v Woolworths Pty Ltd (1970) *2 SA 498*; Drennan v Pickett *[1983] 1 Qd R 445*; and

(i) "any controversy or claim arising out of or related to this agreement or the breach thereof" are very wide words. They have been held sufficient to enable an arbitrator to exercise the Supreme Court's jurisdiction to make orders similar to those under the *Trade Practices Act*. The scope of neither the language of that Act nor the remedies provided by it is sufficient to exclude such claims from the arbitrator's jurisdiction. (Constitutional invalidity was not argued.) Nevertheless, an arbitrator cannot declare a contract void ab initio: IBM Australia Ltd v National Distribution Services Ltd (1991) *20 NSWLR 361* [PDF].

The avenue of severance may nonetheless be open. More particularly, if, as a question of interpretation and construction, the arbitration agreement is properly severable from the contract itself, it can be said to be alive, despite the main contract itself being void ab initio. See QH Tours Limited v Ship Design and Management (Aust) Pty Limited (1992) *105 ALR 371* (Fed Ct, Foster J).

There are increasing demands for the doctrine of severance to apply so as to make a sufficiently wide arbitration clause available even where the main contract is void ab initio eg for illegality (compare the comments of Steyn J in Harbour Assurance Co (UK) Ltd v Kansa General

International Insurances Co Ltd *[1992] 1 Lloyd's LR 81*). On this point the Court of Appeal confirmed that there is no binding authority in English law for the proposition that an arbitrator could not have jurisdiction to decide whether the contract containing the arbitration clause was a void for illegality: [1993] 3 WLR 42 (Ralph, Gibson, Legatt and Hoffmann LJJ); [1993] TLR 1 March 1993 page 32, followed in New South Wales in Ferris v Plaister (1994) *34 NSWLR 474* [PDF], Sup Ct of NSW, Court of Appeal, (Kirby P, Mahoney and Clarke JJA) – contract void ab initio for fraud but arbitration clause severable and survives).

Even though a contract rendered void ab initio is logically the same as any "Clayton's" contract which never was, for whatever reason, there are those who insist upon the distinction. That distinction did not particularly concern Kaplan J in the High Court, Supreme Court of Hong Kong. He held that, even if the contract itself had not been concluded by the parties, the arbitration clause in it was still available, especially so as to allow the arbitrator to inquire as to his jurisdiction and to determine, on a practical level, whether the arbitration should continue. Succinctly put, his Honour said that commercial reality is to be preferred to logical purity. (Fung Sang Trading Ltd v Koi Sun Sea Products & Food Co Ltd *[1992] Doyles DR Reps (Asia Pacific) 80*.)

That does not contradict the nexus used in the converse – namely the "Catch 22" of a dispute about whether there is still a dispute, does come within the jurisdiction of the arbitration clause. This is because the subject matter of the dispute is under the principal contract. There the issue is not whether the principal agreement was void ab initio but whether it has been terminated by discharge.

The Court of Appeal of the Supreme Court of New South Wales in Ferris v Plaister above agreed with Kaplan J's statement that commercial reality is to be preferred to logical purity, in order to uphold Judge Schwebel's classic statement, viz:

When the parties to an agreement containing an arbitration clause enter into that agreement, they conclude not one but two agreements, the arbitral twin of which survives any birth defect or acquired disability of the principal agreement.

(International Arbitration: Three Salient Problems (Cambridge, Grotius 1987 at page 5.) Nevertheless, with great respect to Kaplan J, logic can be pushed only so far. It is not just logical purity to question how there can be an arbitration agreement within (or even as the twin of) a contract which was simply never made. There is great force in the thorough and learned article by Giles CJ Comm D of the Supreme Court of New South Wales in "Severability of Dispute Resolution Clauses in Contracts" (1994) 19 BCL 393.

(1996) 12 BCL 174 at 201

The solution lies, it is submitted, in the realisation that legal argument avoiding a contract has now moved to factual evidence of whether the contract was ever made at all. Compare Multiplex Constructions Pty Ltd v Trans Australian Constructions Pty Ltd (unreported, Sup Ct of NT, Thomas J, 3 February 1995).

In respect of the contractor's prescribed notice the reasonable and impartial observer might fairly ask why a construction contract commercially balanced does not also reciprocally require a prescribed notice by the principal in respect of claims against the contractor.

AS 2124-1992 focuses on the "dispute" rather than the "claims". Written notice is to be given to not only the superintendent but also the other party.

The dispute may be referred to arbitration after:

(a) 28 days from the claimant having requested the other party to provide written reasons for rejecting the claimant's claim and yet their not being provided;

(b) 28 days from the superintendent having received the specified details and reasons from both parties yet not having given his decision; or

(c) the superintendent having given his decision but a party being dissatisfied with it.

The non-fulfilment of earlier steps in the dispute resolution procedure (eg NPWC 3 clause 45(a) and (b)) does not mean that a stay cannot be granted until they have been fulfilled. Enco Civil Engineering Ltd v Zeus International Development Ltd (unreported, Judge Esyr Lewis QC, 22 October 1991); applied in The Channel Tunnel Group Ltd and France Manche SA v Balfour Beatty Construction Ltd (1992) *2 WLR 741* where Staughton LJ said, at 14.4:

… who applies for a stay, may not have any claim which he wishes to make against the plaintiff, or any reason either to start an arbitration or to carry out any preliminary action before that can be done; he may merely wish to resist the plaintiff's claim. I can see no reason why he should not say to the plaintiff: "I dispute the claim. If you wish to pursue it, you must carry out the preliminary step and then proceed to arbitration; I am ready and willing to arbitrate if you do; but if you go to court instead, I shall apply for a stay."

