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Collateral contracts and relationship contracting: Co-operation, teamwork, collaboration … disputation?

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This article considers those circumstances in which a collateral contract may arise in a construction project as a consequence of pre-contractual statements or terms. It does so by utilising a form of relationship contracting, known as "partnering", as an example. While partnering has been adopted with a greater degree of enthusiasm in the United Kingdom than in Australia, the approach of implementing a "partnering charter" as a side document to the main construction contract, serves as a useful illustration of the inherent dangers of collateral contracts. Consequently, the purpose of this article is to explore the issue of collateral contracts rather than draw any definitive conclusions as to the merits or otherwise of partnering.

Introduction

The physician can bury his mistakes, but the architect can only advise his client to plant vines. [1]

If anything, with the efflux of time, major construction projects have only become more complicated as new and increasingly sophisticated building materials and techniques are developed and deployed. This complexity has also had an effect on the intricacy of commercial and legal arrangements between parties to major construction projects, leading to greater risks and increased potential for disputation.

In response, considerable effort has gone into enhancing many types of traditional contracts through the development of a plethora of standard forms and the introduction of a diverse array of non-traditional contracting methods. These non-traditional methods include public private partnerships (or privately financed initiatives), early contractor involvement, partnering and alliancing, to name but a few.

In an attempt to tackle and contain such complexity, parties will often engage in various pre-contractual workshops and draw-up a range of documents to establish how they will collaborate during the project. These activities may take place both in advance of and during the formal stages of the project. For example, in the course of an initial conference the parties may agree and document a negotiation protocol setting out how each will work with the other to settle the main project agreements. Such a protocol may cover issues including the form of contract to be used, the main issues to be negotiated, where conferences will be held and who may participate in the dialogue.

Another example is a pre-contractual risk workshop where parties typically analyse the sorts of issues the project is likely to face and then draw up a risk allocation matrix. As the name suggests, this matrix is used to assign contractual and practical responsibility for these risks to either party.

On some occasions, these pre-contractual conferences, workshops, protocols and other documents are incorporated into the terms of the eventual contract between the parties. However, where this is not the case, and these pre-contractual oral statements or written terms sit in isolation, one party may seek to argue that they actually give rise to a collateral contract which exists alongside the main construction contract and otherwise alters the rights and obligations of the parties.

A particularly pertinent example of this may occur in relation to "partnering". This is a form of relationship contracting where the parties utilise a traditional form of construction contract but also

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draw up a "partnering charter" which flanks that contract with a series of motherhood statements concerning the conduct of the parties during the project. Partnering is particularly significant in relation to collateral contracts because the partnering charter is intended to co-exist with the main construction agreement.

This article considers the circumstances in which a collateral contract may arise in a construction project as a consequence of pre-contractual statements or terms. It discusses the law in relation to collateral contracts generally and utilises partnering as an illustration of the fundamental principles related thereto. As discussed below, partnering has not been adopted in Australia with the same gusto as in certain places abroad (particularly the United Kingdom). Accordingly, in the context of this article, partnering is intended be read as a demonstration of how the parties' conduct may inadvertently give rise to a collateral contract rather than espousing the virtues or vices of partnering per se.

Partnering generally

"Partnering" is a imprecise term used to cover a range of operational arrangements. It is generally directed at instituting a co-operative working relationship between parties to promote trust and confidence and reduce the adversarial nature of construction projects. As Colledge observes:

[P]artnering in construction is not a neatly defined concept. It can be merely an informal agreement that the parties will conduct their relationship with goodwill and co-operation or it may result in a longer-term contractual regime governing successive contracts. In each case, though, the philosophy of partnering is the same, in essence one of mutual trust and co-operation. It demands as a pre-requisite that the parties will work together towards the achievement of common aims. [2]

Its supporters claim that partnering allows the participants to align their strategic objectives and thereby realise the joint benefits of increased productivity and performance. To this end, Bennett and Jayes describe partnering as a:

set of strategic actions which embody the mutual objectives of a number of firms achieved by co-operative decision-making aimed at using feedback to continuously improve their joint performance. [3]

Similarly, Scott describes partnering as a "relationship between two or more companies or organisations which is formed with the express intent of improving performance in the delivery of projects". [4] Typically, the claimed benefits of partnering are realised by reducing the number of disputes between the parties and instituting a more collaborative approach to resolving any such disputes when they arise. In turn, it is claimed, this minimises the parties' recourse to arbitration or litigation and, consequently, increases the overall utility to the construction industry.

Partnering has been a popular form of relationship contracting in the United States and the United Kingdom since the mid- to late 1980s. While it received considerable interest in Australia in the mid-1990s, it has not been embraced with the same degree of enthusiasm across the Australian construction industry as it has abroad. Consequently, partnering has tended to be used in more limited circumstances and for more specialised projects in Australia than other forms of relationship contracting, such as alliancing.

