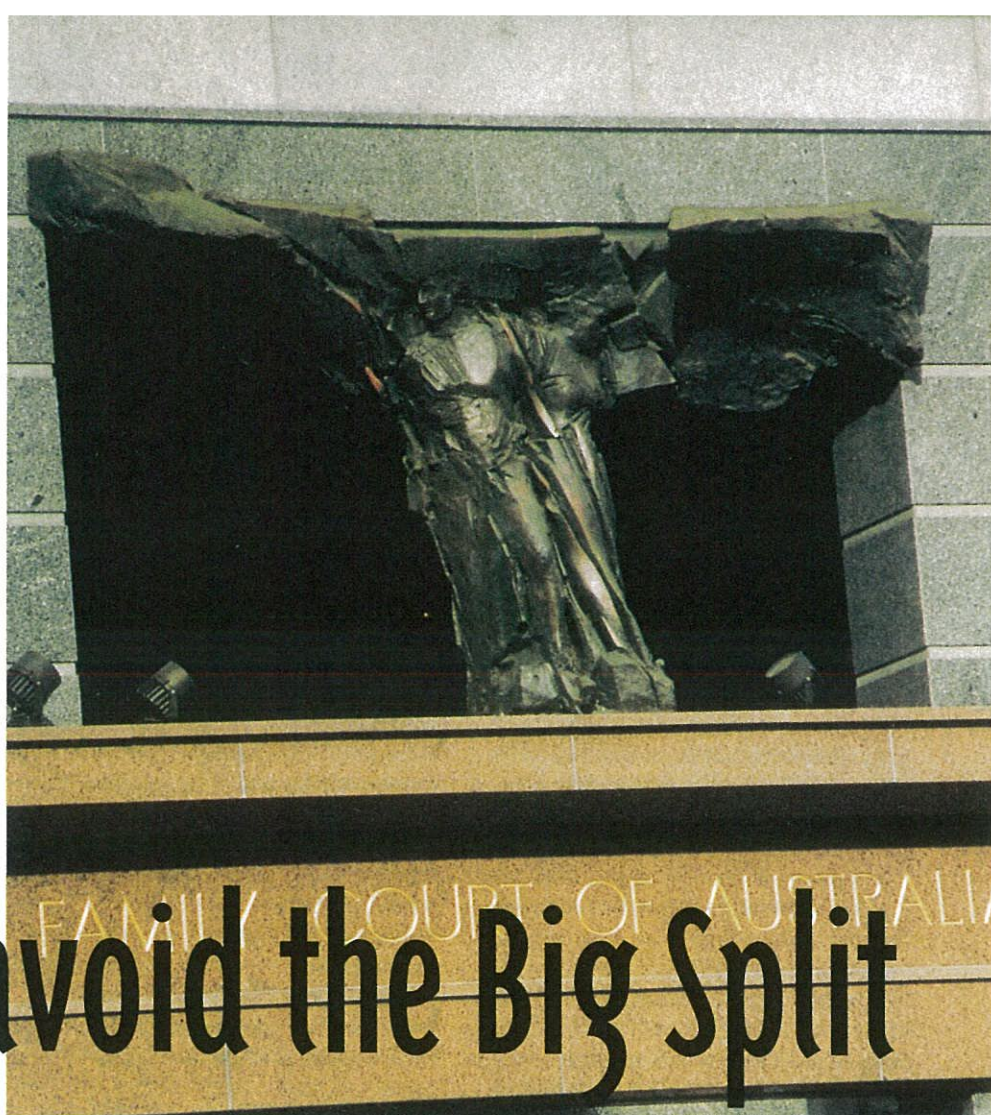


As in marriage, mutual cooperation and respect are essential to any partnership.

**Justin Young** believes the principles of partnering can do more than make a construction project run smoothly – it can save your marriage.



# How to avoid the Big Split

**I**f only I hadn't listened to my wife. She was always telling me not to bring my work home. I bet she regrets it now. It was the failed marriage counselling that finally made me realise – alas too late – that what I was doing at work every day was exactly what would have saved my marriage. You see, I was involved in Partnering.