In affirming the decision of the Court of Appeal, the House of Lords emphasised the court's inherent jurisdiction rather than the statutory provision for a stay. Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd *[1993] 1 All ER 664*.

46.2 Arbitration.

para one: "If … party required … fails to provide … referred to arbitration."

> This "fast tracking" of the disputes process is unfair to a claimant. It enables the recalcitrant respondent simply to sit back and automatically do nothing about the claim and commit the claimant directly and precipitously to arbitration. That is not the modern, more efficacious and cost-effective dispute resolution procedure.
> para one: "… to arbitration."

Whenever the dispute is to be referred to arbitration, this drafting is just too brief. Brevity is not synonymous with conciseness.
In fairness, the intention may have been flexibility but the fact remains that it is inadequate. The balance required of a standard contract is perhaps such that it is desirable to provide something more about the arbitration itself. For example, the doctrine of incorporation by reference is usually of great benefit to construction contracts on these issues.
The contractual procedures are commendable in their characteristics of specifying procedures for identification, definition and hopefully a decision in respect of the dispute. However, common sense and communication should never be forgotten. The plain fact is that disputes fundamentally are concerned with not just paper and procedures, but with people.
Either party may seek the other party's agreement upon the choice of an arbitrator, for example, by offering a number of names, supported by relevant particulars of each candidate. The common procedure is for the respondent who does not agree with any of those candidates to reply with a list of his candidates.
AS 2124-1992 commendably adopts interlocutory alternative dispute resolution philosophy. Unfortunately it depends too much upon co-operation and consensus, in that the drafting is open ended

(1996) 12 BCL 174 at 202

to the extent of an agreement to agree in virtually three respects, namely:
"attempt to resolve"
"failing resolution"
"if possible agree".
The weak obligation to confer and agree is of doubtful legal efficacy. Compare the comments of Giles J in ABB Power Plants Ltd v Electricity Commission of New South Wales Trading as Pacific Power *(1994–1995) 35 NSWLR 596* (Sup Ct of NSW, CA, Handley, Sheller and Cole JJA).
The drafting could be improved by substituting a self-executing deadline triggering the next process.

Where the above fails, what is required?

Money is usually the medium by which people put some measure on their claims. In nearly every situation the claimant is the contractor; although not necessarily so. Nonetheless, even legal proceedings for an injunction or declaratory judgment have some commercial, monetary value underlying them.
Extras, variations and prolongation costs are probably the most usual claims. They can be either actual or constructive eg latent conditions, acceleration and "equitable adjustment".
A mere failure by the superintendent (contract administrator) to agree with such claims is sufficient to constitute a dispute or difference. Almost as a reflex reaction comes the two-pronged counter attack alleging defects and (liquidated) damages.
The latter counter attack in turn invites claims and cross-claims about extensions of time. Whether one be the contractor or the principal, and whether claimant or respondent/cross-claimant, the synopsis of the carriage of construction claims and disputes can perhaps be:

(a) purpose;

(b) pleadings;

(c) procedures;

(d) preparation;

(e) presentation; and

(f) proof.

Although "dispute" may be used more in the connotation of a claim of potential adversary situation, it also has a very wide meaning. It can include a situation where the other party simply ignores a claim made upon him ie without either admitting or denying it. For example, the plaintiff made a claim based on invoices. The defendants admitted that the invoices were correct and did not dispute the claim. However neither did the defendants expressly admit liability; the defendants simply ignored the claim and all communications relating to it.

On the issue of whether there was a "dispute" for the purposes of the arbitration clause, the court held that, although the claim was indisputable, there was nonetheless a dispute simply because of the defendants' ignoring the claim without either admitting or denying it. There could only be said to be no "dispute" (if the defendants had expressly admitted the claim). (Tradex Internacional SA v Cerrahogullari TAS, The M Eregli *[1981] 3 All ER 344*.)

Similarly a mere lack of reply to a request or demand can be sufficient to constitute a "dispute". In respect of ongoing business between them, the plaintiff repeatedly requested the defendant to account for proceeds to date. The defendant simply ignored those repeated requests.

When the plaintiff commenced court proceedings, the defendant successfully argued that there was sufficient "dispute" for the purposes of the arbitration clause. (Ellerine Bros (Pty) Ltd v Klinger (1982) *1 WLR 1375*) (followed in Sandhurst Engineering Ltd v Citra Constructions Ltd (1987) *3 BCL 198*.)

Thus an arbitration is deemed to have commenced if a dispute has arisen and one party has given proper notice or taken any other step contemplated by the arbitration agreement with a view to referring the dispute to arbitration: White Constructions (NT) Pty Ltd v Mutton (1989) *57 NTR 8*.

AS 2124-1992 cl 47.1 depends on only a dispute. Albeit a question of extent and degree, the leap-frogging over the lesser category of "difference" can be material.

A "difference" does not have to be of so high an order as a positive dispute or disagreement. A "difference" can comprise no more than a mere failure to agree. An option for renewal of a lease committed that unfortunate drafting offence of leaving the terms and conditions of any such renewed lease to be as agreed upon by the parties at the time. There was also a wide arbitration clause in respect of any difference or dispute. (It is perhaps interesting that the draftsman did put "difference" before "dispute".)