Typically, a partnering relationship is commenced by way of a "partnering workshop", where the parties convene to discuss and agree the manner in which they will work together – either on a strategic or project specific basis. The outcome of the partnering workshop is usually a "partnering charter", which encapsulates the sentiments of the parties' relationship. This partnering charter sits alongside the "construction contract", which is usually a standard form agreement for building and construction work. The construction contract sets out the detailed rights and obligations of the parties in a more conventional form.

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This article is concerned with whether oral representations made at the partnering workshop (or similar pre-contractual meeting) or the written terms of the partnering charter, could constitute a collateral contract to the main construction agreement.

Collateral contracts generally

A collateral contract may arise where, prior to entering into the main agreement, one party makes a promise to another, the consideration for which is the execution of the main agreement. As Gibbs CJ observed in Hospital Products Ltd v United States Surgical Corp :

A representation made in the course of negotiations which result in a binding agreement may be a warranty – ie, it may have binding contractual force – in one of two ways: it may become a term of the agreement itself, or it may be a separate collateral contract, the consideration for which is the promise to enter into the main agreement. [5]

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Such representations may, of course, be written or oral. In the context of partnering, therefore, if representations are made at either the partnering workshop or in the partnering charter, it is possible that these could give rise to a collateral contract. As Tyrril remarks:
In most instances, the partnering charter would not meet the criteria of offer, acceptance and consideration to constitute a collateral or supplementary contract, which might amend the existing contractual rights and obligations or create new, enforceable rights and obligations. But that potential is there if the partnering charter is mishandled … Certainly, there have been allegations in pleadings of collateral contracts arising from the terms of the partnering charter and that the contractor has rights in relation to it at odds with the terms of the contract. [6]
However, the courts have generally been disinclined to uphold the existence of collateral contracts unless there are persuasive reasons for doing so. As Seddon and Ellinghaus note:
[T]he courts are often reluctant to hold that such a collateral contract was made. The courts have therefore emphasised that statements put forward as collateral contracts must be promissory and not merely representational. Moreover, the High Court has … adhered to the rule that a collateral contract cannot be inconsistent with the main contract, thereby severely inhibiting the ambit of its operation. [7]
Accordingly, in determining whether statements made at a partnering workshop or terms contained in a partnering charter could give rise to a collateral contract, it is necessary to consider whether the statements or terms:

(a) are promissory or merely representational;

(b) were given and agreed to in consideration for entering into the main construction contract; and

(c) are inconsistent with the terms of the main construction contract.

Are the statements or terms promissory?

The intentions of the parties

Gibbs CJ, in Hospital Products , noted that, in order for a collateral contract to arise, the statement on which the contract is based must be promissory rather than merely representational. His Honour observed that the "question whether the representation creates a binding contractual obligation depends on the intention of the parties". [8] This is consistent with one of the fundamental tenets of the law of contract in that parties must intend to create legal relations in order to give rise to binding obligations. [9]

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In Gates v City Mutual Life Assurance Society Ltd , [10] the High Court was asked to consider, inter alia, whether statements made by a representative of an insurance company, which subsequently proved to be false, could amount to a collateral contract. Relevantly, the High Court discussed the need for promissory statements to possess the requisite contractual intent. The High Court posed the problem as follows:
The question whether the statements constituted a collateral contract depends on the intention of the parties: Heilbut, Symons & Co v Buckleton *[1913] AC 30*. In the present case the statements were not promissory in form - they purported to be descriptive or explanatory of one of the terms of the formal written contracts into which the parties proposed to enter. I find it impossible to say that either of the parties actually intended that the statements should constitute a term of the contracts between them or (if it matters) that an objective inference can be drawn that they did so intend. The statements were representations and nothing more. [11]
The High Court dismissed the appeal holding that "[t]he conclusions of the Full Court of the Federal Court that the statements had no contractual force is plainly correct". [12]
When querying whether a statement was intended to be promissory, as the High Court held in Hospital Products , [13] such intent is to be objectively determined rather than looking to the subjective intentions of the parties. In Storer v Manchester City Council , Lord Denning MR observed:
In contracts, you do not look into the actual intent in a man's mind. You look to see what he said and did. A contract is formed when there is, to all outward appearances, a contract. A man cannot get out of the contract by saying, "I did not intend to contract" if by his words he has done so. His intention is to be found only in the outward expression which his letters convey. If they show a concluded contract, that is enough. [14]
In Ellul v Oakes , [15] the Supreme Court of South Australia was asked to consider whether the purchaser of a property was entitled to damages for breach of contract because the description of the property did not match its actual condition – that is, the property was incorrectly

