Brooking On Building Contracts

DJ Cremean BA Shnookal & MH Whitten (4th edition, Lexis Nexis Butterworths)

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For those working in the field of construction law, the nineteen chapters that comprise *Brooking On Building Contracts* have a familiar look to them and cover most areas which one would expect. One understandable exception is the area of adjudication, under the current (and forthcoming) state legislations on construction contracts/security of payments. This is mentioned in passing in various chapters, but not considered in detail.

I had incorrectly anticipated that the book would present the original cases quoted by other books/loose leaf services in the construction law field - this is not so. The cases used in this text have been comprehensively chosen to best provide authority or reasoning for the points made. They are not, like some references, predominantly from one state or jurisdiction; also pleasing is the willingness to endorse Australian cases rather than take the easier option of reiterating the cases quoted in the UK 'bible' (presumably Old Testament): Hudson's *Building & Engineering Contracts*.

The book seems to do simple things well, with each chapter being less than oppressive in length. It deals with basic but practical issues, such as the effect of not completing blanks in a building contract. It is not apparent from the text that three different authors were responsible for each completing specific chapters – this, and other aspects of the text, must please the original author.

Chapters 1-3 – Building Contracts / Contract Documentation / Contractual Doctrines

Rather than lead the reader in cautiously, the authors of this edition jump in with the alternative view to contract offer and acceptance, mutual manifestation of assent.

Although the popular standard forms are dealt with succinctly, the information conveyed may benefit further from tabulation. The writing style is very dense, without words being used unduly or wastefully. This is backstopped by extensive consideration of cases, for example, under the headings 'Parole Evidence Rule' and 'Surrounding Circumstances' no less than sixteen cases are referenced in two pages of text. As these cases are predominantly of recent origin, the book generally succeeds in currently stating the law rather than leaving it in England circa the age of the industrial revolution.

The authors clarify when an agreement is definite and enforceable, as opposed to indefinite and unenforceable. The distinction is drawn between 'subject to details' and 'subject to contract', but readers may benefit from a more detailed debate of this issue.

Quantum meruit is introduced in the context of illegality and then expanded upon when

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considering payment. The treatment of illegality in the text does not consider difficult cases such as *Great City Pty Ltd v Kemayan Management Services (Australia) Pty Ltd & Ors*.[2]

Chapter 4 - Implied Terms

A chapter is devoted to implied terms - this includes two useful cases for the criteria required for implying terms based on trade custom or usage. This chapter also considers business efficacy and particular implied terms, including workmanship, materials, best endeavours, efficacy of work, compliance with regulations, time for completion, progress payments and others. This chapter is a useful microcosm of the whole text. It is well ordered, logical and gives sufficient detail for readers to understand the legal position without extensive detail.

Through this the text fulfils two functions, it:

(a) gives a thorough outline to readers interested in a particular subject; and

(b) narrows the search to particular cases (as referred to) for readers familiar with the area of law, but requiring refreshing.

One minor criticism is that the implied terms of best endeavours and good faith do not include discussions of the most recent cases such as *Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd*.[3]

The topic of site access for proprietors during construction is dealt with under the implied term 'Possession of Site' – it is not dealt with sufficiently. No mention is made of standard contractual forms allowing the principal (or agents) access to the works for inspection. Further, the domestic situation in Victoria is considered but no footnote with regard to other states is considered. The topic of possession of site, the contractor's authority/licence and the rights or otherwise of the principal is one of the few sections that could be dramatically improved.

The authors seem to have a fixation with sewage works, when considering both 'Ancillary Work by Public Authority' and 'Builder's Entitlement to Indemnity'. Perhaps it is so obvious that it does not require mentioning, both these can be contracted out of; also the normal position under a standard form contact is not considered. The text could benefit from such consideration, and from looking beyond the sewer.

Chapter 5 – Tenders

It may be a little known fact in the construction industry, but when work is put out to tender, a contract may come into existence whereby the prospective proprietor/developer agrees to consider all tenders fairly. How many industry participants are aware of the AS4120-1994 Code of Tendering? This sums up both the strengths and weaknesses of this text – it imparts a fair degree of knowledge, but not in sufficient detail that practitioners in the field could rely on it exclusively.

