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Partnering — panacea or problem?

Justin Young

The number of partnered projects in the courts and the results of a recent survey suggest that partnering is not all it promised to be. The question is — are the problems with partnering terminal or does it just need a bit of therapeutic massage to get it into shape?

Many of the principles associated with partnering are already well known to the law. Section 51AA of the *Trade Practices Act* prevents someone from taking advantage of another's weaker position; s 52 creates a duty not to behave misleadingly or deceptively; judges have pronounced that parties to a contract must 'act reasonably' in accordance with the 'principle of fair and open dealing' and 'do all such things as are necessary to enable the other party to have the benefit of the contract.' Recent cases even suggest that the courts are beginning to contemplate the idea, long held in the US, of duty to act 'in good faith' in all contractual dealings.

Whether partnering offers more than that depends on what is expected of it. If it is intended to be the great panacea, the way to keep all cost over-runs and delays out of a project, the cure of all known ailments, then it does not. However, if it is seen as a

> method of monitoring industrial and contractual working relationships (so that stakeholders) are better informed and able to provide input if project parameters are not being met ...

there will be fewer disappointments. These limitations are slowly being recognised.

The Partnering Task Force surveyed 32 partnered projects, and while the majority of those involved considered partnering beneficial, they found the 'potential benefits ... diminished' by a failure to implement the partnering procedures early enough and to involve all the right people. In order to have the best chance to achieve its aims, partnering should shape the structure of the project. This means partnering procedures must be put into place almost at the time of the project's inception — at the earliest stages of design and planning. It must not be superimposed upon a traditional structure which may not be suited to it.

To achieve this, all project participants — principal, builder, consultant (even, in the right circumstances, sub-contractors and suppliers) — should come together at project inception. But how can this work? Probity issues are a significant impediment in many circumstances, commercial ➢

contents

➢ interests in other. This is where partnering really faces challenges. For it to work it requires more than lip service, more even than a genuine desire to achieve improved co-operation. It requires an understanding that real benefits can be gained from *real co-operation*, which means, getting out of a commercial corner and finding a win-win situation from the very outset.

Partnering can create hidden traps. For example, the sample Partnering Charter below appears to be a straightforward and admirable statement of objectives. It is clear and precise and sets out succinctly what the stakeholders wish to achieve. It may be a useful tool at a progress meeting when a potential problem is on the agenda and there is a likelihood that tensions will rise. A skillful chairperson may be able to remind the parties that they have put their signature to this document — a document which talks about common goals, about fairness, even about enjoyment.

But, as we all know, in the construction industry, when things start going wrong on a project and the relationship of goodwill and trust (if there ever was one) breaks down, it is said that the project becomes 'contractual' the parties pull the contract out of the bottom drawer and start looking for breaches. When things go badly, they tend to turn to the contract. When they go really badly, they may turn to lawyers so that the lawyers can turn to the contract.

In a partnered project, one document the parties and their lawyers will look to is the Partnering Charter. Take Objective 4, which refers to:

> Achiev[ing] a safe work place for all involved.

The building contract will already have provisions relating to site safety; there is also ample relevant safety legislation. So why say this? Because it is obviously a good idea for stakeholders to express their intentions at the ➢

SAMPLE PARTNERING CHARTER

Mission statement

Our mission is to strive for co-operation, trust and understanding, to work to a common goal and to minimise risk by supporting each other to achieve the Partnering Objectives

Partnering objectives

1. Enjoyment	Create an atmosphere conductive to high morale and job satisfaction
2. Budget	All stakeholders achieve their monetary aims
3. Time	Meet agreed deadlines
4. Safety	Achieve a safe workplace for all involved
5. Quality	Exceed appropriate quality standards
6. Outside relationships	Comply with all obligations to the community

➢ outset so that all concerned can be reminded of the value of that issue to the stakeholders.

However, in the event of a site accident, that objective may be argued to be a binding obligation resulting in a long (and costly) argument about something that may never have been intended. If it were intended, there is no problem; but if the objective was not meant to create any new obligations, then it may have backfired. While the author is not necessarily convinced of the argument in this case, it illustrates the kind of traps that exist.

The jury is out. Are the problems illustrated in this article soluble or do they create fatal flaws for partnering? Partnering participants are positive on the whole. But, for all the early fanfare, they are not falling over themselves backwards to embrace the wonder of partnering. At best they are re-evaluating it; at the worst they are abandoning it and 'getting on with the job'. ❖

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Footnotes

1. David P Johnson: 'Public sector partnering' (1992) Allr No. 4 166
2. 'Partnering — models for success: A Research Report to the Construction Industry Institute Australia' as reported in ACLN issue no 52, p 49.
3. *Renard Construction (ME) Pty Ltd v Minister For Public Works* (1992) 26 NSWLR 234.
4. *Interfoto Picture Library Ltd v Stilelto Visual Programmers Ltd* [1988], All ER 348 (at 352).
5. *Secured Income Real Estate (Australia) Ltd v St Martins Investment Pty Ltd* (1979) 144 CLR 596 (at 607).
6. Above n 3.
7. Above n 2.
8. Above n 2.

Case Notes

HEMMING v BILLINGTON HOLDINGS PTY LTD T/A OWNER BUILDER SERVICES

Unreported, WA Supreme Court, Templeman J, 19 May 1997

This recent decision of the WA Supreme Court considered the failure of an arbitrator to give proper reasons, and the course to be taken by the court in such circumstances.

Background

The dispute, the subject of the arbitration, arose out of a contract for additions and extensions to a property, in a standard form which contained an arbitration clause. When a dispute arose between the parties, they referred the matter to arbitration.

In his award, the arbitrator dealt with the dispute by referring to various paragraphs of the defence and counterclaim and saying, in relation to each, whether the claim set out therein had been rejected or upheld or rejected in part or upheld in part. He also noted, by reference to specific paragraphs, where claims had been agreed by the builder.

The arbitrator awarded damages in the sum of $4,484.83 to the owners, in respect of certain items. He awarded the sum of $17,882 to the builder, which was the amount of the final progress claim. He awarded this amount to the builder, less the amount of damages awarded in favour of the appellants.

The arbitrator then gave reasons, under s 29 of the *Commercial Arbitration Act 1985* (WA) (the Act).

Arbitrator's failure to give proper reasons

Justice Templeman dealt with the arbitrator's reasons sequentially.

Implied Terms

The arbitrator had held firstly that, because the contract had words inserted in one of its clauses, the claim by the owners that the conditions were partly written and partly oral must fail, because the parties had recognised that special terms could be written into the contract, and that they could not have agreed any oral terms. Furthermore, the arbitrator had held that because the contract had set out the method of calculating the cost of the works — that is, because it was a cost-plus contract — he did not accept that an oral term had been intended to vary those written conditions. In other words, the fact that the written contract had been formulated in a particular way precluded any oral agreement by way of variation of the written terms.

Justice Templeman held that it was clear from these passages in his reasons that the arbitrator had misdirected himself. What the arbitrator should have done, his Honour said, was to consider the evidence given by the parties in relation to that aspect of the claim — whether or not there was any oral agreement forming part of the overall bargain between the parties — and evaluate that evidence. The arbitrator ought to have found as a fact whether or not any such oral agreement had been made.

His Honour held that because the arbitrator did not approach this question in a proper manner, he misdirected himself. His decision in relation to that aspect of the ➢