POSITIVE POSITIONING—AVOIDING THE WAR

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INTRODUCTION

The construction industry has long been known as a fertile ground for disputes.

Disputes arise as a result of the competing interests of contracting parties. The competing interests are often exacerbated by inappropriate risk allocation, lack of clarity of contract terms, and contract administration which does not accord with the terms of the contract.

As well as being fertile ground for disputes, the construction industry has been a 'hotbed' of innovation in terms of embracing different and alternative means of dispute resolution. In addition to litigation and arbitration, the construction industry has been prepared to actively embrace expert determination and adjudication as fast and efficient methods of resolving disputes.

In this paper, I will concentrate on mechanisms for managing those competing interests and avoiding the development of disputes. Whilst the tools available to limit and avoid disputes are no doubt many and varied, there are certain steps and approaches which can certainly assist parties in both minimising the advent of disputes, and, in the event of disputes arising, will assist in the management of those disputes.

TERMS OF ENGAGEMENT—THE TERMS & CONDITIONS OF THE CONTRACT

In deciding the terms and conditions upon which parties will engage, the parties are setting the scene, either for a 'body strewn battle field', or a narrowly avoided 'engagement of rival armies'. As in any battle the 'victor' will not be entirely victorious having paid a price in loss of men, equipment, and possibly territory. Similarly, any dispute in respect of which parties may formally engage in either litigation, arbitration or other resolution mechanisms will not result in any absolute victory for either party.

In recognition of the reality of engagement, even of the contractual type, parties need to pay close attention to the terms of their engagement. The contract terms embody the basis upon which the contractual parties will proceed with their commercial relationships.

Amongst other things, the contract terms:

(i) reflect and embody the risk allocation; and

(ii) set out, hopefully in clear terms, the intention of the parties.

RISK ALLOCATION

Allocating risk to the party 'best able to manage it' is a very hackneyed expression and one which I suspect is honoured more in the breach than in the observance. Risk allocation very often is dictated by the party proffering the contract, usually the principal, and hence will generally adopt an allocation of risk most suited to the principal. That allocation of risk may not, in fact, recognise or pay any regard to specific risk issues prevailing in the particular circumstances of that contract.

Often, the party proposing the contract 'abdicates' risk, rather than 'allocating' risk in any manner which may reflect either party's ability to manage or control that risk.

Where risk allocation is approached in an informed manner and risk is allocated such that the party having some control over the risk is responsible for the risk, the outcome would generally be considered appropriate. This approach is commonly seen in many of the published standards such as Australian Standards contracts.

Allocation of risk in relation to site conditions in standards such as AS4300, requires the contractor to take steps to investigate and inform himself as to conditions which could be reasonably anticipated, but preserves a right to claim additional cost or time caused by any latent condition. This risk allocation recognises the practical realities that parties cannot in fact price for conditions which are unknown and cannot be ascertained at the time of tender.

In contrast, an example of inappropriate risk allocation is illustrated by the following circumstance:

The principal let a contract for the construction of major engineering works which included provision of large footings across a wetland area. No access was available to the wetland area, it was physically unable to be trafficked, and no geotechnical information was available in respect of the particular conditions.

The contract required the contractor to take full design risk and prohibited the contractor from making any claims in respect of any condition of the site, including the conditions in the wetland area. In addition, the contract required that the contractor effectively release the principal from any claim it might possibly have arising from any such site condition.

Here, there was clearly a risk that the site conditions in the wetland area, which were unknown, may impact on the design, progress and cost of the project. The contractor was required to accept that risk, notwithstanding it had no control whatsoever over the risk and was unable to mitigate its risk because it was unable to physically undertake any investigation.

Notwithstanding the prohibition on claims, the parties fell into dispute as the cost and time consequences were unable to be borne by the contractor.

Risk allocation should be a matter of understanding the risk and allocating it in an informed way. The approach taken above was an abdication of risk; that is, without an informed decision, the principal sought to exclude itself from all risk relating to the particular site conditions.

If the principal in the example referred to above wished to maintain a strict risk profile in terms of site conditions, it could have done so, but perhaps have the particular wetland area excluded from the preferred risk profile as it was unable to be accessed for the purposes of investigation.

Similar circumstances arose in the recent case of Abigroup v Sydney Catchment Authority (2004) 208 ALR 630, where the parties became engaged in long drawn out litigation on the basis of allegations of misleading and deceptive conduct to overcome the contractual prohibitions on claims in respect of adverse and unknown site conditions.