2. [1999] WASC 70.
3. (2003) 196 ALR 257.

The text is generally very good, but is marred by very minor discrepancies. An example is the assertion that tenderers are required to submit two tender prices (one inclusive/one exclusive of 'rise and fall'). Since about 1990, this has not been normal practice; in the reviewer's experience, rise and fall no longer merits consideration. In contrast, the section immediately following deals with *quantum meruit* and tendering costs very well and is very relevant.

According to the text, letters of intent:

- Do not normally give rise to any binding contractual obligation on the proprietor;
- Preparatory work carried out by a tenderer on the strength of such a letter can be allowed;
- There is a presumed intention that promissory statements included in a letter of intent create legal obligations in a commercial context.

This does not particularly help the reader and could have been better developed, such as the following section on 'Withdrawal of Tenders'.

The current Australian position regarding the postal rule of acceptance is stated in *Lamont v Heron*,[4] which allowed acceptance by a telegram taking up an option to buy and stating letter following. No mention is made of the validity or otherwise of email acceptance of an offer. Anyone needing a case regarding the geographic locations where a contract came into existence can refer to *Deer Park Engineering Pty Ltd v Townsville Harbour Board*.[5]

Chapter 6 – Time for Completion

Completion of building projects is a central and recurring theme throughout most building contracts and disputes. The danger of omitting to fill in the contract period in a contract is illustrated with the effect that the contract would revert to the common law position; completion within a reasonable period.

The text frequently makes accurate postulations, by reference to the (old) authority, and then considers the modern twists or considerations. The old test of Lord Dunedin as to whether a stated sum in a contract is a penalty (and hence unenforceable), rather than liquidated damages, is such an example. This is followed by consideration of cases such as *AMEV-UDC Finance Ltd v Austin*.[6] Useful authorities are given for the proposition that liquidated damages are to be applied per calendar day unless expressly stated to be working days.

Those lawyers who wish to obtain an unscrupulous advantage for their clients might consider the forfeiture deposit clause, which thankfully has fallen out of use in most developments. This clause allows principals to levy a deposit due from tenderers; if the lowest tenderer refuses to do the work at the tendered price, they then lose the deposit. The

4. (1970) 126 CLR 239.
5. (1975) VR 338.
6. (1986) 162 CLR 170.

principal is not seen as penalising that tenderer. This chapter, as in all construction law books, could benefit from more in depth analysis of the Court's attitude to various types of extension of time claims. The basics of the subject are well covered.

Chapter 7 - Rise & Fall Claims

Again, rise and fall clauses are well explained, giving ignorant lawyers enough information on this subject, but is detailed discussion of this subject really necessary? The most interesting point raised in regard to rise and fall clauses is what happens if they are void for uncertainty; either:

1. The rise and fall clause alone is inoperative, bearing the contract as a fixed value;
2. The invalidity of the rise and fall clause renders all the contract price clauses to fail for uncertainty, leaving the rest of the contract in place; work to be carried out for a 'reasonable price';
3. The contract is void for uncertainty; contractor can recover on a *quantum meruit* basis.

The parallel with the severability of arbitration clauses is highlighted.

Chapter 8 – Payment

Those representing builders and contractors should be particularly interested in this chapter. Subjects considered include entire and indivisible contracts, substantial performance, *quantum meruit* and taking benefit of the work.

Those lawyers outside New South Wales, Victoria and South Australia may not be familiar with the *Frustrated Contracts Acts* in those jurisdictions – the text would benefit from a statement of the common law in the absence of such legislation.

Lawyers not frequently working in construction can make the mistake of believing that monthly payments equate to acceptance of the work – the text will save such lawyers.

Discussion on *quantum meruit* should include the issue where a tenderer is required to provide services following close of tenders in anticipation of later accepting a contract for works. *Quantum meruit* may arise if the tenderer is later replaced by another, with the proprietor gaining the benefit of the work carried out.

The discussion of restitution on pre-contract expenditure could have been further developed. Negligent misstatements are also considered here.