When one party alleged that in fact no binding right for renewal had been created, the courts were concerned with the familiar question of whether the

parties had done no more than create an unenforceable, uncertain agreement to agree or whether there was some machinery or formula whereby sufficient certainty could be ascertained. The Court of Appeal found the latter in the wide arbitration clause, in which "difference" was sufficient to catch the mere failure to agree. (Attorney-General v Barker Bros Ltd (1976) *2 NZLR 495*.)

In the great majority of construction contract claims the contractor is demanding money. Often he or she is also claiming extensions of time in order to protect himself or herself from loss of money by way of liquidated damages. Frequently the principal is also claiming money and, quite often, extensions of time in order to preserve his or her contractual right to liquidated damages.

Such claims, cross-claims and issues necessarily involve a consideration of tactics. To take just a couple of illustrations:

(a) does the claimant claim intra or extra the contract?

(b) quite commonly, either or both parties may urgently need to put their contractual position in better order before they actually commence the proceedings eg by making required applications for extensions of time, prolongation costs, variations etc. On the other hand, if one be the principal, one may need to ensure that the superintendent has adequately dealt with such applications and has duly assessed and certified them;

(c) if it appears that the contractor has in essence a simple, common money count claim which has not yet adequately been disputed, it is still possible to use summary proceedings in the face of more cumbersome, general disputes procedures (including arbitration). (Plucis v Fryer (1967) *41 ALJR 192* did not overrule John Grant & Sons Ltd v Trocadero Building & Investment Pty Ltd (1938) *60 CLR 1* [PDF] on this aspect.) The defendant who belatedly disputes such a liquidated claim (eg on a certificate) may find that he or she is in fact the one who is caught by the disputes clause, so that he or she has to fight on a separate front for an unliquidated claim in a different forum. (Approved KB Hutcherson Pty Ltd v Pier One Pty Ltd (unreported, 3 December 1982, NSW Sup Ct, Master Sharpe). (Northern Regional Health Authority v Derek Crouch Constructions Co Ltd (1984) *1 QB 644* has "no application in Australia to the JCC form of contract": (KBH Constructions Pty Ltd v PSD Development Corporation Pty Ltd (1991) *7 BCL 90*.

The "Crouch" principle has, in relation to AS 2124-1981, been both distinguished: Hawker Noyes Pty Ltd v New South Wales Egg Corp (unreported, 11 November 1988, NSW Sup Ct, Brownie J), yet followed: Bond Corp Pty Ltd v Thiess Contractors Pty Ltd (1988) *17 FCR 487* [PDF];

(d) similarly a claimant in arbitration can still sometimes obtain tactical advantages in drawing his or her notice of dispute in very precise, tight and narrow terms, so as to avoid consolidation of counterclaims (as distinct from set-off);

(e) contractual advantages may need to be exploited as early as possible and before the disputes for determination crystallise. Not every construction contract empowers the superintendent to initiate an extension of time (the usual purpose of which is to preserve the principal's right to liquidated damages). In some circumstances it may be very good tactics for the contractor not to apply for or otherwise claim extensions of time but to insist upon strict performances by the principal eg in nominating subcontractors (including especially replacement of failed nominated subcontractors) or otherwise performing the principal's obligations when the contractor knows that the principal cannot unless the contractor "triggers" the extensions of time procedure;

(f) subject to one's moral views, there is considerable, commercial leverage in a principal "pulling the guarantees", regardless of the merits. The High Court of Australia has confirmed that an unconditional bank guarantee is just that, and that it is not possible to imply into it conditions according to the provisions of the construction contract. (Wood Hall Ltd v The Pipeline Authority (1979) *141 CLR 443* [PDF]; followed in Hortico (Aust) Pty Ltd v Energy Equipment Co (Aust) Pty Ltd (1987) *6 ACLR 29*.) As distinct from attempts to imply into the bank guarantee such a term, one should not forget that equitable doctrine that equity will not be seen to be a passport to a breach of contract. Accordingly, where there are appropriate conditions precedent in the construction contract which must be satisfied before the right to call up the security crystallises, and where there are sufficient equitable factors to tip the

balance of convenience (eg prejudice to the aggrieved party which cannot adequately be compensated by damages), the contractor will be able to obtain an injunction. (Compare Pearson Bridge (NSW) Pty Ltd v State Rail Authority (NSW) (1982) *1 ACLR 81*; followed in Selvas Pty Ltd v Hansen & Yuncken (SA) Pty Ltd and State Bank of South Australia (1987) *6 ACLR 36*.) Even if the contractor be denied an injunction, that is not to deny the aggrieved contractor's right thereafter to bring proceedings against the principal for breach of the construction contract in wrongly calling up the security but that takes a little longer than the monetary mechanism; and

(g) quantum meruit is probably the most attractive claim for contractors. It is also the nightmare of both principals and financiers.

Until comparatively recent times it was not, however, accorded a high probability of ultimate success; rather was it a threat and a bargaining tool. The fundamental rules are relatively simple. (Lawyers' distinctions between contractual quantum meruits, common law quantum meruits etc are perhaps not only unnecessary but confusing rather than clarifying for non-lawyers in the construction industry.)

Fundamentally the quantum meruit claim has virtually no prospect of success in the face of a contract which deals with price. Accordingly it is essential to remember that any existing construction contract which does deal with price must first be avoided. Hence the allegations of frustration, acceptance of repudiation or other rescission.

