Book Review

Practical Guide to Engineering and Construction Contracts

Philip Loots and Donald Charrett, CCH Australia Limited, Sydney 2009, 439 pages plus index, ISBN 9781921593529 (hardback) AUD 95

Philip Loots is an international construction lawyer who has been closely involved with the development and application of FIDIC contracts. He is a registered statutory adjudicator in Western Australia and the Northern Territory. Dr Donald Charrett is an engineer, barrister, arbitrator and mediator practising in building and engineering disputes.

Although called a 'Practical Guide' this book is more like an encyclopaedia. It covers an enormous range of topics and includes references to hundreds of valuable sources of information. It includes a glossary of terms. The book is concerned with Australian contracts but uses some terms not commonly found in Australian Contracts. For example, 'Employer', 'Engineer' and 'performance bond' are used instead of 'Principal', 'Superintendent' and 'bank guarantee'. The book focuses on commercial contracts. It does not attempt to address the particular features of contracts for domestic building work. The Authors assume that readers will have no formal knowledge of the law. Nevertheless lawyers will find much of value in the book.

Under the heading 'Objectives of this book' the authors say, 'This book is intended to provide a concise but accurate guide to the law relating to construction contracts in Australia as at 2009. It is intended for the use of engineers (and others) who are involved in the negotiation and administration of construction contracts to enable them to understand the risks involved, and how to minimise them'. The book is neither concise nor always accurate but nevertheless it is a magnificent work and an excellent guide to engineering and construction contracts.

At the front of the book is an important disclaimer, 'No person should rely on the contents of this publication without first obtaining advice from a qualified professional person'. The book covers such an enormous range of topics that it cannot be expected to deal in depth with the law on particular topics. In a few places, the authors make a statement as to the law that is unsupported by any authority and which, in the Reviewer's opinion, is not accurate.

For example, at p 78 the Authors say:

> A common definition of the role of the Engineer (Superintendent) is that given in cl 23 of AS2124-1992:
>
> "The Principal shall ensure that at all times there is a Superintendent and that in the exercise of the function of the Superintendent under the Contract, the Superintendent –
>
> (a) acts honestly and fairly;
> (b) acts within the time prescribed under the Contract or where no time is prescribed, within a reasonable time; and
> (c) arrives at a reasonable measure or value of work, quantities or time."
>
> This definition is consistent with the terms that would be implied by law in a construction contract if there was no explicit provision governing the role of the Engineer.

With respect, this is not true. I drafted the clause for inclusion in AS2124-1986 to provide a protection for the Superintendent and the Contractor that was not provided in then current construction contracts or the law. At p 56 the Author's say:

> There may also be contractual requirements that defined types of communications such as approvals, certificates, consents and communications shall not be unreasonably withheld or delayed. It is good practice to have default or deeming provisions to ensure that failure to issue a communication will not have adverse implications for the innocent party. For example, if the certificate of the Engineer is a condition of the liability of the Employer, the absence of the certificate will prevent the Contractor from recovering payment due to it, even if the Engineer's conduct is unreasonable.

At p 166 they say that where the Engineer has not dealt with an extension of time claim within time or has wrongly refused an extension of time and the Employer has deducted liquidated damages, the Contractor may have an action against the Engineer in tort to recover damages. There is no authority for such an extraordinary claim. At p 83 the Authors concede that attempts by Contractors both in England and Australia to seek damages for the Engineer's negligent certification have been unsuccessful. That is why clause 23 is so important.

The effect of clause 23 is that if the Superintendent fails to issue or delays in the issue of a certificate or fails certify a reasonable amount or a reasonable extension of time, the Contractor has an entitlement against the Principal for damages. The entitlement is to the amount necessary to put the Contractor in the position in which the Contractor would be had the Superintendent done what the Principal promised to ensure that the Superintendent did. No similar entitlement would be implied by law in the absence of clause 23.

The consequence clause 23 is that the Contractor is not financially disadvantaged by the Superintendent's failure to certify correctly. The Contractor has an entitlement under the Contract against the Principal. The Contractor has no claim against the Superintendent because the Superintendent's conduct has not diminished the Contractor's entitlement.

At p 78 the Authors say:

> A more modern Australian Standard definition of the Superintendent's role is the concise requirement in clause 20 of AS4000-1997: "The Principal shall ensure that at all times there is a Superintendent and that the Superintendent fulfils all aspects of the role and functions reasonably and in good faith."

This is not more modern. Clause 23.1 of AS2124-1981 included, "The Superintendent shall exercise in a reasonable and equitable manner the powers conferred on him by the Contract." I was able to convince the Standard's Association's Contracts Committee to omit this clause from the 1986 edition. The obligation to act reasonably invites problems. It might be reasonable to let the Contractor depart from aspects of the drawings and specifications but the Principal should be entitled to require strict compliance. What is the Superintendent to do when the Principal will not agree to a departure from the specification but the Contractor insists that it would be reasonable for the Superintendent to allow a departure?