Chapter 9 – Approvals & Certificates

Various issues are covered including the satisfaction of the architect, approval as a condition precedent to payment, waiver and *estoppel* of conditions precedent, certification, progress certificates, certificates of practical completion and final certificates. The authors are not afraid to identify cases which, in their opinion, have been incorrectly decided, for example where the contract prevents a challenge to an architect's certificate.

If the certifier gives a reason for not certifying (or presumably, not certifying the full amount claimed), the reason given for non-certification should be more than 'there is nothing due to you'. Authority is given that this refusal was not a statement of reasons for not certifying – it was found to be a mere statement of a conclusion. Unfortunately, the citation (1866) 2 WW & a'B (L) 193 may prove too elusive for most practitioners.

Practitioners should note that the doctrine of entire contract only applies where no interim payments are contemplated by the contract and presumably none made during the performance or otherwise of the works.

The obligation of certifiers to act honestly and fairly is covered and includes consideration of *Peninsula Balmain v Abigroup Contractors*,[7] but this obligation does not extend to a duty to comply with the rules of natural justice; fairness incorporating impartiality and independence is sufficient, as the certifier is not acting judicially.

The authors indicate that the terms of a building contract may be drafted to prevent the proprietor claiming a defect, by making the effect of a final certificate being a bar to defect claims. Some of the standard form contracts are mentioned in this context, but could benefit from more detailed consideration of the effect of their provisions. Final certificates are not covered by any 'slip rule'; equally, it appears that it is never too late to issue a final certificate, as a final certificate issued outside the time period of the building contract was still effective.

For a certificate to be final, the certificate must be unequivocal. To merely call a certificate final, but by its terms contemplate further work (for example by an accompanying letter) would result in a finding that the certificate was not 'final' in terms envisaged by the contract.

The Security of Payments/Construction Contract legislation is considered briefly under 'Approvals and Certificates', and mentioned elsewhere throughout the text.

Chapter 10 – Variations

Eager novices should be aware of the common law position regarding contracts which do not sanction variations. If the contract makes no provision for variations, and a proprietor insists on a variation, then where a proprietor insists upon a variation such conduct may amount to a repudiation of the contract. Such a situation would be unusual, as most contracts contain variation clauses. Builders should protect themselves by getting instructions in writing, if there is any doubt that the purported variation works are a variation. Some contracts allow the builder to confirm oral (or other) instructions – this allows an unscrupulous builder to adopt the 'floodgate approach' and use architect memos, letters, drawing revisions and site meetings minutes to be relied on in claiming alleged variations.

The text treats with brevity the subject as to whether builders can be paid/reimbursed in the absence of a written order, where such an order is a condition precedent to payment, a question impossible to answer with confidence. *Estoppel* may be a viable reply to a defence based on the absence of writing.

7. (2002) 18 BCL 322.

Chapter 11 – Defects & Damages

Damages are defined as:

> *[W]here a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.*

In building contracts, this generally means the difference between the contract price of the work, and the cost of making the work conform with the contract, together with appropriate consequential damages, such as demolition costs.

When should damages be assessed? The general rule is that they should be assessed when the cause of action arose. There are, as always, exceptions to this rule; for example, if 'some other date is necessary to provide adequate compensation.' Such other date may be required to provide adequate compensation to a Plaintiff.

It is interesting to note that the measure of damages following breach of a building contract is not affected by whether the building proprietor has sold the property for profit, retained it or gifted it, to a third party. Equally intriguing is a list of authorities for stress and anxiety claimed as a result of building defects, the reviewer believes that the point that these types of damages are generally not recoverable should have been made, rather than left open. Other interesting successful damages claims are raised under 'Damages for Inconvenience'.

Chapter 12 – Determination

The common law right to determine a building contract, by virtue of repudiatory conduct, will not be excluded by a contractual provision entitling party 'A' to determine the contract in the event that party 'B' breaches the contract. Common law rights are not excluded by a contract unless the contract expressly states so. The courts have interpreted contractual rights to determine as being in addition to and therefore expanding any common law rights. The review of the builder's ability to determine under the main contract is thorough, but does not include reference to relevant legal principles, or consider the effect of an incomplete notice or incorrectly served notice.

