

Partnering - a fine romance

Is our lack of enthusiasm for confrontation just talk?

The relationship between dispute avoidance and dispute resolution can sometimes be strained. Over the last decade, construction professionals, lawyers and claims consultants have made some progress in understanding these concepts; but there is still some way to go.

Some have said it has been a time of public virtue and private vice; while many in the industry have made pious noises - from the Latham Report to the Be Collaborative form of contract - the Joint Contracts Tribunal (JCT) 1998, with its apparently confrontational baggage, is still the most popular form; and adjudication, for all its faults, seems to be used increasingly widely.

So do we merely talk about partaking partnering while at heart remaining unreconstructed dispute-mongers? English law contains no duty to act fairly and, though fair-dealing often leads to mutually successful outcomes, contracting is still seen as a cut-throat enterprise.

We must confront some apparent heresies:

- Have we been seduced by the new vocabulary of non-confrontational contracting, allied to quick and easy dispute resolution?
- Is partnering an end in itself? Or - crucially - do partnering agreements lead to partnering relationships?
- Does the availability of adjudication and mediation help? Or do they simply encourage disputes? This leads to more questions:
 - To what extent have the precepts of the Latham Report been adopted?
 - Is the use of partnering a sign that some of its suggestions are taking hold?
 - Do the current forms of partnering agreement achieve real partnering?
 - Does the easy availability of adjudication and mediation help partnering or hinder it?

Latham: a decade on

Re-reading the Latham report after a gap of several years, two things are starkly apparent:

- Much that was regarded as radical in 1994 is now taken for granted.
- While we are now enthusiastic about these ideas, no more than lip service has been paid by many.

Latham gives a neat summary of what most of us understand by partnering at paragraph 5.18:

- 1 A specific duty for all parties to deal fairly with each other and with their subcontractors, specialists and suppliers, in an atmosphere of mutual co-operation.
- 2 Firm duties of teamwork with shared motivation to pursue those objectives. These should involve a general presumption to achieve 'win-win' solutions to problems which may arise during the course of the project.
- 3 A wholly interrelated package of documents which clearly defines the roles and duties of all involved and which is suitable for all types of project and for any procurement route.
- 4 Easily comprehensible language and with Guidance Notes attached.

Partnering itself is only – tentatively – mentioned in paragraph 6.42, where he suggests formal partnering agreements for larger projects and those with repeat processes.

The following principles emerge throughout the report:

- fairness – in the parties' dealings with each other and in how they regulate risks;
- openness – in procuring and subletting the works, and in addressing problems during the works;

- transparency – particularly in the contract documents;
- clarity of communication; and
- commitment to success – ‘shared goals’.

Adversarial and unfair contract forms are seen as contributing to confrontation, with the JCT and Institution of Civil Engineers (ICE) families of contracts coming in for criticism, while the New Engineering Contract (NEC) form receives a vote of confidence. Engaging lawyers to produce extensive contract amendments is condemned.

Those who wish to continue using the JCT and ICE forms should amend them to incorporate the principles set out above. This has not happened and the reader of these forms will realise – in moments – that, to achieve this, the documents need rewriting from scratch.

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It is difficult to avoid the thought that ‘good’ amendments (designed to achieve fairness) are to be encouraged; ‘bad’ amendments (intended to secure commercial advantage) are not.

Rethinking contracts

In Re-Building ‘The Thinking Construction’, Sir John Egan expressed the still more extreme view that the answer lies, not in redrafting fairer contracts, but in doing away with contracts altogether.

"Contracts can add significantly to the cost of projects and often add no value to the client. If the relationship between constructors is soundly based and the parties recognise their mutual interdependence, then formal contract documents should gradually become obsolete... In the motor industry we have seen non-contractually based relationships between Nissan and its 130 suppliers."

Would this view prevail if the word “contract” was replaced by “insurance” or “health and safety regulations” – both of which can add to costs without providing direct benefits? In the motor industry, where one party's bargaining position is significantly stronger than the other's, partnering is surely no more than the imposition of terms by the stronger party.

In her keynote address to the KPMG Partnering Symposium, Fiona Hammond, of British Airports Authority, expressed a better view: "Was partnering about contracts? Probably not. Contracts were about risk. Relationships were a different matter. Contracts had become largely empirical, and partnering was about managing the process and building teams. Partnering was about making the contract reflect what the parties had agreed, not what the lawyers thought it ought to mean."