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described as being "sewered". The court held that the representation did amount to a warranty, entitling the purchaser to damages. It was of no significance that the seller did not subjectively intend to mislead the purchaser. Bray CJ held that:
[T]rue, the [seller] did not subjectively intend that it should be a term of the contract that he warranted that the property was sewered. But I think a reasonable man would conclude from the [his] statements … that he was so warranting … I think he did intend that the statements in the form should go out to the world as an accurate description of the property and be accepted as such by potential purchasers. [16]

In Pacific Carriers Ltd v BNP Paribas , [17] the High Court also considered the need to determine contractual intent objectively. This case concerned the transport of cargo from Sydney to Calcutta. When the goods arrived at their destination, a bill of lading was not produced and the appellant refused to unload the goods without a letter of indemnity. The vendor prepared such a letter, which was subsequently signed by a representative of the respondent bank's credit department. The representative believed she was to merely authenticating the vendor's signature rather than making any "promise" on behalf of the bank. The vendor contended that the bank had endorsed the letter and so accepted liability as an indemnifier.
The court was asked to determine the proper construction of the letter of indemnity and whether the bank was liable. Gleeson CJ and Gummow, Hayne, Callinan and Heydon JJ held that:

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The case provides a good example of the reason why the meaning of commercial documents is determined objectively: it was only the documents that spoke to Pacific. The construction of the letters of indemnity is to be determined by what a reasonable person in the position of Pacific would have understood them to mean. That requires consideration, not only of the text of the documents, but also the surrounding circumstances known to Pacific and BNP, and the purpose and object of the transaction. [18]
The court considered that the text of the letter and the surrounding circumstances, objectively construed, suggested that the bank was undertaking an obligation of indemnity.

In Australian National Nominees Pty Ltd v GPC No 11 Pty Ltd , [19] the defendants provided an "information memorandum" in relation to a proposed lending arrangement for a commercial development. The plaintiffs entered into a loan agreement by way of "promissory notes". These notes did not incorporate the terms of the information memorandum by reference. The plaintiffs argued that the information memorandum constituted a collateral contract.
Einstein J held that the information memorandum was merely representational and, consequently, no collateral contract could arise. His Honour noted that such a conclusion was to be drawn from the objective intentions of the parties, citing the "intelligent bystander" test espoused by Lord Denning in Oscar Chess Ltd v Williams as follows:
The question whether a warranty was intended depends on the conduct of the parties, on their words and behaviours, rather than on their thoughts. If an intelligent bystander would reasonably infer that a warranty was intended, that will suffice. [20]
His Honour also noted that, while the promoters' conduct was clearly intended to mislead and deceive, this was not a relevant consideration when determining whether the statement was intended to be promissory. Einstein J noted that "[e]ven the existence of fraudulent intent on the part of the representor in making the statement is insufficient to establish that the statement operated as a contractual warranty". [21]
Some of the factors leading his Honour to a conclusion that the information memorandum was merely representational included:

(a) the promissory notes were complete on their faces;

(b) the information memorandum contained "general terms", which were not detailed enough to give rise to specific obligations;

(c) the information memorandum was drafted in the future tense, which his Honour concluded was not intended to be immediately binding on the parties; and

(d) the promissory notes did not attempt to incorporate the terms of the information memorandum by reference. Conversely the promissory notes stated that: "The issuer has agreed with the Noteholder to issue this Note *on the terms contained below* ".

For these reasons, his Honour determined that: "I am unable to discern an objective intention that the words upon which the plaintiffs rely were promissory over and above being representational." [22]
Similar to the position in Australian National Nominees , in the context of partnering it would be usual for:

(a) the construction contract to be complete on its face;

(b) the partnering charter to be drafted in terms of general obligations, such as a duty to co-operate; and

(c) the construction contract not to incorporate the terms of the partnering charter by reference.

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These factors may suggest that an intelligent bystander would reasonably infer, as Einstein J found in the context of the information memorandum, that a partnering charter is merely representational and, accordingly, would not give rise to a collateral contract.

Oral statements made at the partnering workshop

It is not uncommon for an aggrieved commercial party to claim that an oral statement made prior to entering into a contract was promissory and, consequently, should be construed by the court as a collateral warranty. The Bench's scepticism for such claims, however, appears to be directly proportional to the frequency with which they are pleaded.

For example, in Ross v Allis-Chalmers [23] the appellant (Ross) purchased a combine harvester from Allis-Chalmers, which he intended to finance by way of contract harvesting. Ross claimed that the area manager of Allis-Chalmers (Preston) made various representations to Ross concerning the performance of the harvester, including that: "my own experience with our machine is you should budget on 90 acres per day." Ross claimed that this representation amounted to a collateral warranty. When the machine failed to perform to that standard, Ross sought to recover damages for a breach of warranty.

