

SEMINAR 2

OVERVIEW

- What is a contract?
- What is a building contract?
- Key issues
 - o Risks
 - o Content and Structure
- Types of contracts
- Group exercise
- Contract Administration

WHAT IS A BUILDING CONTRACT?

- Building contracts and like any other contracts, fundamentally based on contract law, equity and statutes (which vary nationally) and are usually more complex
- An exchange of promises that is legally enforceable
- Known as an agreement or deed
- Note: agreements require consideration and there is 6 yrs to raise a cause of action (statute of limitation) whereas a deed does not require consideration and there is a 12 yr limit to raise a cause of action
- What makes a binding contract?
 - o Offer
 - o Acceptance (counter offer/conduct/letters of intent)
 - o Consideration (not for a deed)
 - o Intention to create legal relations
 - o Consent (no misapprehension of fundamental facts/mistake)
- Warning: no legal requirement for binding contract to be in writing. Binding contracts can be oral, in a quote, in letters. Don't get caught!

WHO ARE THE PARTIES TO A BUILDING CONTRACT?

- A building contract sets out the rules between two or more parties
- Who are the parties?
 - o An individual?
 - o Sole trader? (ABN)
 - o Company? (ABN and ACN)
 - o Trust? (Warning: requires additional due diligence)

TYPES OF BUILDING CONTRACTS?

- Lump sum (note: fixed price)
- Design and construct
- Detailed design and construct
- Cost plus/cost reimbursable (fixed margin)
- Construction management (builder manages job, does project managers work)
- Managing contractor (usually for tight deadline contracts)
- Guaranteed maximum price
- Alliance (not common anymore)

- Public private project

WHAT IS A BUILDING CONTRACT?

- A building contract is a risk allocation tool (not a risk management tool)
- But, transfer of risk without considering the ultimate management of risk is 'only half the job done'
- How to transfer risk?
 - o 'a risk should be transferred to the party best placed to manage the risk'

TYPICAL RISKS

- Latent conditions (not reasonably anticipated e.g. archaeological relics)
- Weather
- Defective work
- Acts of prevention
- Third party failure
- Third party interference
- Industrial
- Late completion

CONTENT OF BUILDING CONTRACTS

- Express terms
- Implied terms
 - o Facts
 - o Law
 - o Other
- Technical project documentation

STRUCTURE

- Formal instrument of agreement (head contract)
- Definitions
- Express terms such as:
 - o Time
 - o Payment
 - o Variations
 - o Security
 - o Insurance
- Annexures/schedules (technical project documentation e.g. brief, scope, design, construct sum, etc.)

TIME

- Date **for** practical completion (save for minor errors or omissions) (when scheduled for)
- Date **of** practical completion (when it actually happens)
 - o Note: about express terms and enforcing them
 - o E.g. when it could be occupied, functionally ready to be used
 - o E.g. when principle takes charge
 - o E.g. when certificates are handed down
 - o Common law does not help with this

- 'genuine pre-estimate of your loss' calculated as at date of contract usually worked out for date for practical completion
- Liquidated damages (agreed sum of what each day is worth, has to be a genuine pre-estimate of loss, considered a penalty)
 - Principals of head contractor's cost of delay paid by the contractor or subcontractor
- Delay damages
 - Contractors or subcontractor's cost of delay paid by principal or contractor

TIME: CERTIFIER

- Who is the certifier?
- Usually, the **superintendent** (engineer, architect or principal's representative) who acts:
 - Independently, honestly, reasonably and in accordance with the contract
- Warning: what does the contract say? No one definition!

TIME: GROUNDS

- Grounds for more time to complete (usually listed as 'qualifying clauses of delay'):
 - Breach or act of prevention including principals/head contractor's consultants and contractors/subcontractors ('prevention principle')
 - Variation (including deemed variation for change in law or as per contract)
 - Instructed change in working hours
 - Suspension
 - Industry wide industrial disputes
 - Artefacts
 - Force majeure (act of god e.g. crane fire)
 - Delay in giving access

TIME: ENTITLEMENT

- The contractors/subcontractors claim for an extension of time (EOT)
- Draft a clause setting out how it works:
 - What are the qualifying causes of delay? (how to get more time)
 - Are there any compensable causes of delay? (how to get money)
- Qualifying causes of delay include:
 - Acts of prevention
 - Weather
 - Access to site
 - Concurrent delay (from both sides) (likely to be separate clause)
- If no EOT clause, the common law says, 'reasonable time' to complete applies

