Journals

Partnering – think it through

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[This article is 5 pages in BCL]

(1997) 13 BCL 23

Wings are placed on the plane, not on the people – all so as to facilitate the plane to fly and to keep the people safe.
Similarly, partnering should be more than a facilitation of people and their relationships on a project under a construction contract. Succinctly put, the partnering should be part of the contract in order that it not crash. Short of that, the partnering relationship must at least be meshed with the construction contract.

Introduction

This article addresses what can go wrong in respect of partnering vis-a-vis the main contract.
More particularly, it addresses the quintessential issue of reconciling contract with conduct.

Partnering and contracts

while good faith is not yet an openly recognized contract law doctrine, it is very much a factor in everyday contractual transactions. To the extent that the common law of contracts, as interpreted and developed by our courts, reflects this reality, it is accurate to state that good faith is part of our law of contracts.
In this vein, a great many well-established concepts in contract law reflect a concern for good faith, fair dealing and the protection of reasonable expectations, creating a legal behavioural baseline.
"Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement". ((1981) Restatement (Second) of Contracts, American Law Institute.)
Everybody involved in the construction industry has improved, and can continue to improve, the contracting and construction of projects by:

(a) improved risk identification;

(b) improved risk allocation; and

(c) improved risk management.

There should not be a "blurring" of risk allocation and control of those risks between the parties.
Care should be taken to allocate risk in a clear and simple fashion.
Standard contracts should not be used unthinkingly. That is as bad as unintelligent copying of precedents.
On the other hand, the other end of the spectrum is even worse; viz prototypes of radical new brainchild ideas which are in danger of crashing on their first test flight.
The better solution lies in the balanced position between the two extremes. Underlying most of the standards is a long line of both principle and precedent. It is that principle, together with the reasons for the line of authority interpreting such provisions, which must be looked at and followed through.

Who is in the better bargaining positioning of knowledge, experience and competence? Is it the principal (together with his consultants) or is it the major contractor?
It is too simplistic simply to say that risk is best borne by him who can best bear it.
The facts are that we now have marked evidence of the documentation risk being shifted to tenderers. It is in the overall interests of the industry that that be at a price. Unfortunately tenderers tend to shave that price too finely. Even worse, perhaps they not only inadequately price it but also inadequately recognise that risk.
Drafting after careful consideration and with clearly expressed rights and obligations generally does not leave much room for argumentative interpretation, avoidance of obligations or dispute. On the contrary, it identifies and allocates obligations.

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The consulting professions must admit that specification writing and contract documentation are not their forte. (Indeed, some communicate better in figures than in words.) It is all very well for them to plead that this aspect was not their motive in becoming architects, engineers etc but that does not excuse their duty. Were it not for the fact that in practice very many documentation defects are rectified during the administration, they would be suffering much more. As it is, if the client does not thereafter claim against them, they still suffer the trauma of cross-examination and other criticism when arbitrators review their documentation (and administration).
Without such consultants having to be lawyers, the plain fact is that simply stapling together the historically relevant documents and correspondence, and with even unintelligent scissors and paste, produces a confusing, contradictory collation of paper conducive of disputes.
To take just one illustration:
I must say that the departure from traditional terminology in amending the well known clause …is not only anomalous but deplorable. It is like tipping an entirely gratuitous truck load of manure into this already sufficiently muddied stream. (In the Matter of an Arbitration between Taylor-Woodrow International Limited and the Minister of Health (1978) *19 SASR 1* [PDF].)
Time spent on preparation is seldom wasted.
It is really asking too much of all those involved in tenders and contract documentation to address their minds to, and make a decision on, when this risk shifts.
To take just one illustration, if changed statutory requirements increase the cost, what is the relevant cut-off date? Is it the date upon which the tenderer lodged his particular tender (not always the last day)? Is it the date of closing of tenders? Is it the date the formal contract documents are signed?
Whatever the parties choose, they must think about it and follow it through.
The industry, including its consultants, can do better. The construction contract draftsman's dilemma is between a comprehensive code and, on the other hand, evidence of agreed intentions on major substantive points. In connection with the latter, the construction industry's recent attempt to use "guidelines" is quite unsatisfactory.
The good construction contract must strike the appropriate balance between a rule book and agreements in principle. The latter is quite inadequate. This balance is all the more essential for standard contracts.
Concepts are commendable. Contractual provisions, especially as a standard, need to be clear, certain, competent, comprehensive, consistent and capable of being enforced.
A comparatively recent attempt to reconcile these competing desires, let alone solve the dilemma, is the culture of partnering. Partnering itself also needs to be thought through.
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 man's word being his 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

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arrangement was a contract binding on the other party but not upon himself.
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.
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 and so differently from their previous happy one.
This reversal of fortunes upon realisation of expectations and like benefits raises that ever-pertinent 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, co-operative 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.