The High Court held that Ross "must show that the statement relied on as a pre-requisite to entering the contract was 'promissory and not merely representational', that is, it was a promise –however expressed, whether as an assurance, guarantee, promise or otherwise". [24]

Ultimately the court concluded that Preston's statements were not promissory but merely recounted the results of his own experience. Stephen, Mason and Wilson JJ held that:

when taken in their context, these words amount to no more than a statement of Mr Preston's opinion, based on his experience with his own machine and made in order to help the appellant with his budgeting calculations. It has about it that tentative character that belies any of the indicia of a promise or assurance.

In the case of a partnering workshop, it is usual for the parties to focus on their anticipated strategic approach to undertaking the proposed project. This typically involves brainstorming and discussing concepts at a tactical or managerial level. Consequently, it may be argued that the context of the workshop suggests that the parties intend the discussions to act as a precursor to entering into the partnering charter and the construction contract. This is, of course, consistent with the use of the terminology "workshop" to describe the process.

As such, statements made at a partnering workshop are less likely to have the "indicia of a promise or assurance". Accordingly, such statements are less likely to be construed as promissory and are more plausibly viewed as part of the factual matrix of the background negotiations between the parties. Naturally, however, this assumption will be dependent on the actual statements made by the parties at the meeting. If statements are made at the workshop which, viewed objectively, are promissory, then such statements may give rise to a collateral warranty.

Written terms of the partnering charter

In the case of a partnering charter, one must look to the terms of the charter itself in order to ascertain whether the parties objectively intended the charter to be promissory. Unlike family or domestic arrangements, in commercial agreements (which construction projects obviously are) it is generally presumed that the parties intend to create legal relations. This presumption will rarely be rebutted [25] and usually such refutation only occurs where the parties have either expressly stated that they do not intend to create legal relations or, when objectively determined, this may be implied. As Graham J observed in Ku v Song :

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It is quite possible for parties to come to an agreement by accepting a proposal with the result that the agreement concluded does not give rise to legal relations. The reason for this is that the parties do not intend that their agreement should give rise to legal relations. This intention may be implied from the subject matter of the agreement, but it may also be expressed by the parties. In social and family relations such an intention is readily implied, while in business matters the opposite result would ordinarily follow. However, even in business matters, there can be no reason why the parties should not intend to simply rely on each other's good faith and honour. If they clearly express such an intention, there can be no reason in public policy why effect should not be given to it. [26]

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In the case of the partnering charter, the transaction will be a business transaction. Accordingly, consistent with the position in Ku v Song , there may, prima facie, be a presumption that the terms of the partnering charter are intended to be promissory.
However, a partnering charter will often contain an express term that the document is intended to be "non-binding", as is the case under the JCT Standard form of non-binding partnering charter. Where this is the case, such a statement will constitute a formidable bar to a claim that the parties intended that the charter would be promissory. For this reason, combined with the similar indicia as those in Australian National Nominees , it is unlikely that the partnering charter will be viewed as promissory such to give rise to a collateral contract (unless there are express terms to the contrary).

Is there adequate consideration?

If, however, one is able to establish that statements made at the partnering workshop or terms of the partnering charter are promissory, it then becomes necessary to establish that there is the requisite consideration to give rise to a collateral contract. Such consideration is usually by way of a promise to enter into the main contract.

For example, in JJ Savage & Sons v Blakney , [27] the High Court was asked to consider whether the terms of a letter written by a vendor could amount to a warranty in a subsequent contract of sale. In this case, Blakney bought a 33-foot fibreglass cabin cruiser from JJ Savage & Sons. Prior to the sale, Savage made a written recommendation to Blakney that, by including a particular type of motor, the boat would be capable of an "estimated speed of 15 miles per hour"; however, the contract of sale did not contain a similar term. Once the boat was delivered, it was discovered that the estimated speed was not achievable. Blakney asserted that the pre-contractual statement constituted a collateral warranty and sued Savage for damages. The Full Court of the Supreme Court of Victoria [28] posed the problem as follows:
[T]he statement was made in a document which was not part of the contract itself and in order to be a collateral warranty, for the beach of which the plaintiff would be entitled to damages, it is necessary for the plaintiff to establish either that the warranty was given in consideration of the making of the contract or that without the warranty the contract would never have been made. [29]
The High Court, while coming to a different conclusion (and allowing the appeal), endorsed the approach of the Full Court, holding that:
So far from being a promissory expression, "estimated speed 15 mph." indicates, in our opinion, an expression of opinion as the result "of approximate calculation based on probability" to use the dictionary equivalent of "estimate" referred to by the Full Court … The words in themselves tend, in our opinion, against the inference of a promise that the boat would in fact achieve the nominated speed. [30]