A useful warning is sounded where over eager building proprietors post a notice of determination on the 14th day, where the contract allows 14 days from the date of the notice of default. Posting of notice in these situations is the giving of notice. If the 14 days have not lapsed, posting on the 14th day (to arrive on day 15) is premature notice, and therefore not valid.

Chapter 14 – Subcontracts

The difference between provisional sums, provisional quantities and prime cost sums is succinctly explained – readers would therefore have no reason to continually misuse these often misquoted terms.

Chapter 16 – Negligence

This is a succinct well-written chapter: we should remember that where a duty of care exists, there is not a duty of the caregiver to be correct but merely to be careful. Damages including a psychological component are noted as being possible in building cases in 'special circumstances'. Unfortunately, these circumstances are not given.

Chapter 17 – Architects and Engineers

Architects may find the section on copyright useful. Also useful is a clear explanation of the dual role of the Architect (or Engineer) as impartial certifier.

All Architects should consider carefully their contracts with their clients, and avoid the phrase 'periodical supervision and inspection' if proposed or included in their standard engagement. In *Florida Hotels Pty Ltd v Mayo*,[8] the legal meaning of these words were considered. It was found that Architects could not rely on the foreman to give notice of when concrete would be poured, and hence when formwork and reinforcement would be covered up because concrete was poured and it was found the reinforcement was defective – the Architect was found liable as he had failed to periodically supervise and inspect. Barwick CJ found that the architects had not 'made reasonable arrangements of *a reliable nature* to be kept informed'. This may appear to be a somewhat harsh decision – subsequent Client and Architect Agreements appear to have diminished these requirements.

Chapter 18 – Building Disputes

Four pages are dedicated to quoting the common building contract standard forms – this sector could have been better utilised by, for example, discussing case law on the applicability or otherwise of these clauses in AS2124 when tested in the Courts; what happens if neither Alternative 1 or Alternative 2 of Clause 47.2 has been selected in the appendix?

Arbitrator's fees are also considered in this chapter; a reference to the unsatisfactory behaviour of the arbitrators in *Sea Containers Ltd v ICT Pty Ltd*,[9] would have been appropriate for inclusion here.

Chapter 19 – Building Operations

By its chapter heading, 'Building Operations', implies concrete pumps cranes and the like for under informed lawyers. Instead is a chapter that considers the legal effect of building operations, such as trespass, nuisance, easements, rights of support and under pinning. These subjects are very useful for practitioner and lay person alike, and are often not considered, or not considered as discrete subject, in other texts.

Where an existing building has been built and has acquired a right of support, what happens if that building is demolished and replaced with a larger building exerting more

8. (1965) CLR 588.
9. [2002] NSWCA 84.

force on the adjoining soil? It is arguable that the right of support may be limited to the force which would have existed from the demolished building, and not the additional force from the new larger building. Although arguable, it is more likely that the right of support acquired by the building subsequently demolished will be terminated when a new and significantly different building replaces the demolished building.

The common law position regarding rights of support has been partially modified in New South Wales, by the introduction of amendments to the *Conveyancing Act 1999*. Underpinning is more heavily regulated and divergent; some states have no Regulations or Acts; most have, but these differ significantly from state to state.

Conclusion

This text should appeal to both those involved in the building industry and lawyers providing advice to clients involved in the building industry. The isolated issues where more detailed consideration may be merited do not detract from the comprehensive and useful nature of the text. Brevity does not permit investigation of every rabbit-hole. It will be a very useful reference for arbitrators and advocates involved in building matters; it is readable and well organised. The breadth of subject matter is extensive; many cases are considered or noted, making further research (where required) on a subject easier for the reader.

The subject matter of this text has evolved and compounded in the 30 years since the first edition appeared. In the past one good (or even adequate) text on this subject might have been enough – this is no longer so. In this context, this text will always suffer in a comparison to a constantly updated loose leaf service. However, it should still be a most useful addition to arbitrators, lawyers, construction professionals and all other industry participants alike.