ABIGROUP CONTRACTORS PTY LTD V SYDNEY CATCHMENT AUTHORITY (2004) 208 ALR 630

Abigroup was engaged by Sydney Catchment Authority (SCA) to design and construct an auxiliary spillway for Warragamba Dam. Part of this work involved excavation down to a solid rock base and refilling the area to the level necessary to support the spillway.

The risk allocation under the contract was such that all risk was to be borne by Abigroup in respect of both the site conditions and any inaccuracies in the tender information.

Whilst the tools available to limit and avoid disputes are no doubt many and varied, there are certain steps and approaches which can certainly assist parties in both minimising the advent of disputes, and, in the event of disputes arising, will assist in the management of those disputes.

Although Abigroup was allowed on site to conduct investigations to verify the accuracy of the geotechnical information there was no effective opportunity for them to do so.

During excavation works an outlet pipe was discovered on the embankment which greatly increased the costs of works. Abigroup commenced proceedings for misleading and deceptive conduct on the basis that SCA made a representation that no such outlet pipe existed. It was later discovered that SCA had at all times in its possession a 1951 plan disclosing the existence of the outlet pipe.

The court determined that the fact that Abigroup bore the risk of the site conditions and the accuracy of the tender information was not fatal to establishing reliance on that information, particularly where:

• Abigroup had no practical opportunity to conduct its own geotechnical investigations; and

• SCA did not merely pass on information prepared by the Department of Public Works and Services, but made the representation themselves that there was no outlet pipe.

The outcome of this case is an example of how strict and prescriptive contract provisions do not necessarily minimise disputes.

Whilst, from the principal's point of view, there may be some resistance to adopting a risk profile which may possibly allow the contractor to claim a variation or make a claim for additional costs, the prohibition and/or restrictions of those rights is not, in fact, an effective method for minimising disputes. A clear and structured contractual entitlement may not only minimise disputes but ultimately manage the extent of exposure to damages to which the principal may otherwise be exposed.

CLARITY OF TERMS

A clearly drafted contract, where the rights, obligations, entitlements and liabilities are clearly articulated, is a major tool to minimising disputes.

Clear communication and careful articulation of the contract, particularly as to the matters which the parties may have spent some time negotiating, will of itself limit the circumstances in which disputes can arise.

To illustrate this point, one need go no further than examine some of the extension of time clauses, and the manner in which the notification requirements in relation to a claim for an extension of time, may be expressed.

In Multiplex Constructions Pty Ltd (1999) 1 QdR 287, the relevant clause required that a contractor who wishes to make a claim for an extension of time must make that claim 'within 28 days after the delay occurs'.

The parties fell in dispute as to the meaning of the phrase 'after the delay occurs'. Did it mean after the delay first occurred, or after the whole of the delay had occurred and had been brought to an end?

In that case, the court determined that the phrase 'after the delay occurs' meant after the delay had first occurred, notwithstanding that it might be continuing. The court considered that this was the natural and ordinary meaning of the phrase.

This is to be contrasted with another drafting attempt to capture the same concept.

CORPORATION OF THE TRUSTEES OF THE ORDER OF THE SISTERS OF MERCY (QLD) V WORMALD INTERNATIONAL (AUST) PTY LTD (1981) 5 BCL 77, SC (QLD)

The parties fell into dispute as to meaning of special condition 16 of the contract which stated:

Claims by Contractor: 'if the Contractor intends to submit a claim to the Principal for any occurrence or happening under the Contract which the Contractor considers has caused him any costs or to suffer any loss, damages or delay he shall submit to the Manager within a period of 7 days a notification of his intention to submit a claim and shall within 14 days from the date of notification to the manager of the said claim submit a statement to the manager showing full details of the said claim'.

Again, at the centre of the dispute was the failure to state the event from which the period of seven days runs within which notification of the contractor's intention to submit a claim must be made to the principal.

In this case it was determined that time runs 'from the date when the complete loss attributable to the occurrence or happening has materialised, a date at which it is possible to start assembling the full details of the claim'.

A classic example of difficulty in identifying the exact contractual scope often arises in the area of design development. In particular, when does design development become a variation resulting in an increase or decrease in the contract sum? This question was addressed in the case of Multiplex Constructions v Epworth Hospital (unreported) (28/06/1996) Vic CA.