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The High Court recognised that, not only does the statement need to be promissory but, in order for the promise to be effective, as a matter of law, there needs to be consideration. As the name suggests, in a collateral warranty the consideration is typically the entry into the main contract. The High Court framed this two-stage analysis as follows:
The question is whether there was a promise by the appellant that the boat would in fact attain the stated speed if powered by the stipulated engine, the entry into the contract to purchase the boat providing the consideration to make the promise effective. The expression in De Lassalle v Guildford (1901) *2 KB 215* at 222] that without the statement the contract in that case would not have been made does not, in our opinion, provide an alternative and independent ground on which a collateral warranty can be established. Such a fact is but a step in some circumstances towards the only conclusion which will support a collateral warranty, namely, that the statement so relied on was promissory and not merely representational. [31]
Thus, in this case, it was argued that Savage promised Blakney that the boat would obtain the required speed, in exchange for which Blakney entered into the main contract for the purchase of the boat. Therefore, it was argued that the promise in relation to the speed of the boat gave rise to a collateral contract. However, the High Court held that the pre-contractual statement was merely representational rather than promissory and, accordingly, could not give rise to a collateral warranty.
In the case of partnering, one would need to argue that either the contractor's or the principal's promise to co-operate and otherwise act in accordance with the partnering charter, was made in consideration for entering into the construction contract. Just as the promise concerning the speed of the boat related to a performance characteristic of the main contract, it is arguable that the promises in the partnering charter relate to the parties' performance under the construction contract. On this basis, it is arguable that the partnering charter was the inducement to enter into the construction contract. Unlike the case in Savage v Blakney , in the context of partnering, it is arguable that the promises in the partnering charter are bilateral rather than unilateral. However, as with Savage v Blakney , it may be difficult to establish that the terms of the partnering charter are promissory – for the reasons discussed above.

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What if the terms of the partnering charter are replicated in, or inconsistent with, the terms of the construction contract?

Even if it is possible to establish that the terms of the partnering charter (or representations made at the partnering workshop) are promissory (which may be difficult for the reasons set out above), it will be necessary to consider whether these terms (or representations) are:

(a) replicated in; or

(b) inconsistent with,

the express provisions of the construction contract.

Were either of these situations to occur, it is likely that the terms of the construction contract will prevail. As Seddon & Ellinghaus note:

[T]he High Court has throughout – and despite trenchant criticism – adhered to the rule that a collateral contract cannot be inconsistent with the main contract, thereby severely inhibiting the ambit of its operation. [32]

Where the terms of the collateral contract are replicated in the main contract

Where the terms of the collateral contract are replicated in the main contract, the terms of the main contract will prevail and no separate liability under the collateral contract will arise. This occurred in Osric Investments v Woburn Downs Pastoral , [33] which was a case concerning a cattle sales scheme. In this case, the Federal Court found that certain pre-contractual statements were promissory in nature; however, they did not give rise to a separate collateral warranty because those statements were duplicated in the eventual contract between the parties. Drummond J held that, while certain

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statements were promissory in character, they were:

merely paraphrases of contractual obligations undertaken by the relevant … respondents to the applicant under the various Agreements ultimately entered into and so cannot provide a source of contractual liability additional to that arising from the promises to the same effect contained in the executed Agreements. [34]

His Honour, citing De Lassalle v Guildford [35] as authority, concluded that:

I do not think that any liability in contract can arise on what would otherwise be a warranty collateral to an agreement when *exactly the same subject matter* of the collateral warranty is the subject matter of a promise in the agreement. [36]

Accordingly, where statements are made at a partnering workshop or the terms of a partnering charter are replicated in the construction contract, contractual liability will arise from the construction contract rather than from any collateral contract. Consequently, any claim for breach of that term should be brought under the construction contract rather than under the collateral warranty. Furthermore, if the terms of the collateral warranty are wholly covered by valid and enforceable terms of the construction contract, it is unlikely that any collateral warranty could exist in parallel to the construction contract.

This will apply equally to express as well as implied terms of the construction contract. Thus, if the construction contract contains an implied duty to cooperate and act in good faith, it is likely that that term will render nugatory any such duty under the partnering charter (which is one of the most common provisions of a partnering charter).

However, as Drummond J noted in Osric Investments , the term under the collateral contract must relate to exactly the same subject matter as that covered in the main agreement. Accordingly, where the terms relate to generally the same issues, this may not be sufficient for the main contract to supersede the collateral warranty.

In relation to partnering, the partnering charter is likely to cover generally the same subject matter as the construction contract. For example, both are likely to address obligations in relation to the time to complete the work. However, the obligations under the construction contract are likely to be much more specific than under the partnering charter. For example, the partnering charter may state that the parties shall carry out the work "cooperatively and with due expedition"; whereas the construction contract may require the contractor to achieve practical completion by the date for practical completion. In this case, while the general topic is equivalent, the terms are not exactly the same. Consequently, if the terms under the alleged collateral contract (the partnering charter) do not relate to exactly the same subject matter as under the main agreement (the construction contract), then it is arguable that both obligations are likely to coexist.