AS 2124-1992 attempts a contractual code for restoring the parties after frustration of contract, especially for those States which do not have frustrated contract legislation. The clause is optional and unfortunately does need some further drafting. More particularly, in respect of security,

> 45 Termination by frustration
> … the Principal shall pay the Contractor–
>
> (d) all retention moneys and security;

The clause does not really provide for other provisions about security, such as that in a form other than cash and security provided by the principal.

Collaterally, unjust enrichment is not a separate cause of action: Goliath Portland Cement Co Pty Ltd v McNalley Australia Pty Ltd (No 4) (unreported, 2 February 1993, Tas Sup Ct, Underwood J).

Furthermore, it is necessary to take what is for some a giant step away from contractual notions in order to understand the basis of the claim. No longer is it correct to think of it as quasi-contractual. Quite to the contrary, the twin sisters of restitution and unjust enrichment draw on fundamental principles of equity and morality. Consequently, all those involved in an unjust enrichment claim must look to the benefit to the party taking the materials and work.

So much is this latter aspect so that the common allegation by principals that the contract price nonetheless "capped" the quantum on a quantum meruit is wrong. At its highest, the pricing in any contract which has now gone (for all purposes) is no more than a guide as to what might be reasonable rates. Even that does not override the very important financial factor, viz unjust enrichment, pricing at the date the work was done, rather than the conservative and tightly competitive bid often some years earlier. Most contractors generally equate it to cost plus. That aspect is of course very attractive to him or her if he or she now with that "20-20" vision called "hindsight" realises that his or her pricing

of the tender could have been better; assuming of course that he or she did not underbid it. Yet again, even if he or she does have a rise and fall clause or other contract sum adjustment provisions, it was probably negotiated, whereby he is unlikely to receive 100% recovery – let alone sufficient profit element. The lawyer knows that it is usually quite difficult to set aside an existing contract in order to succeed on quantum meruit. However the High Court of Australia has revived some hopes on frustration, especially in promoting a favourable decision of the House of Lords over the previous obstacle in the form of a decision of the Privy Council as to whether an arbitrator has jurisdiction. (Codelfa Construction Pty Limited v State Rail Authority (NSW) (1982) *149 CLR 337* [PDF], preferring Heyman v Darwins Ltd *[1942] AC 356* (determination in futuro) to Hirji Mulji v Cheong Yue Steamship Co *[1926] AC 497*

(1996) 12 BCL 174 at 205

(void ab initio)). Sed quaere in Australia since the High Court of Australia held that the basis of quantum meruit is more restitution than quasi-contract (Pavey & Matthews Pty Limited v Paul (1987) *69 ALR 577*). A relatively narrow arbitration clause, that is "arising out of the Contract …" had previously been held by the High Court of Australia to be sufficient to ground an arbitrator's jurisdiction in quantum meruit. (Codelfa Construction Pty Ltd v The State Rail Authority (NSW) (1982) *149 CLR 337* [PDF].) Mason and Wilson JJ said:

it is a short step in circumstances such as these to find the claim for a quantum meruit consequent on a finding of frustration within the contemplation of the arbitration clause.

Avoidance of a contract by frustration semble still has sufficient nexus for the arbitration clause; especially if the underlying rationale of the doctrine of frustration be the implied term. Contra the dispute about whether the contract was ever concluded at all, such that a claim in quantum meruit in that situation is, since Pavey & Matthews Pty Limited v Paul above, beyond the arbitration clause; eg "all disputes, controversies or differences which may arise between the parties, out of or in relation to or in connection with the contract …" was probably still not able to embrace a claim in quantum meruit where the contract itself had not been made. (Bliss Corp Ltd v Kobe Steel Ltd (unreported, 29 September 1989 NSW Sup Ct, Smart J).)

There have of course also been some notable successes on the sparring between the parties as to who repudiated on whom. (Compare Cox v Franz (1987) *6 ACLR 35*; John Holland (Constructions) Pty Ltd v Bell Bros Pty Ltd (unreported, 11 July 1980, Full Ct, WA Sup Ct); Ownit Homes Pty Ltd v Batchelor *[1983] 2 Qd R 124* (insistence upon a wrong view of the facts beyond what is reasonable) and McLachlan v Ryan (1987) *4 BCL 155* (principal's failure to notify a reasonable time for completion yet failure to make payments due and notice of purported rescission in fact constituted repudiation).)

Although tactics may be fun, the primary objective is such that they should not become like that description of the game of cricket, albeit much loved by no less than Lord Denning:

You have two sides – one out in the field – one in. Each man on the side that's in goes out: and when he's out, he comes in and the next man goes in until he's out. When they are all out, the side that's been out comes in and the side that's been in goes out and tries to get those coming in out. Then when they're all out including the "not outs" that's the end of the game.

(Lord Denning, The Closing Chapter (1983), Butterworths.)

More particularly, the claimant needs, much earlier than most actually do:

(a) to identify;

(b) to distil; and

(c) to frame,

the particular claims available to him or her.

To take just a few illustrations, does the claimant have a claim in the following instances:

(a) intra the contract eg a latent conditions claim or other constructive variation? Yet again is he or she able to turn the superintendent's right and power into an obligation, from which the claimant/contractor can benefit? For example, AS 2124 and NPWC 3 contain a very, very wide definition indeed, viz in AS 2124.

"direction" includes agreement, approval, authorisation, certificate, decision, demand, determination, explanation, instruction, notice, notification, order, permission, rejection, request or requirement.