MULTIPLEX CONSTRUCTIONS V EPWORTH HOSPITAL (UNREPORTED) (28/06/1996) VIC CA

Multiplex was engaged by Epworth Hospital under a fixed price contract for the redevelopment of the Epworth Hospital. Epworth was responsible for providing the design to Multiplex. However, the design was incomplete at the date of tender. Multiplex was responsible for the costs and risks arising from Epworth's design development.

The contract stated that variations excluded 'any change/s or additional work caused by or resulting from the development of the design of the works (including…the development of the design for that part of the Works not documented as at the date of the Builder's tender and/or in the [contract documents])'.

Although Multiplex had accepted the risk of Epworth's development of 'the design' that would not make the contract open–ended. It was 'the design of the Works' which was identified in the contract documents to be developed, not some other design. Once a design component had been 'fully exposed', its design development was at an end. Once 'fully exposed', Epworth could refine the exposed design at Multiplex's expense. Anything beyond refinement would be a variation except where some other design development had a consequential impact.

An example given by the court was if Floor 5 of the works is fully documented in the contract drawings but Floor 6 is not. If in developing the design of Floor 6 the hot water pipes are shifted significantly leading to consequential changes to Floor 5 (in respect of which the design was otherwise complete), these changes can be said to be 'caused by or resulting from the development of the design of the [works]' and are not variations.

In another example, if toilets were added to the drawings where there were previously none, this alteration would be a variation, not design development.

This issue is not really assisted by the approach used in the NSW Government Contract GC21 2003 (revised to 30 January 2007) edition which provides in this regard:

... clause 52.7 The Contractor acknowledges that the development of Design (including developing the requirements for and detailed scope of the Works) by the Contractor does not constitute a Variation.

Inclusion of time bars in relation to the making of variation claims, particularly where there may be some doubt as to whether or not a variation has been instructed, is a concept included in some contracts. For example, the GC21 provides as follows:

Regardless of any other provision of the Contract, if the Contractor considers that a Variation applies but the Principal has not instructed a Variation, the Contractor must make its claim for a Variation within seven days from the start of the event giving rise to the variation, or from the time when the event should have become known to the Contractor with reasonable diligence on its part.

This clause raises a number of questions, such as:

- When, and in what circumstances, can a principal be said to have instructed a variation?
- 'Within seven days from the start of the event giving rise to the Variation'—Does this clause refer to the event which is said to constitute the relevant instruction from the principal, or does the timeframe relate to the undertaking of the work said to constitute the variation?
- In what circumstances should it be said that the contractor should have known of the 'event'?

Assuming that a contractor can satisfy these questions and proceed to make its claim within seven days of the relevant circumstance, then it may be able to press the claim.

There are no doubt numerous examples of drafting issues which have themselves directly given rise to disputes, and whilst not entirely avoidable, care and clarity in drafting is an important ingredient in the limitation of disputes.

POSITIVE POSITIONING

Approach

Once the 'terms of engagement 'have been established, then the parties move to the contract execution phase when the effectiveness of those terms of engagement will be tested. In the execution phase it is incumbent on those administering the contract to administer in a manner which is positive, proactive, and which will minimise any disputes. Clearly an environment must be created which is focused on the positive delivery of the project.

The concept behind 'positive positioning' is the antithesis of the 'contract in the bottom drawer' approach. Rather than ignoring the terms and conditions, which often have been extensively negotiated and hard fought, a 'positive positioning' approach requires:

Knowledge

The parties are well aware of their obligations and entitlements provided by the contract.

Proactive administration
Approach the administration of the contract consciously regarding those obligations and entitlements.

Preservation of entitlements
Act in a professional and compliant manner with those obligations and entitlements.

The issue of relevant notices, compliance with time bars, and other steps which the parties may be required to take to comply with the contract, reflect what is simply proper administration of the contract, and should not be considered destructive of any amicable and positive relationships on the project. Far greater damage will be done to a party's interests when a party seeks to overcome its lack of compliance in failing to properly observe the terms of the contract and administer it correctly, than may occur by proper and compliant contract administration. Failure to comply may not only prevent a party from pursuing entitlements it otherwise would have had, but the ensuing action which may take place in a bid to recover position is likely to be itself destructive of any positive inter party relationship.