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Where the terms of the collateral contract are inconsistent with the main contract

It is a long-standing rule of the common law that where a term of a collateral contract is inconsistent with a term of the main contract, the main contract shall prevail to the extent of that inconsistency. This was recognised in Australian jurisprudence in Hoyt's Pty Ltd v Spencer . [37]
In this case, Hoyt's leased a building from Spencer for a period of four years to use as a motion picture theatre. The terms of the lease allowed Spencer to terminate the lease upon four weeks' written notice. Hoyt's argued that it entered into the lease in consideration for a promise given by Spencer that it would not exercise its rights to terminate under the lease. When Spencer terminated the lease, Hoyt's brought an action against Spencer for a breach of the collateral warranty. The High Court held that the collateral contract and the terms of the lease could not consistently stand together.

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Consequently, the collateral contract was invalid and unenforceable. Knox CJ observed:
A distinct collateral agreement, whether oral or in writing, and whether prior to or contemporaneous with the main agreement, is valid and enforceable even though the main agreement may be in writing, provided the two may consistently stand together so that the provisions of the main agreement remain in full force and effect notwithstanding the collateral contract. [38]
Further, Isaacs J held:
The truth is that a collateral contract … cannot impinge on [the main contract], or alter its provisions, or the rights created by it; consequently, where the main contract is relied on as the consideration in whole or part for the promise contained in the collateral contract, it is a wholly inconsistent and impossible contention that the other party is not to have the full benefit of the main contract as made. [39]
This issue was subsequently considered by the High Court in Maybury v Atlantic Union Oil Co Ltd . [40] This case concerned a number of written agreements for the broadcasting of "packages" of advertising material on a network of radio stations. Atlantic Union sued Maybury for moneys owing under the written agreements. Maybury counter claimed for breach of an oral collateral contract. The High Court found that the collateral contract was not consistent with the terms of the written agreements and, consequently, held it to be unenforceable. Dixon CJ and Fullagar and Taylor JJ held that if:
a collateral contract is to have effect as a contract it must be consistent with the provisions in the main agreement, the making of which by the other party provides the consideration. If the promise sought to modify, control or restrict the principal agreement it would detract from the very consideration which is alleged to support the promise. [41]
In State Rail Authority of NSW v Heath Outdoor Pty Ltd , the Supreme Court of New South Wales was asked to consider whether oral assurances made during pre-contractual negotiations could amount to a collateral contract. McHugh JA held:
…it is not possible to conclude that the assurances amounted to a collateral contract, since the terms of the assurances contradict the terms of condition 6: Hoyt's Pty Ltd v Spencer . The main contract can be the consideration for a collateral contract only when the terms of the collateral contract do not reduce or alter the rights created by the main contract. [42]
The High Court also had an opportunity to consider inconsistent collateral contracts in Gates v City Mutual Life Assurance Society Ltd . [43] This case concerned representations made by an insurer in relation to benefits for a total disability insurance policy. The plaintiff asserted that the representations gave rise to a collateral contract under which he was entitled to certain benefits not otherwise set out in the insurance policy. The High Court held that the representations were not promissory and, in any event, were inconsistent with the terms of the insurance policy. As such, the terms of the main contract prevailed over the terms of the collateral contract. Gibbs CJ, while finding that the terms were not intended to be promissory, went on to hold that:
Even if a different view had been taken on the question of intention, the alleged contractual agreement constituted by the statements could not stand consistently with the main written agreement and for that reason, according to established authority in Australia (including Hoyt's Pty Ltd v Spencer and Maybury v Atlantic Union Oil Co Ltd), could not be enforced. [44]
More recently, in Equuscorp Pty Ltd v Glengallan Investments Pty Ltd [45] the High Court reaffirmed the approach to inconsistent contracts established in Hoyt's Pty Ltd v Spencer. Equuscorp

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concerned a venture to develop and operate an aquaculture farm in Queensland (primarily for the production of crayfish). The respondents wished to invest in the venture and executed a written loan agreement. When the project failed, the applicant (as the assignee of the loan debts) sought to call upon the loans. The respondents claimed that the written agreement was subject to an earlier oral agreement with the original lender whereby the amount payable in the event of default was limited. The High Court held that:

The respondents each having executed a loan agreement, each is bound by it. Having executed the document, and having been induced to do so by fraud, mistake, or misrepresentation, the respondents cannot now be heard to say that they are not bound by the agreement recorded in it. The parol evidence rule, the limited operation of the defence of non est factum and the development of the equitable remedy of rectification, all proceed from the premises that a party executing a written agreement is bound by it. [46]