PAYMENT

PAYMENT: PROGRESS CLAIMS

- Building and construction security of payment act (NSW) 1999
 - contracts should reflect this act
 - all about securing cash flow
 - to ensure cash flow throughout the project
- Vic SOPA is very different – excludes variations, EOT claims (plus others)
- Warning: legislation differs across Au – also, east coast model vs west coast model

- In NSW, **claims** to be on last business day of month (or as otherwise specified) to contain:
 - Detailed breakdown of contract value of work
 - All material and labour costs relevant to variation
 - Totals of amounts previously certified and paid
 - Statutory declaration and subcontractor statement
 - Subcontractor statement – new enactment running record
 - Case law suggests might not be a valid payment claim without these docs
 - Each month with every payment claim
 - Insurance certifiers
 - Details of other monies due to the contractor/subcontractor
 - Any other details reasonably requested by the superintendent

PAYMENT: PAYMENT SCHEDULE

- In NSW, must be within 10 business days of payment claim
- Issue to contractor/subcontractor
 - Statement amount due to contractor or principal
 - Reasons for any differences from payment claim
 - Can't add these later in adjudication
 - Amounts due to principal
 - Amounts set off
- Warning: if fail to issue within 10 business days FULL debt is due and payable

PAYMENT: OTHER ISSUES

- In NSW, payment must be made within 15/30 business days of receipt of payment claim (SOPA)
- What is the **contract sum**? (e.g. lump sum, cost plus, guaranteed maximum price)
- What are the provisional sums?
 - Works which the superintendent may direct the contractor to carry out
 - If directed, a margin (%) for attendance applies (usually priced as a variation plus %)

VARIATIONS

VARIATIONS: HOW CAN THEY ARISE?

- Superintendent direction/proposed variation notice (change in scope)
- Superintendent acceptance of defective work
- Deemed variation for change in legislative requirement
- Contamination
- Rectification cost due to excepted risk
- Contractor requests for its convenience

Warning: need to ensure that the contract says that you can claim for a variation for the above, otherwise no entitlement to direct/claim variation!

- Note: If no variation provision or if something is not in the contract, you have no entitlement

VARIATIONS: PREFERRED ROUTE

Example:

- Superintendent variation proposed notice (or skip to superintendent direction)
- ASAP but within 10 business days (or such longer period agreed), contractor/subcontractor variation proposed.
 - o Can it be effected?
 - o If so, estimated time effects and cost and if directed by superintendent, details quotation
- Superintendent directs variation and either:
 - o Accepts the contractor's estimate; or
 - o Directs valuation in accordance with variation pricing rules and awards EOT; or
- Superintendent withdraws variation

Note: define variations, mechanisms to deal with variations should all be in contract

VARIATIONS: PRICING

Example:

- Prior agreement
- Applicable rates or prices in contract
- Rates or prices in a schedule of rates even though not a contract document
- Reasonable rates or prices (including % aggregate for profit and overheads if a net addition and no deduction if a net omission)

Warning: what does the contract say about claiming variations and how variations are priced? Need to ensure that the mechanism is reasonable

SUPERINTENDENT

- Don't always need one
- Scope of services set out by contract – what does the contract say?
- Separate roles:
 - Issues directions (agent)
 - o As principal's agent
 - o Issues directions to contractor
 - Certifier, assessor & valuer (decision maker)
 - o 'independently' (check precise terms or contract)
 - o Principal's agent in loose sense
 - o Once decision is made, superintendent is ex officio (usually final unless disputed)
 - Other roles?
 - o Designer (conflict of interest?)
 - o Project manager (slipstream of RFIs?)
 - o Assisting principal with SOP legislation?

SECURITY

- Usually 5% of contract sum (or otherwise specified)
- Being 'as good as cash' in the eyes of those whom it is issued is essential (*Wood Hall Ltd v The Pipeline Authority* (1979) 141 CLR 443 per Stephen J), unless contract says otherwise
- Purpose
 - o Allocate to the contractor/subcontractor the risk of being 'out of pocket' pending the resolution of dispute, because security is required by the principal/contractor as 'surety' over the contractor's/subcontractor's performance
- Types

- Unconditional bank guarantee (most common)
- Insurance bonds
- Retention