The level of sophistication in the industry and the familiarity with contract terms and contract requirements should enable those matters of administration to sit side by side with effective and proactive communication between the various stakeholders in the project to progress the project to a successful completion.

Where contract administration is proactive and not reactive, the parties can at least then rely on the terms of the contract which they have agreed.

PRESERVING ENTITLEMENTS

A failure to notify claims in accordance with the notification requirements of a contract will simply place the parties in a position of dispute as to the effect of that non–compliance, and whether the time bar should operate effectively, rather than enabling the parties to focus on the substance of any issue between them. The withholding of notices or claims 'in the interests of the project' may be a route to litigation and an effective destruction of the relationship.

In Wormald Engineering Pty Limited v Resources Conservation Co International (1992) 8 BCL 158, the contract was an amended version of AS2124–1978 amended by the principal. The superintendent issued a number of variation orders, and the contractor was paid the direct cost of performing those variations.

Clause 40.2 required the contractor to give notice of a claim in respect of a variation order as follows:

If … compliance … is likely to prevent him from or prejudice him in fulfilling any of his obligations under the contract, he shall forthwith notify the Superintendent thereof in writing, and the Superintendent shall as speedily as is practicable determine whether or not these orders shall be complied with.

The contractor brought a claim seeking delay and disruption costs arising from the cumulative effect of complying with numerous variation orders. The principal argued that the contractor had failed to comply with clause 40.2. On appeal from the award of the arbitrator, Rogers CJ confirmed:

Failure to give notice was destructive of the appellant's entitlement to recover under this clause.

His Honour held that a failure to uphold the requirement of compliance as a condition precedent would limit the principal's remedy to damages and would mean that:

... the Superintendent … by the failure of the appellant to adhere to its obligations and to follow the prescribed route, were deprived of the opportunity of making an informed assessment …

Accordingly, a failure to comply with the terms of the contract rendered the entitlement, which the contractor may have had, void.

Similarly, in Australian Development Corporation v White Constructions (ACT) Pty Limited (1996) 12 BCL 317, Mr Justice Giles CJ of the Commercial Division in the Supreme Court of New South Wales upheld a time bar.

In that case, White Constructions (White) was engaged as contractor to design and construct an office block and residential building. The work was delayed and was ultimately brought to a halt by an industrial dispute. The contractor sought an extension of the date for practical completion pursuant to the extension of time mechanism. The relevant contract provided that, where the contractor was delayed, the date for practical completion may be extended provided that it complied with article 4.4.1 of the contract which required:

... within 30 days of when the company reasonably believes that delay has occurred within the meaning of this clause, it shall notify the developer the time of commencement and actual or estimated termination of the delay, the cause thereof and the developer shall determine the time by which the date for practical completion shall be extended.

No notification was provided in a timely manner, and the court

held that the contractor was not entitled to an extension of the date for practical completion.

Again, the contractor failed to secure its entitlement to an extension of time, or at least its ability to claim an extension of time (subject to proof of the other underlying contractual requirements) because of a failure to meet the threshold contractual requirement, namely the issue of a notice within the stipulated time period.

FALLBACK POSITION

Failure to comply with the various elements of the contract, and to at least secure the availability of pressing a claim, if and when it is appropriate to do so, will mean that parties are often reduced to relying on secondary and less certain legal arguments and devices in an attempt to overcome the non–compliance with the contract.

For example, requirements to submit claims for extensions of time within the stipulated time frame may be said, as a matter of fact, to have been waived by the relevant parties, pending further investigation or other site activities. Where that agreement, or waiver, is not documented, the party seeking to rely on it is placed in evidentiary difficulty.

Further, the contract may contain a non–waiver clause which will seek to prevent a party relying on a waiver argument unless the waiver is properly recorded in writing. To establish waiver, a party must demonstrate that a right has been abandoned where a party has acted in manner inconsistent with that right (Craine v Colonial Mutual Fire Insurance Co (1920) 28CLR 305 at 326).

Alternatively, a party may seek to establish a defence of estoppel; namely that the contractual provision need not to be complied with as a party has been induced into the assumption that the right would not be relied on, and the other party cannot later seek to reassert it.

These are largely matters of evidence and can be difficult to establish.