The High Court ultimately rejected Glengallan's argument and held that the terms of the written loan agreement prevailed over the oral agreements. However, the High Court did recognise a number of exceptions to this general rule. In particular, their Honours noted the possibility of a contract being party oral and partly written, but observed that wasn't the case in Equuscorp because the "oral limited recourse terms alleged by the respondents contradict the terms of the written loan agreement". [47] Consequently, the court observed that if "there was an earlier, oral, consensus, it was discharged by the parties' agreement recorded in the writing they executed". [48]

Accordingly, in a partnering context, where the terms of the construction contract are inconsistent with the terms of the partnering charter, it is likely that the construction contract shall prevail to the extent of any such inconsistency. In practice, the partnering charter is likely to set out a number of obligations in very general terms. Most of these issues are then likely to be addressed much more specifically under the construction contract. For example, the partnering charter in Birse Construction Ltd v St David Ltd , [49] required the parties to "work towards zero defects". However, the construction contract required the contractor to rectify all defects as they were discovered. Consequently, in this case, the general bilateral obligation in the partnering charter is likely to be superseded by the more specific unilateral obligation in the construction contract. Where this occurs, the obligations in the partnering charter which are inconsistent with the construction contract, will be rendered nugatory – thus undermining the utility and effectiveness of the partnering charter.

What is the effect of an "entire agreement" clause in the construction contract?

Assuming that it is possible to establish that a partnering charter constitutes a collateral contract, another consideration is the function and effect of an entire agreement clause contained in the construction contract. It is usual for commercial agreements to include an entire agreement clause. For example, a standard form of Australian construction contract (PC-1 1998) contains an entire agreement clause as follows:

This Contract constitutes the entire agreement and understanding between the parties and will take effect according to its tenor despite:

(i) any prior agreement in conflict or at variance with the Contract; or

(ii) any correspondence or other document relating to the subject matter of the Contract which may have passed between the parties prior to the Award Date and which are not included in the Contract. [50]

(2008) 24 BCL 224 at 235

The purpose of these types of entire agreement clauses is, essentially, to specify that the written document (or documents) setting out the understanding of the parties contains the whole of their agreement – so that the parties cannot, thereafter, resort to earlier documents or remarks and claim that these are part of the contract.

Lightman J in Inntrepreneur Pub Co (GL) v East Crown Ltd , flamboyantly described the purpose of an entire agreement clause as preventing a party from "threshing through the undergrowth and finding in the course of negotiations some (chance) remark or statement (often long forgotten or difficult to recall or explain) on which to found a claim". [51] Similarly, Mitchell states that "[t]he ostensible function of the [entire agreement clause] … is to prevent any further *contractual* obligations arising outside the terms of the agreement". [52]

In the context of partnering, it is common for the construction contract to contain an entire agreement clause. Consequently, it becomes important to consider the effect the entire agreement clause may have on the partnering charter.

It is arguable that, if the partnering charter is intended to be non-binding, it is an entirely separate document to the construction contract and is not a collateral contract. As such, the entire agreement clause would not extend to the partnering charter and, instead, would operate to preclude it from having an effect on the construction contract.

Alternatively, if the partnering charter is held to be a collateral contract, one must consider whether the entire agreement clause:

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(a) extends to, and includes, the collateral partnering charter, in which case the terms of the partnering charter would not be excluded; or

(b) only covers the construction contract, in which case the terms of the partnering charter would be excluded.

The answer to these questions will be a matter of contractual interpretation, in light of the circumstances of the transaction as a whole.
In support of the first proposition, it may be argued that since collateral contracts are only enforceable to the extent that they are not inconsistent with the main contract, they should be viewed merely as an extension of the main contract. In which case, the entire agreement clause should be interpreted as naturally including all collateral contracts. This approach is favoured by Peden and Carter who note that:
Arguably, if the [entire agreement] clause refers expressly to collateral contracts that should be a sufficient statement of intent that a collateral contract may not be put forward as an additional express term of the bargain. But if there is no express reference to collateral contracts, it seems odd to regard a clause in the main agreement as effective to prevent enforcement of a collateral contract. At least in cases where the alleged collateral contract was contemporaneous with the main contract, it would seem logical to infer that the parties intended the collateral contract to operate because otherwise the very reason why one party entered into the main contract – the willingness of the other to enter into the collateral contract – would count for nothing. [53]
Alternatively, it may be argued that since an entire agreement clause is designed to isolate the manifestation of the parties' bargain, such a clause should be read so as to refer to the main contract only. Consequently, this will effectively render any collateral contracts unenforceable. Judicial support for this approach may be found in England in cases such as Inntrepreneur Pub Co (GL) v East Crown Ltd ; [54] and Deepak Fertilisers and Petrochemicals Corp v ICI Chemicals & Polymers Ltd . [55] As Mitchell observes:

