It is fair to say, however, that the book is carefully prepared, contains a considerable amount of very useful information for international construction practitioners, and is a work which makes a very useful contribution to the area.

DOUGLAS S JONES


As its title indicates, this book is written for engineers and others involved in the administration of construction contracts. Its authors are two leading lawyers, both of whom have written for this Review. Philip Loots is a very well-known international construction lawyer who has extensive experience, particularly in the Southern Hemisphere, since he has worked not only in Australia but also South Africa. Dr Donald Charrett is a barrister, but for 30 years practised as an engineer, including 12 years as a director of a consulting engineering firm. He is based in Melbourne, Australia. The authors do not intend the work to be a completely comprehensive guide to construction contracts in Australia. The title places “engineering” before “construction” contracts. For example, it is not about domestic building contracts, the scope of which is considerably regulated in Australia by statute. On the other hand, the work is not concerned solely with practice in Australia as it looks outside that country and its various jurisdictions. Notably, the work is arranged by chapter in a manner consistent with the FIDIC contracts. However, the work is principally for use in Australia and so it is not a commentary on FIDIC contracts but it does provide an introduction for those familiar with FIDIC contracts who need to know more about the law and practice in Australia.

The book is clearly and lucidly written and well arranged. It is model of its kind (even if all the notes are at the end). It begins with a general description of the law of contract as it applies to construction contracts. The opening chapter also covers the application of the Trade Practices Act 1974 which is of considerable importance in providing remedies where there has been misleading or deceptive conduct. Thereafter, the book follows a conventional approach by describing the parties and participants to the project, and their rights and obligations, and then works through obligations relating to the quality and fitness of work, the amount payable, time for completion and the mechanisms by which contracts may be brought to an end, claims made under them and disputes resolved. One of the last chapters of the book (25) in covering the handling of claims and disputes
concludes with an interesting and useful table which compares methods of alternative dispute resolution.

The work ends with a set of “Case Studies” on projects which the authors provocatively classify as “successful” and “unsuccessful”. In its opening section the authors say that they will look at some of the features of the contracts, although this is not in fact always done in any depth. (This reviewer was once familiar with some of them and they would have been worth an examination.) Amongst the projects classified as “successful” is the Channel Tunnel High Speed Rail Link, which at a cost of about £1.8bn. has saved some 30 mins off the rail journey time between London and Paris. On other hand the Channel Tunnel contract is deemed “unsuccessful”. Many, probably most, would regard the project as successful in engineering terms. From the contractors’ viewpoint, despite claims and settlements, the project was probably also reasonably successful. The contracts were the product of the policies that led to the manner in which the project was implemented. It is not entirely clear why the project should have been characterised as “unsuccessful”. The fact that the financial outcome was not entirely as expected by some participants is, perhaps, more attributable to the genesis and history of the project.

Similarly, the Heathrow Express Tunnel is included as an “unsuccessful” project because there was a major collapse at Heathrow. An inquiry into the project revealed possibly little more than the not unusual absence of certain measures. The authors’ discussion prompts the query: if there had not been a collapse, would this tunnel still have been regarded as unsuccessful? The authors point out that the lessons learned from the collapse of the tunnel at Heathrow led the British Airports Authority to adopt a radically different approach for the construction of Terminal 5 which is classified as a successful project. Again, one might pose the question, why is this regarded as successful? The authors conclude their description of the project with an account of the difficulties that were encountered on its opening which became notorious throughout the world. It appears that, in fact, the building had been taken over before it was complete as a decision had been made to move in. It was apparently thought that the cost of delaying the move would have been too great (£16m. had been expected to be incurred in dealing with the opening “glitches”). To say that this project (as others) was completed on time and within budget, raises the questions: is this a reference to the original time for completion or to the time for completion that was ultimately set and is the reference to the original budget (if so, at what date?), or to the budget adjusted as the work proceeded? Users of Terminal 5 who have trudged long distances in unappealing conditions may also question whether fitness for purpose should not be a criterion for success or failure.