The astute claimant can claim that some such, seemingly, neutral, communication from the superintendent constituted a "direction" with monetary consequences. Alternatively, the claimant can claim that the circumstances of the project were such that a direction was both necessary and reasonable yet the superintendent failed to give it;

(b) despite the cynicism of those who seek to brush aside the claimant's implied term as being the pleader's last resort there have been some notable successes on it.
A contractor forced into two years' overrun ran the lack of due and proper information arguments. The judge held that the (Perini Corp v Commonwealth (1969) *2 NSWR 530*)

(1996) 12 BCL 174 at 206

implied terms were to be implied. Flowing on from the duty to co-operate the contractor argued for a third implied term to the effect that the architect would provide him with coordinated, full and correct information concerning the works. The judge held that "coordinated" and "full" were going too far and should be deleted for the term to be implied. Correctness was a question of degree but the judge did hold that the contractor was not under an obligation to *check* the drawings to see whether there were any discrepancies or divergences. (Stanley Hugh Leach Ltd v London Borough of Merton (1985) *32 BLR 51*.) Similarly there is an implied term to provide such information and in such manner and at such times as is reasonably necessary for the contractor to have in order to enable him to fulfil obligations under the contract: J & J Fee Ltd v The Express Lift Co Ltd *[1993] 34 Con LR 147*;

(c) too often construction people are blinded by the confusing collation of contractual chaos glibly called "the contract documents". If people retain that very valuable quality of in fact being able to see the wood for the trees, they will often find a collateral contract.
A principal indicated to a tendering contractor that it was the principal's intention to accept the tender. Various preliminary works had to be undertaken and the contractor requested the principal to provide an early letter of intent as a form of indemnity for the preliminary work to be performed prior to the execution of the contract. The contractor proceeded with the preliminary work after the principal wrote a letter to the contractor in which the principal expressed his intention to let the contract in due course. Formal contracts were never executed and the project was cancelled. The contractor claimed payment for the preliminary work. In the court's view the contractor's offer to carry out the preliminary work urgently was accepted by the principal providing the letter of intent. The contractor was accordingly held entitled to recover from the principal the cost of the preliminary work. (Turiff Construction Ltd v Regalia Knitting Mills Ltd (1971) *9 BLR 24*);

(d) similarly, but differently, quasi-contractual claims may be available even if collateral contract ones are not.
For some three and a half years after the contractor was told that he was the successful tenderer, the parties worked on alternative schemes, necessary consents and then even a drastically new proposal; all in a spirit of goodwill, co-operation and give-and-take. When the contractor rendered an account for $426,000 for work done to date, the proprietor refused to pay.
The court held that, subject to quantification of the expenditure, the contractor in such facts and circumstances was entitled to restitution or compensation. It was significant that the contractor, in reliance upon the assumption of both himself and the proprietor that they would be signing a formal contract, carried out gratuitously the work for the benefit of the proprietor's project to an extent beyond what would normally be expected as a fair thing on a tender. (Sabemo Pty Ltd v North Sydney Municipal Council (1977) *2 NSWLR 880* [PDF].) Similarly a restitution claim was upheld for work done upon request preparatory to a contract which was not consummated. (Marston Construction Co Ltd v Kigass *[1989] CILL 476*.);

(e) yet again, even more extra the contract, there can be little doubt that the tentacles of tort continue to reach out. The contractor claiming his money but presented with contractual obstacles (eg limitations or other time bars) is not the only one presented with a very attractive alternative claim in tort. Subcontractors and other similar potential plaintiffs are no longer thought to be too removed; eg aggrieved tenderers, subcontractors, subsequent purchasers and any one who qualifies as a neighbour by reasonable foreseeability (or Lord Wilberforce's "proximity" test).
Specialist flooring subcontractors were nominated. The principal had relied upon their specialist knowledge and experience. In accordance with the traditional chain of responsibility, the head contractor contracted with them as subcontractors. Their work was defective and had to be replaced.
The principal claimed directly against the nominated subcontractors.

(1996) 12 BCL 174 at 207

It was held that despite the absence of any privity of contract, the principal could recover on the basis that there was the requisite degree of proximity. This was so because the principal, in choosing them, had relied on the subcontractors' speciality and the subcontractor must have known that the principal so relied. (Junior Books Ltd v Veitchi Co Ltd (1983) *1 AC 520*); and

(f) there is also the increasing influence of Parliament. The Commonwealth in the Trade Practices Act 1974 strikes at both defects and negligence. Section 74 implies, in contracts for the supply of services by a corporation to a consumer, the implied warranty of due care and skill, together with the warranty that materials supplied will be reasonably fit for the purpose. Consistent with the common law principles, the warranties can be excluded where the circumstances show an absence of reliance or that it is unreasonable to have relied. The Supreme Court of Victoria has held that the situation is similar to the common law principles; especially where the defendant contractor had even sought to warn the plaintiff and, additionally, had gratuitously suggested improvements. (Anngar Timber Pty Ltd v PWP Constructions Pty Ltd (unreported, Vic Sup Ct, Fullagar J, 5 December 1979).)