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

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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 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.

Illustration

Government contracted out the construction, maintenance and operation of a motorway. The construction component was construct only and the general conditions of contract were based on AS 2124 (now to be AS 4000).
After award of the contract the principal suggested to the contractor that the project be partnered.
Two months later a one day workshop was held. Most of the site personnel who were going to be "at the coal face" attended and generally got on very well, especially over a very lengthy barbecue. Senior representatives of the principal and the contractor did not attend. Neither did the contract administrator nor the consultants attend.
At that workshop the principal's people said more than once that partnering would not change the legal relationships; rather it would "define the working relationships between the parties and the factors that would facilitate the successful completion of a successful project." One of the more senior officers of the principal also said: "Partnering is not a legal procedure but a formal recognition that every contract should include an implied covenant of good faith and fair dealing."
At the end of the workshop all present signed a "charter", which includes statements: "in partnership, we promise that we are committed to … trust … co-operation … minimum extra cost … maximising budget opportunities … no delays … no disruption … all so as to bring the project in within time and price".
Two months later the contractor told the contract administrator that it had been delayed for some four months in trying to obtain adequate resources for a specialist portion of the project, in that, despite the principal's and the contract administrator's insistence thereon, it was just not available in the industry. The principal intervened and told the contractor not to worry about it any more, in that the principal would now do that part of the contract work itself. The contract administrator did not issue a variation order to omit that work.
One month later the contractor encountered a latent condition. The contractor did comply with the contract in giving notice to the contract administrator. The principal intervened and told the contractor that the contractor might now use nearby borrow pits which were not previously to be available, thus (in the principal's opinion) solving the contractor's problem.
Six months further on the contractor gave formal notice to the contract administrator that the compounding of the above events had caused disruption and delay. The contractor claimed adjustments to the contract sum by way of compensation. Again the principal intervened and told the contractor that a particular programme deviation put forward by the principal would solve the contractor's problem.
Three months further on, the contractor made it clear to the principal and the contract administrator that it wished to commence litigation against the contract administrator. The contractor told the principal that a co-operative compromise would be for the principal to remove and replace the contract administrator.

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At one of the regular partnering review and evaluation meetings the principal's on-site champion said: "How come our last partnered project went so much better than this one? (You seem to have resourced down on this one.)"
The situation continued to deteriorate. The contractor made a formal claim, alleging, inter alia:

(a) a collateral contract, particularised as to the partnering charter;

(b) breaches of contract, particularised as to:

(i) an implied term to cause the contract administrator to co-operate where difficulties were encountered;

(ii) latent conditions;

(iii) programme deviations and adjustments to the contract sum; and

(iv) variations;

(c) misrepresentation;

(d) misleading representations and misleading conduct, particularised (allegedly without limitation) as to the workshop and the "charter";

(e) frustration, particularised as to contradictions between the construction contract and the partnering relationship;

(f) waiver of the contractual provisions for the benefit of the principal, including especially time bars on claims; and

(g) estoppel, including as a sword.

The claim goes on to claim relief by way of:

(a) an order that the contract be set aside and the contractor be entitled on a quantum meruit basis;

(b) in the alternative, damages.

In support of the claim the contractor argues, inter alia, that:

(a) the principal (including those for whom the principal is responsible) used an inappropriate and misleading contract delivery method, viz D & C would have been more appropriate; and

(b) partnering should have been suggested before tenders were invited or at least before the contractor's tender was accepted.

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Carter v Boehm (1766) *97 ER 1162*

In the Matter of an Arbitration between Taylor-Woodrow International Limited and the Minister of Health (1978) *19 SASR 1* [PDF]

Mellish v Motteux (1792) *170 ER 113*

Walford v Miles (1992) *2 AC 128*