(2008) 24 BCL 224 at 236

In Alman v Associated News [Alman v Associated Newspapers *(CH D, unreported, 20 June 1980)*] the [entire agreement clause] was to the effect that the written contract constituted "the entire agreement and understanding between the parties with respect to all matters therein referred to". The judge accepted that such a term could exclude any collateral contracts and warranties arising out of the parties' bilateral understandings, but not as a matter of construction, a claim for misrepresentation. [56]
In the case of partnering, if the partnering charter is held to be a collateral contract this is most likely to be because the terms of the partnering charter are promissory and not inconsistent with the terms of the construction contract. In which case, it is arguable that the parties intended for the partnering charter to form part of the contractual matrix comprising the parties' relationship. Where this is the case, it is arguable that an entire agreement clause in the construction contract should not be interpreted so as to exclude the terms of the partnering charter.
Conversely, it could be argued that the terms of the partnering charter are so general in nature (suggesting that they are merely representational, as was the case in Australian National Nominees) that they should not be construed as part of the contractual matrix. Consequently, the entire agreement clause could be interpreted as excluding the terms of the partnering charter in this situation.
Ultimately, the appropriate interpretation will be a question of fact having regard to the context of the transaction as a whole. However, it is submitted that, given the non-binding context of the partnering relationship, there should be a strong presumption that the inclusion of an entire agreement clause in a construction contract should operate to exclude the terms of the partnering charter.

Conclusion

If the partnering charter is found to be a collateral contract, it may give rise to separate and enforceable obligations on the parties in addition to those set out in the construction contract.
In order for the partnering charter to constitute a collateral contract, it will be necessary to establish that the terms of the charter are promissory rather than merely representational. Whether the terms are promissory will depend on the objective intentions of the parties (which may be ascertained by reference to a reasonable bystander). That is, the actual or subjective intentions of the parties is irrelevant. In the context of partnering, the fact that:

(a) the construction contract sets out all of the rights and obligations of the parties, that is, the construction contract is complete on its face;

(b) the partnering charter normally sets out terms in a general and non-specific way; and

(c) the construction contract typically does not incorporate the terms of the partnering charter by reference,

suggest that the terms of the partnering charter may objectively be interpreted as representational rather than promissory.

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Further, where a partnering charter is expressed to be "non-binding", as is commonplace, this may raise a strong presumption that the partnering charter was not intended to be promissory. Additionally, the fact that the construction contract may, in many respects, deal with the same or similar subject matter to the partnering charter but in greater detail, may suggest that the partnering charter was intended to be merely representational.

While it may be possible to argue that a partnering charter is adequate inducement to enter into the main construction contract, if an entire agreement clause is included in the construction contract, this may raise a strong presumption that the terms of the partnering charter should be excluded.

At the end of the day, it will be a question of fact whether the objective intentions of the parties give rise to an enforceable collateral contract in the form of the partnering charter. However, on the basis of the indicia set out above, it is submitted that a court should be wary of construing a typical partnering charter as a collateral contract in the absence of extenuating circumstances to the contrary.

(2008) 24 BCL 224 at 237

As a precautionary measure, if the parties to a partnering relationship wish to prevent the partnering charter being interpreted as a collateral contract, they should expressly do so both in the partnering charter and in the construction contract.

Footnotes | Top

* The author would like to thank Associate Professor Fred Ellinghaus of the University of Melbourne for reviewing and commenting on an earlier draft of this article. This article forms part of the author's research towards an LLM in the Faculty of Law at the University of Melbourne.

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18 Pacific Carriers Ltd v BNP Paribas (2004) *218 CLR 451* [PDF].

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24 Ross v Allis-Chalmers (1980) *32 ALR 561* at 567 with reference to JJ Savage & Sons Pty Ltd v Blakney (1970) *119 CLR 435* [PDF] at 442.

25 See, eg Ku v Song *[2007] FCA 1189*; Orion Insurance Co Plc v Sphere Drake Insurance Plc *[1992] 1 Lloyd's Rep 239* at 269.

26 Ku v Song *[2007] FCA 1189* at [38]. His Honour cited the decision of the English Court of Appeal in Rose and Frank Co v Crompton & Bros Ltd (1923) *2 KB 261* by way of authority for this position.

27 JJ Savage & Sons Pty Ltd v Blakney (1970) *119 CLR 435* [PDF].

28 The Full Court of the Supreme Court of Victoria held that the statement did amount to a collateral warranty, concluding that the "the plaintiff would not have entered into the contract for the purchase of the cruiser … without the statement that the estimated … speed … would be 15 mph", as described in JJ Savage & Sons Pty Ltd v Blakney (1970) *119 CLR 435* [PDF] at 441.

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52 Mitchell C , "Entire Agreement Clauses: Contracting Out of Contextualism" (2006) 22 JCL 222 at 225.

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