Of greater concern is the prohibition on misleading or deceptive conduct or conduct likely to mislead or deceive found in ss 52 and 51A , with consequent damages (s 82); especially as the courts have now held that the Act is not restricted to consumer transactions (Jet Corp (Aust) Pty Ltd v Petres Pty Ltd (1983) *50 ALR 722* (Fed Ct, Northrop J); Lubidineuse v Bevanere (1985) *59 ALR 334*). More recently, the High Court of Australia has held that it is to be regarded as settled law that s 52 proceedings can be brought by other than a consumer. That is not to say, however, that regard cannot be had to the heading "Consumer Protection"; rather the law is that that heading does not dictate the limitations of s 52 proceedings. (Concrete Constructions (NSW) Pty Ltd v Nelson (1990) *92 ALR 193*.) "Even silence may be relied upon in order to show a breach of s 52 when the circumstances give rise to an obligation to disclose relevant facts" (per Rogers CJ in Vipal Kumar Mehta & Ranjana Mehta v Commonwealth Bank of Australia (unreported, NSW Sup Ct Comm Div, 29 June 1990), applying Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (1988) *79 ALR 83*; David Securities Pty Ltd v Commonwealth Bank of Australia (unreported, Fed Ct 11 May 1989) per Hill J at p 53; Rhone-Poulenc Agrochimie SA v UIM Chemical Services Pty Ltd (1986) *68 ALR 77*; and Kabwand Pty Ltd v National Australia Bank Ltd *[1989] ATPR 50*; "likely to mislead" are very, very wide words indeed. Parliament has recently opened the door even more widely. Whereas it had been fairly well established law that the liability under s 52 did not extend to representations about future matters, the very recent amendments reverse that (in s 51A):

For the purposes of this Division, where a corporation makes a representation with respect to any future matter (including the doing of, or the refusing to do, any act) and the corporation does not have reasonable grounds for making the representation, it shall be taken to be misleading.

Even worse, the statutory amendment provides a presumption (albeit rebuttable) that the maker of the representation did not have reasonable grounds for making the representation.

Furthermore, section 53A has been successfully relied upon in respect of false or misleading statements in contract documents implying, wrongly, an absence of fill. (Phillip & Anton Homes Pty Limited v The Commonwealth (1988) *7 ACLR 39*.)

The fair trading legislation of Victoria and other States (Fair Trading Act 1987 (NSW) ; Fair Trading Act 1985 (Vic)) is, prima facie, consumer protection legislation but its essence is virtually the same prohibition as in s 52 of the Trade Practices Act 1974 (Cth) (viz conduct that is misleading or deceptive or is likely to mislead or deceive). Accordingly those contemplating the possibility of claims against corporations can take their guidance from the comments above in respect of the *Trade Practices Act*, including especially the more recent decisions of the Federal Court noted above leaving open the applicability of such legislation to this context.

Similarly, although the Contracts Review Act 1980 is so far restricted to New South Wales,

most people did not contemplate it applying to the construction industry.

However, in Toscano v Holland Securities Pty Ltd (1985) *1 BCL 264*, Mr Toscano entered into a contract to carry out certain site preparation work with Kensington TV Pty Ltd (Kensington) on 8 March 1979. He did so as agent for an undisclosed principal, namely, a partnership consisting of himself and Mrs Toscano. On or about 17 September 1979 the business was transferred from the partnership to F Toscano Enterprises Pty Ltd. The Toscanos were the sole shareholders of that company. The site preparation work was completed in July 1980 and building work commenced towards the end of that year. In February 1981 subsidence of the ground occurred in the vicinity of two adjoining buildings in the course of construction, which resulted in distortion and cracking of partly completed walls. After various discussions and negotiations, Mr Toscano accepted liability. On 25 March 1981, the Toscanos each entered into a separate deed with Kensington and gave a mortgage over certain property to a related company, Holland Securities Pty Ltd. McLelland J held that any deed whereby an obligation is undertaken by a party thereto is a contract within the meaning of the Act. Having regard to all of the circumstances, the transactions of 25 March 1981 were unjust.

The responsibility of each of the parties involved

The contractual procedures are commendable in their characteristics of specifying procedures for identification, definition and hopefully a decision in respect of the dispute. However, common sense and communication should never be forgotten. The plain fact is that disputes fundamentally are concerned with not just paper and procedures, but with people.
Many of Australia's trading partners, and now Australia itself, are moving into a very different psychology of dispute resolution. This is especially so in respect of commercial disputes. The differences lie not just in the commercial community's desire to find an alternative to the time and cost of traditional litigation but, more fundamentally, in the different psychology.
Instead of the traditional adversarial, assertive and even aggressive allegations and attacks, the technique is negotiation. This negotiation is often on a constructive, co-operative and even collaborative basis, all designed to work to a joint solution.
Even positional bargaining is only the tip of the iceberg. True negotiation and similar alternative dispute resolution reach for the underlying nine-tenths by way of a party's needs and concerns. First it is necessary to frame the issues. It is desirable to frame them according to principles which should govern the dispute resolution (eg fairness). Because negotiation is not a single event but an on-going dynamic process, it is often necessary from time to time to re-frame the issues.
Next it is important to generate good emotions in the other side. Those emotions should include respect, confidence, trust and optimism. Break down barriers and build bridges. Early investment in relationships and building of trust is important if there has to be a change in tactics. It is very easy to move from the co-operative mode but it is virtually impossible to do the reverse.
Then it is necessary to acknowledge that tactics are involved. The three critical elements are:

(a) information – especially about one's own entitlements and about the other side's needs and concerns. One should know more about theirs than vice versa;

(b) time – it is very important to be under less time constraints, pressure and deadlines than the other party; and

(c) power – it should never appear that the other side has more power.

