Contract Rigours for Sluggish Economies

By Professor Kim Lovegrove FAIB

When money's tight it tends to bring out the worst in people. One thing I can say about 25 years of construction law practice is that the building industry is not known for sentimentality. Astute operators stick to the letter of the contract and have a tendency to sue under the contract as a weapon.

A perennial source of bewilderment is the ability of seasoned contractors to ignore the fundamentals, so this article will re-examine the fundamentals of contracting.

Price the job correctly

Always ensure that the estimators have displayed the requisite rigour in price formation. Ensure that there is sufficient profit margin in the contract, don't "buy the job". Construction law is a mature art now and courts of law are ill disposed to the concept of coming in low and then playing "catch up" by variations. If the project can't be done for the quoted price then an unhappy ending is invariably the outcome. The greatest source of insolvency in the building industry is under quoting.

The same advice apples to building surveyors, many of whom have a remarkable ability to under quote. They don't price the risk properly and the risk is high. There's a number of times I have heard certifiers chirping to the effect of: I priced the job, there was "bugger all" margin but I was undercut by another competitor by 30%. Little wonder that building surveyors are the rock stars of the defendant fraternity, because so many of them insist upon cannibalising fees. Low prices lead to short cuts and short cuts lead to liability.

Beware the home grown contract, do not expect largesse

The 'home grown contract' if drafted by the other party to the contract is not fashioned to help you. Much money has been spent on lawyers whose brief was to incorporate draconian and often well camouflaged contractual conditions, the raison d'etre of which is to "pull a nice one" on the unsuspecting. Our largest litigation 2 years ago was one such contract, a contract that was hurriedly entered into, in circumstances where one of the parties was really helping the head contractor out. The largesse however was not repaid when it came to the pointy end of the season and draconian contractual provisions were invoked that led to much unhappiness.

If you get the contract wrong don't expect the courts to fix it up

The paramount rule of statutory interpretation is literal interpretation. Be it an Act of Parliament, be it a contract, the courts don't stray from the leash of literal interpretation. They look closely and unimaginatively at the wording and they give the words their literal meaning. If the import of the words is clear and unequivocal yet generate an unkind commercial outcome for one of the parties then so be it. Courts are not to be confused with moral arbiters or mediums that right wrongs born of naivety and haste.

Speed kills

Don’t sign up contracts too quickly, read them, get construction lawyers to check them out, don’t be pressured into signing the contract too quickly. Because once that signature is on the document the contract is set in concrete and if there is any latent misery in the document , the misery will bloom.

Administer the contract like your life depends upon it

The contract once signed must not be destined for the bottom drawer. The contract is a living instrument, it has to be pored over, applied, invoked and driven. Pay homage to time frames and notice requirements. Be prompt and rigorous with time execution applications, variation clauses, suspension clauses. Remember the contract can be your friend if you apply it with rigour. Equally it can be your enemy if you neglect it. It`s a bit like a marriage - if you invest time and effort into the marriage happy days if you neglect or take your spouse froe granted unhappy days.

Talks cheap when money’s too tight to mention

Commit to writing, commit to writing, commit to writing. When you are told “it’s all good, we sort the variations and time extensions out later” then be wary. Do not place too much solace on what was said or what was agreed verbally. 25 years of litigation has taught me that when it comes around to verbal recollections the 2 memories rarely if ever align. Whether one party considers it to be self-serving to be economic with the truth, memory is cloudy or they simply and genuinely can’t remember, who knows? But it’s a bit like experts, they never agree. So minute and confirm instructions by email, corroboration is the name of the game.

For the love of Pete only use construction lawyers

If you have a heart condition you don’t go to a specialist who deals with ailments of the feet, you go to a cardiac specialist. Likewise with the law go to the building lawyer as the jurisdiction is highly specialised and intricate. And while we focus on this point click here to find out more about our construction law capability and click Stephen, Kim and Justin to carry out some due diligence on our partners.

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