Another fall–back position, in the absence of clear compliance with contractual requirements, may be relying on implied terms, sometimes referred as the last resort of the desperate. This is well illustrated in the decision of Smart J in Jennings Construction Ltd v OH & M Birt Pty Ltd (1986) 8 NSWLR 18.

JENNINGS CONSTRUCTION LTD V OH & M BIRT PTY LTD (1986) 8 NSWLR 18

Jennings Construction Ltd entered into a head contract with The Commissioner for Main Roads for the construction of the Sutton By–Pass. Jennings entered into a subcontract with OH & M Birt Pty Ltd (Birt) under which Birt was responsible for certain subgrade preparations and earthworks. The earthworks required the excavation of sections of the site and the replacement of certain materials corresponding to a particular specification.

Once the works had commenced, it was found that the excavated materials needed to be both processed and blended with other materials before they could be replaced. A dispute then arose between Jennings and Birt regarding Birt's entitlement to be paid for this work.

Clause 47 provided:

The Contractor shall not be liable upon any claim by the Sub–Contractor in respect of any matter arising out of this Contract unless the claim, together with full particulars thereof, is lodged in writing with the Contractor not less than fourteen (14) days after

Failure to comply may not only prevent a party from pursuing entitlements it otherwise would have had, but the ensuing action which may take place in a bid to recover position is likely to be itself destructive of any positive inter party relationship.

the date of the occurrence of events or circumstances on which the claim is based.

The arbitrator rejected Jennings' submissions, holding that, since there was an implied term that Birt would be paid for the additional work, clause 47 had no operation. Jennings appealed to the Supreme Court of New South Wales.

Smart J found that the parties had intended clause 47 to be an exclusion clause, and it operated accordingly.

As can be seen in the above case, whilst the implication of a term found favour with the arbitrator, the court rejected the notion and relied on the terms of the contract, giving the exclusion clause full effect.

PROPER RECORD

Whilst the concept of a comprehensive paper trail is not of itself attractive, the proper recording of events, instructions, agreements reached on site, matters resolved in project control meetings, is essential and is itself a risk minimisation strategy. All matters which may go to the entitlement of the parties or the proper administration of the contract need to be properly documented if they are to be ultimately relied upon.

Firstly, such matters should accord with the terms and conditions of the contract, but should be communicated and thus form part of the written record of the project which can be relied upon if necessary. Failure to comply with the steps outlined above, namely:

- compliance with all notification requirements;
- compliance with all time bars;
- clear, concise and agreed minutes of any relevant meetings, particularly meetings which may have contractual status; and
- written confirmation of any instructions, agreements or other matters,

will put at risk the party seeking to rely on such material. To ensure that all these steps are taken is to place a party in the best possible position to secure the benefit of the entitlements which it may have obtained as part of the contractual negotiation at the outset. Failure to have regard to these matters will put those very entitlements at risk.

TOOLS IN THE TOOLKIT

Additional tools in the 'positive positioning' Toolkit include:

- contract administration manuals;
- flowcharts; and
- proforma notices to assist in the positive administration of the contract.

Where a contract may include a complex series of steps, including notifications, administration decisions and the like, it is often useful for those various steps to be extracted from the word in the contract and represented in a flowchart form which can then be easily followed by those responsible for administering the contract.

Similarly, preparation at the outset of proforma notices and proforma documents, which comply with the terms and conditions of the contract, also assist in proactive and positive contract administration.

These tools, whilst enabling those charged with administration of the contract, to focus on the necessary project outcomes, they also provide useful risk management tools in ensuring that the parties will not end up in a position where they are unable to enforce entitlements due to procedural non–compliance.

CONTROL OF STRATEGY AND OUTCOME

A proactive approach to contract administration consistent with the terms and conditions of the relevant contract enables the parties to the contract to exercise control over the contractual outcomes. Having negotiated the terms and conditions of the contract, thereby establishing the 'terms of engagement' the parties will be well served by ensuring that the ongoing administration of the contract is consistent with those terms and ensures 'positive positioning' for the parties.

This approach ensures a high level of control over contractual outcomes, which is consistent with the approach currently prevalent in the market, in that parties wish to maintain control of commercial and contractual outcomes. They do not wish to abdicate their commercial interests and wish to manage not only the contract itself, but also the manner in which disputes may arise and are resolved. This trend is reflected in the choice of dispute resolution procedures such as expert determination which procedure is itself determined by the contractual terms—the terms of engagement.

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