Traditional techniques are perhaps too concerned with making points. More enlightened techniques are often more effective because they are concerned with gaining information. Not only is the question more effective than the assertion but it also leads the other party to make unwarranted assumptions about one's needs. This technique of questions applies even where one thinks one already knows the answer. It also applies to the sometimes objectionable technique of answering a question with a question.
Similarly, silence can be very effective. It forces the other side to talk, even if only to break the ice.
Similarly, appropriately timed laughter can be very effective. If one laughs with the other party, rather than at the other party, it induces a cooperative atmosphere.
These various measures are all related to time. Time must be to one's advantage, not disadvantage.

(1996) 12 BCL 174 at 209

The more time one has, the less risks one has to take.
The risks in the negotiation process must be transferred or at least diffused.
These considerations and techniques should result in the other side feeling that they have more to lose in their investment of time and energy.
There must be a goal by way of resolution of the dispute and the process should be such as to move the other party to it. For example, very often it is better to make one's concessions early and then move towards detriments to the other party, which detriments will often be increasing. The reverse development is often seen as a sign of weakening.
With the impending and increasing detriments there should be awareness of a deadline at the end of the road. Deadlines must come at the end of the negotiation and have some reinforcement by way of legitimacy. They cannot be exposed as being empty threats.
The quintessence of determination of claims and resolution of disputes is respect, especially for the facilitator, conciliator, mediator and arbitrator. Procedures are important in gaining and maintaining confidence in the process.
A conciliation or like alternative dispute resolution clause making mandatory some interlocutory negotiations for settlement before litigation is valid. Breach of its provisions will be a breach of the fundamental term to co-operate.
If such a clause be drawn as a condition precedent to arbitration, it is valid on normal principles.
If it be drawn as a condition precedent to litigation, again it should be valid. However, Master Horton QC has held that such a breach of that fundamental duty to co-operate is nonetheless subordinated to the principle that the courts' jurisdiction be not ousted – sed quaere. With all due respect, it is trite law that such a condition precedent does not as a matter of law oust the courts' jurisdiction. (Allco (Steel) Queensland Pty Ltd v Torres Strait Pty Ltd (unreported, Qld Sup Ct, Master Horton QC, 12 March 1990).)
On the contrary, rather than treat an alternative dispute resolution provision as an agreement to agree, commercial courts to-day are prepared to enforce such a promise on the basis that it is not for a court to pre-judge what may happen in the alternative dispute resolution process: A W

A Ltd v George Richard Daniels (unreported, NSW Sup Ct, Rogers CJ Comm D, 24 February 1992). Absitprovisions in the parties alternative dispute resolution agreement for a preliminary ruling by the court, commercial courts to-day are loath to interfere during the alternative dispute resolution process before its result eg determination by an expert: Norwich Union Life Insurance Society v P & O Properties Holdings Ltd (1993) *13 EG 108*.

Promises of confidentiality can prove to be a myth and are often subject to mishaps. Construction industry people are usually promised confidentiality in the smorgasbord of dispute resolution processes being marketed to them. This is even more so in the market expansion for dispute management and dispute prevention.

Sadly, what is not disclosed to construction customers is the list of defects in such promises. Without legislation, the best that can be achieved is generally promises between the parties themselves. Without astute legal evidentiary arguments, the promised confidentiality is of little avail once a third party is involved in subsequent arbitration or litigation.

Frequently occurring instances of the problem include the subsequent involvement of a subcontractor, an insurer and anyone else who may be involved in a contest about whether or not any settlement even achieved in the earlier process was a reasonable one.

The various resolution procedures other than true arbitration include the following:

Negotiation The parties to the dispute should always keep the lines of communication open themselves, but human nature is such that they often need help. The addition of a neutral adviser as the third member of a "tribunal" comprising a top executive of each party can employ the benefits of both parents of such a hybrid. This "mini-trial" has been used successfully, largely in America, for resolution of lengthy and complex disputes. Legal representation is not excluded but preparation and presentation should be by those who are properly familiar with the subject matter, for example in-house legal officers or responsible executives of the parties. The technical rules of both procedure and evidence are generally not followed, although the advantages of the adversary system are maintained. Time for the presentation or hearing is strictly limited, for example two days. The respective senior executives of each party constituting the tribunal witness the strengths and weaknesses of each side's

case and then move into negotiation, assisted by the neutral adviser also constituting the tribunal.

Valuation The expert's own expertise, work and, for example, calculations provide a third party decision. It is usually not really in the nature of an arbitration in the quasi-judicial sense, although sometimes there is a blurring in the concept of the "look and sniff" arbitration or quality dispute. Most quality disputes are themselves however usually more than just valuations and do involve the basic aspects of arbitration. A valuation is an inquiry that presents a question to be answered on the basis of individual experience, expert knowledge, and personal inquiry and investigation. On the other hand, arbitration is an inquiry of a judicial kind that involves the determination of a dispute about existing rights according to an external objective standard or criterion. Nonetheless, the same or related issues may arise for determination in the course of both valuation and an arbitration, whereupon the method and legal consequences will be different. (Seabridge Australia Pty Ltd v JLW (NSW) Pty Ltd (1991) *95 ALR 147*.)