At p 89 the Authors say that generally the Arbitrator has power to open up, review and revise the decision of the Engineer. That right is not as valuable as the right to damages provided by clause 23. For example, if the Superintendent refuses an extension of time, the Contractor may decide to accelerate the work. Acceleration costs could be damages for breach of clause 23. The granting by the Arbitrator of an extension of time would give no entitlement to damages. Similarly, with value of work, the Arbitrator may revalue work but that does not give the claimant the right to damages. For breach of clause 23, the Contractor might recover Hungerford's damages but the revision of a decision of the Engineer would not give that right.

The Superintendent performs two roles. One is a certifying role. In that role the Superintendent should certify a reasonable amount or a reasonable extension of time. The Superintendent's other role is that of agent for the Principal. The Principal should be able to insist upon strict performance of the contract and should not be bound to act reasonably.

When advising on the selection of a construction contract, the Superintendent should look for a form of contract that includes the version of clause 23 which is in AS2124-1992.

At p 190 the Authors say:

> The Final Payment Certificate is a written confirmation to the Employer and the Contractor that the Engineer is satisfied that:
> (a) the defects liability period for the Works (or the relevant part of it) has expired; and
> (b) the Contractor has fulfilled all its obligations under the Contract, including in respect of rectification of all known Defects in the Works (or the relevant part).

When advising on the selection of a construction contract, the Superintendent should look for a form of contract that does not require the Superintendent to certify that the Contractor has fulfilled all its obligations under the Contract or rectified of all known defects. The Contractor may appear to have fulfilled all obligations and appear to have rectified all known defects but the Superintendent can never be certain.

The Authors do not distinguish between a 'final certificate' and a 'final payment certificate'. The two most commonly used forms of construction contract in use in the early 1980s were AS2124-1981 and NPWC3-1981. Both provided that the Superintendent must issue a final certificate. Both included:

> When all work under the Contract has been finally and satisfactorily executed and the Contractor has fulfilled all his other obligations under the Contract, the Superintendent shall issue to the Principal and the Contractor a Final Certificate.

This provision caused considerable concern to Superintendents. Some refused to issue the certificate because they considered it placed too great an onus and risk on the Superintendent. The clause was of major concern to Principals. Once it was issued, it seemed that the Contractor was no longer liable for defective work or other breach of contract. Consequently, when drafting AS2124-1986 I removed the provision for a final certificate and coined the term 'final payment certificate' and provided in clause 42.8, 'In the certificate the Superintendent shall certify the amount which in the Superintendent's opinion is finally due from the Principal to the Contractor or from the Contractor to the Principal under or arising out of the Contract or any alleged breach thereof.'

The final payment certificate was no more than the Superintendent's opinion. It did not certify that work had been satisfactorily executed or that the Contractor's other obligations had been fulfilled. It did not act as a bar to any claim by the Principal for defective work that might later be discovered. It is important for the protection of the Superintendent and the Principal that the final payment certificate is not a certification by the Superintendent that the Contractor has fulfilled all its obligations under the Contract or rectified of all known defects.

In chapter 19.15 the Authors briefly refer to *Security of Payment* Legislation. Since the book was published, Tasmania and the ACT have enacted and commenced *Security of Payment* legislation based upon the NSW Act. South Australia has enacted legislation but at the end of November 2010 it has not commenced. At p 239 the Authors say:

> Because of the far reaching nature of the provisions of such legislation for both Contractors and Employers, it is vital, when drafting and administering construction

contracts in Australia, to determine whether and how it applies in the particular contract circumstances.

Security of Payment legislation has made such profound changes to the risk allocation in construction contracts that to read the book without at the same time studying any applicable *Security of Payment* legislation would be a grave mistake. The book does not cover the implications of the legislation or give guidance on the risks involved or how to minimise them. In those States with *Security of Payment* legislation based upon the *Building and Construction Industry Security of Payment Act 1999* NSW [now NSW, Victoria, Queensland, Tasmania and the ACT], it is vital for the Superintendent to determine whether his or her role is to issue progress certificates under the Contract or issue payment schedules [for the Principal] under the *Security of Payment* legislation or both.

At p 241 the Authors describe the *Security of Payment* legislation in NSW, Victoria and Queensland as the 'east cost legislation' to distinguish it from the *Security of Payment legislation* in WA and the NT which is quite different. The Authors refer readers to the second edition of my book *Adjudication in the Building Industry* [Federation Press]. The third edition was published in 2010.

Generally speaking, forms of Contract in use in Australia have not been redrafted to provide the protection available to respondents to payment claims under the *Security of Payment* legislation. The result is that sometimes Contractors can recover large payments on account of damages and delay costs. Examples are *Walter Construction Group v CPL (Surry Hills)* [2003] NSWSC 266 and *Coordinated Construction v Climatech* [2005] NSWCA 229. When drafting a construction contract for use in jurisdictions with the 'east cost legislation' the best advice a Superintendent could give a Principal is to do away with progress certificates and appoint the Superintendent as the Principal's agent to issue payment schedules for the Principal.

Philip Davenport
Solicitor