The work has a number of instructive tables and diagrams as well as a useful Glossary of Terms, some of which, paradoxically, indicate its few limitations. For example, “set-off” is defined but without any cross-
reference to any paragraph in the text (most other terms have a useful cross-reference) because there is no section which deals with the basic principles of the common law which recognise abatement, set-off and counterclaim. In turn, the discussion of the circumstances in which payment may be resisted by an owner or contractor on the grounds that the other party to the contract had not done the work properly and, accordingly, the amount otherwise due was not payable either in full or at all needs development. The important case of *Gilbert-Ash v. Modern Engineering*¹ is cited, but not for the proposition that an owner is entitled to set up as a defence to a claim for payment the fact that the work has not been done properly. The discussion seems to proceed on the basis that an owner must be in a position to quantify a counterclaim. For practical purposes that may be sound advice but in law it falls short of the position, at least in English law. The position in Australian law may, of course, be different.

Throughout the authors emphasise the importance of points relevant to drafting contracts. On the question of responsibility for the quality of work, the authors rightly draw attention to the general approach that terms may be implied by law and, as it is said, implied in fact, i.e., those that arise out of the particular circumstances of the contract. In the former case, courts have established that, in contracts of a defined type, including construction contracts, certain terms will be implied unless the implication of such a term would be contrary to what had been expressed in the contract. Such terms have therefore to be positively displaced since public policy requires their inclusion. This principle is stated in for example, *Liverpool City Council v. Irwin*,² and, in relation to construction contracts, in *Young and Marten v. McManus Childs*³ as applied to obligations as the quality of what has been contracted for and, where appropriate, fitness for purpose. The latter category is, however, concerned with filling out what has already been expressed. The difficulties that are encountered in practice are well illustrated in numerous cases, such as in Australia, *Atlantic Civil Pty v. Water Administration*⁴ (the facts of which are, a little strangely, not discussed by the authors), and, in England, *IBA v. BICC*⁵ (mentioned only in a footnote) and the difficult case of *Rotherham BC v. Frank Haslam*.⁶ The practicality of this Guide would be enhanced by a discussion in detail which would guide the specifier and whoever drafts the modifications to standard conditions, as most disputes do not arise from established conditions.

The authors do, however, discuss most of the other principles that affect construction contracts, including, in a number of places, the basic proposition that, where obligations are dependent upon each other, one party must

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² [1977] AC 239.
⁵ (1980) 14 BLR 1.
not prevent or hinder the performance of those obligations. This approach is described by them in a number of places as a “prevention principle” but it would perhaps be more helpful to have had a common approach to the application of the various aspects of this principle. Notably, the discussion on extension of time and liquidated damages might well need to be reconsidered for the purposes of the next edition. One of the more surprising omissions, at least to this reviewer, is the absence of any reference to a series of Australian cases which have discussed and dealt with whether the position of a contractor who failed to give notice requiring an extension of time in circumstances in which the employer was at fault. This is of some importance since differing views have been expressed in Australian courts. In *Turner Corporation v. Austotel*⁷ and in *Décor Ceiling Pty Ltd v. Cox Constructions Pty Ltd (No 2)*⁸ the courts have taken the view that a failure to give a notice which, if duly given, would have entitled the contractor to an extension of time did not have the effect of exonerating the contractor and relieving him from liability for the failure to complete on time. On the other hand, a different view was expressed in *Gaymark Investments Pty v. Walter Construction Group*⁹ and at first instance in *Peninsular Balmain Pty Ltd v. Abigroup Contractors Pty Ltd.*¹⁰ But on appeal in *Peninsular Balmain* the approach in *Turner* was apparently confirmed. The practical importance of this debate for international contracting was the subject of an article in this *Review* in 2002 by Gordon Smith.¹¹ He considered that, if a FIDIC contract were governed by Australian law, an employer might not be able to recover liquidated damages where the employer had delayed the contractor but the contractor had failed to comply with the notice requirement in clause 20.1.

But these reservations are minor. The *Guide* is otherwise very good and is also good value. It should be on the shelves of every professional who deals with projects in Australia of any significant size and of any lawyer interested in comparing the law and practice in Australia with the position in other countries.

HUMPHREY LLOYD

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⁷ (1994) 13 BCL 378.
⁹ [1999] NTSC 143.
¹⁰ [2002] NSWCA 211.