Appraisal This procedure is very similar to the attributes of "valuation" above but with some of the attributes of "assessment" below. The practicalities of the procedure are illustrated by rules suggested by Mr Philip J Davenport LLB, Legal Officer of the Public Works Department of New South Wales:

Rules for Resolution of Disputes by Independent Appraisal

The parties named in the schedule agree to submit the dispute outlined in the schedule for independent appraisal by the appraiser named in the schedule on the following conditions:

1. Within 7 days of the date of this agreement each party must lodge a deposit in the amount stated in the schedule with the appraiser.
2. Within 14 days of the date of this agreement the appraiser must nominate a time and place for the hearing suitable to the parties, which time shall not, without the consent of the parties, be more than 28 days after the date of this agreement.
3. At the time nominated for the hearing each party must appear before the appraiser and present orally or in writing or by a combination thereof that party's case.
4. Without the consent of the parties and the appraiser and upon such terms as may be agreed, the hearing must not be postponed or adjourned and must not exceed 5 hours in hearing time.
5. Within the said time constraints, the appraiser must give each party a fair opportunity to present his case.
6. A party may be represented by anyone other than a lawyer provided that with the consent of the parties any party may have legal representation.

7. The appraiser must finalise his opinion on the matters in dispute within 14 days after the completion of the hearing and must forthwith advise the parties in writing of his opinion and his reasons therefor.

8. Neither the agreement nor any opinion of the appraiser made pursuant hereto will prejudice any right of a party at any time to submit the same matters in dispute to arbitration or to litigation.

9. The appraisal is not an arbitration within the meaning of any legislation dealing with arbitration and the appraiser's opinion is not binding.

10. The appraiser will not be liable for negligence in the performance of his functions pursuant to this agreement.

11. No transcript will be made of the hearing but the parties and the appraiser may make notes.

12. The proceedings shall be without prejudice and any evidence given or statements made in the course of the hearing must not be used against a party in any other proceedings.

13. The sum of the deposits lodged by the parties must be disbursed by the appraiser as follows:

    13.01 If prior to the date fixed for the hearing, the dispute is settled or the appraiser is requested by the parties not to proceed, the appraiser will retain for himself 25 per cent of the sum of the deposits and must pay out the remainder in accordance with the joint request of the parties.

    13.02 If, on or after the date fixed for the hearing but before the appraiser

    (1996) 12 BCL 174 at 211

    finalises his opinion, the dispute is settled or the appraiser is requested by the parties not to proceed, the appraiser will retain for himself 50 per cent of the sum of the deposits and must pay out the remainder in accordance with the joint request of the parties.

    13.03 If the appraiser finalises and states his opinion in writing the appraiser will retain for himself 50 per cent of the sum of the deposits and must pay out the remainder as he decides is appropriate.

SCHEDULE

PARTIES (Print full names and addresses)

APPRAISER

OUTLINE OF THE DISPUTE

DEPOSIT PAYABLE BY EACH PARTY

DATE OF THIS AGREEMENT

SIGNATURES OF THE PARTIES

Assessment The expert third party assesses or decides the nature and extent of pre-existing rights and liabilities without conducting an inquiry of a judicial or quasi-judicial nature. Often he is trying to make a decision in order to avoid a full dispute arising, rather than judicially hearing and determining a dispute which has arisen.

However, there are dangers in confusion. In one well-known case (albeit before the Commercial Arbitration Act 1984 (Vic), s 27), the arbitration agreement gave the arbitrator or assessor a discretion somewhat similar to s 27 viz:

Any arbitrator appointed under the provisions of this agreement shall at his own discretion act as arbitrator or assessor. Where he considers that any question arising out of the dispute refers to the quality or value of any work or materials supplied he may act as an expert and arrive at and make his assessment in such manner as he considers fit. Where any question arising out of the dispute shall relate to the interpretation or existence of any agreement between the parties hereto then the arbitrator should act as arbitrator and allow the parties to appear before him and to produce witnesses and evidence to him relating to the dispute and on the evidence so given and on his own investigations and on any assessment which he may make arrive at his decision and make his award.

The Supreme Court of Victoria held that the unfortunate attempt to combine two basically different concepts, that is arbitration and assessment, resulted in the arbitration agreement not in fact being a submission to arbitration for the purposes of the then Arbitration Act 1958 (Vic) . More

particularly, arbitration does involve an inquiry in the nature of a judicial inquiry and, for example, the parties generally have a right to be heard if they so desire. On the other hand, the concept of an assessor and an assessment is more akin to that of an expert assessing or determining the nature and extent of pre-existing rights and liabilities, without conducting an inquiry in the nature of a judicial inquiry. Such latter concepts are more akin to valuation than arbitration. (Hammond v Wolt *[1975] VR 108*.)

Conciliation Conciliation is more the nature of pacification, winning over to goodwill and settlement of differences in a friendly and non-adversarial way. The conciliator is not necessarily impartial. He may have to get "beside" one party; and then the other. Consequently it is often unwise for the nominee/arbitrator to adopt the role of conciliator and thereafter try to salvage the role of the arbitrator. Compare:
The attributes of a mediator or conciliator are patience, a sympathetic understanding and a strong desire to assist the parties. How often have we heard of two commercial men in dispute, they have a friend and turn to him to mediate. The friend is successful in the task and the disputing parties leave the field friends, but shun the mediator for the rest of his life. So whoever takes up this task may expect some success in assisting disputants but may not win friends.

(Ronald Fitch , National President of The Institute of Arbitrators Australia in The Arbitrator, Vol 2, November 1983 p 86.)

Mediation The interposition of a third party is employed with a view to persuading parties that are experiencing differences to adjust their positions and settle their dispute. The mediator relies on assistance and persuasion rather than power to make binding decisions. The mediator, however, should be more at arm's length than the conciliator. The mediator should be impartial.

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