Ms Hammond points out that contracts do not of themselves create disputes. These are caused less by onerous terms than by ambiguity, leading to genuine disagreement. One-sided obligations encourage a party to look for ambiguous wording.

Partnering: I'll know it when I see it

In ‘Making Partnering Work in the Construction Industry’, Julian Critchlow quotes Reading University's research which shows that, over time, less confrontational approaches to construction can (as Latham said) achieve cost savings of 30%. Partnering is not an exercise in ticking boxes but a matter of hard work. And it means different things in different projects, with different functions, depending on the nature of the works.

The Project Partnering Contract (PPC) 2000 is, to date, the only standard form partnering contract. There are also several bespoke partnering agreements. All contain variations on a

central theme: the definition of a series of shared goals, allied to a commitment to achieving those goals in an atmosphere of trust, and free from confrontation.

Two distinct philosophies are at work. PPC 2000 is an over-arching agreement constructed so that all participants in the project buy into a single set of partnering goals; these incorporate the work provided by each participant and a set of conditions governing the execution of that work. By contrast, the home-made agreements are generally single relationship agreements between individual members of the team. They either sit alongside a contract for the execution of the works or serve the dual function of setting out the terms for works and the participants' partnering goals. The object of PPC 2000 is to bind all the participants into a mutually consistent set of goals and obligations, assuming that shared goals will lead to shared achievements. The idea behind the bespoke agreements is that parties who undertake to conduct themselves in a way which is free from disputes are giving themselves the best chance of doing so.

Worth an argument

The flaw to both approaches can be seen in *Mowlem Marine v Stena Lines* (unreported, Lawtel 12 October 2004). It was provided that, pending certain events, Mowlem's entitlement to payment would be capped at £10 million. Mowlem unsuccessfully argued that the provision in question was ambiguous and that, where the value of work carried out was (they claimed) well in excess of £10 million, they were entitled to payment of the excess. Advised by experienced lawyers, Mowlem felt that the position was sufficiently unclear to be arguable in court. There was no partnering agreement in this case; but the parties will have been aware of partnering principles. The obligations were sufficiently cloudy, and the sums of money sufficiently large, that the existence or otherwise of a partnering agreement made not a scrap of difference. Partnering agreements are only as good as the underlying agreements they are intended to regulate.

In a number of major transport projects, partnering agreements form part of the (usually huge) package of contract documents. Disputes have arisen – with many settled without resort to adjudication – largely because of understandable uncertainties in defining target costs and the circumstances in which the contract's gain/pain provisions have been intended to work.

The resolution of these matters owes little to the existence of partnering provisions and much more to the commercial benefit of sorting matters out. A partnering agreement may even have been a hindrance because, having 'ticked the box', it was thought that no more needed to be done.

Partnering is about relationships and not contracts. Relationships are founded on trust, and trust is founded on understanding. One way of preventing misunderstandings is to encourage relationship building from the tendering or negotiation process onwards. In many project finance contracts, selection of the preferred bidder is dictated by key performance indicators – where price features well below the ability to deliver; and an understanding of what is actually being delivered is paramount.

Be, the independent construction reform group, has published a Be Collaborative form which has a unique approach; both parties list all the risks as to delivery and performance on a risk register. Then they agree and record on the register how the timing and financial consequences of these items are to be allocated. Although this does not cover unforeseen risks, the parties are encouraged to confront potential problems at the outset and to find mechanisms for resolving them.

Dispute resolution

Disputes can occur even in the best planned contracts. Since Latham reported, adjudication has proved a great success, as is reflected in the Umbrella Task Force Report and by Chris Dancaster in a review of the report delivered last month to the Society of Construction Law.

But, increasingly, adjudication is not always seen as the answer. In London and Amsterdam v

Waterman Partnership, Judge Willcox observed that the use of adjudication to deal with complex disputes needed urgent review. While adjudication works well for disputes where the main issue is payment, it is less successful for more complicated questions. This is not a criticism of adjudicators but of parties' unrealistic expectations as to what can be done in the time available. Difficult issues are more sensibly dealt with in the comparatively speedy timetables on offer from The Technology and Construction Court (TCC), rather than among the procedural and jurisdictional minefields of adjudication.

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