Partnering is a concept that developed in the United States in the 1980s as a result of perceived inefficiencies in the conduct of projects, such as construction projects, arising out of the parties conducting themselves in a defensive manner, lacking cooperation and as a result of high levels of litigation. It is a voluntary procedure to improve working relationships by establishing processes to encourage mutual commitment and improved communication.

It had been staring me in the face all that time: mutual commitment; improved communication. I could have kicked myself at the marriage counselling sessions.

"You've been involved in Partnering, too," I said naively to the counsellor as she threw those very same words at us.

"In a way," was her curt reply.

But it was too late. Irretrievable breakdown; or, in project language, the contract was repudiated: termination followed. Had

my wife and I drawn up a Partnering Charter (like the sample below) when we were first married, I am sure we would have made it.

The sample is typical of a Partnering charter used in the construction industry. Such statements are usually non-binding and set out the contract parameters. It would be useful to have it pinned up on the wall during a project, particularly if tensions are rising. I should have had it up on the kitchen wall at home when tensions were rising, I thought!

But I know now that would not have been enough. As the marriage counsellor said, good intentions are not enough. You need some practical measures, some tangible steps, to turn ideas into action.

"You have to work on your relationship," she said. I reached into my bag and grabbed the C21 Construction Contract Conditions published by the NSW Government in late 1996 and showed her the Partnering-type provisions in clauses 4.1, 5, 6.1, 6.2 and 7.1:

#### ■ Promotion of cooperation

In carrying out the general responsibilities described, the parties each undertake to actively promote cooperation between them at all levels of their respective organisations.



## SAMPLE PARTNERING CHARTER

### MISSION STATEMENT

Our Mission is to strive for cooperation, trust and understanding, to work to a common goal and to minimise risk by supporting each other to achieve the Partnering Objectives.

### PARTNERING OBJECTIVES

- ENJOYMENT  
Create an atmosphere conducive to high morale and job satisfaction.
- BUDGET  
All stakeholders achieve their monetary aims.
- TIME  
Meet agreed deadlines.
- SAFETY  
Achieve a safe work place for all involved.
- QUALITY  
Exceed appropriate quality standards.
- OUTSIDE RELATIONSHIPS  
Comply with all obligations to the community.
- FAIRNESS  
Recognise the rights of all parties to fair treatment.
- DISPUTE RESOLUTION  
Ensure efficient resolution of disputes within agreed time periods.

#### ■ Duty not to impede performance

Each party must use reasonable endeavours to avoid interfering with or impeding the performance of the other under the Contract.

#### ■ Early warning

The parties are to use best endeavours to communicate and promptly inform each other of any knowledge likely to affect the timing, cost or quality of the Works, and to investigate how to avoid or minimise any adverse effects on the Works.

The parties are to meet regularly to discuss problems or issues involving the Works and, where possible, to develop adequate solutions to them.

#### ■ Evaluation and monitoring

In addition to the parties' obligations under clause 6, the parties are to meet regularly to evaluate and monitor performance of the Contract using the procedures and criteria shown in the Contract monitoring management evaluation and monitoring matrix forms, or other agreed procedures and criteria."

But, once again, it was too late. I felt sure if we had only heeded the words of those simple clauses, our marriage would have thrived like so many Partnered

projects have done over the past decade.

So all we had in common after that was the litigation. It was expensive, slow and destroyed any last chance we might have had of working things out. That, sadly, I knew, was what litigation was like in many non-Partnered projects. The alternative dispute resolution procedures often adopted in Partnered projects might have saved us. They are designed to get people negotiating quickly, to recognise and resolve disputes before they get out of hand. That was what we needed.

For example, we could have used the C21 clause 6.2 above; or we could have used an "elevation process" (so described in the NSW Partnering Guidelines of December 1993), a mechanism established to ensure that a dispute is dealt with at the most appropriate level at the most appropriate time. If the dispute is not resolved at a lower level within a certain time frame, it must be passed to the next level and so on.

Or we could have mediated. This involves the intervention of an independent third party whose role is to facilitate the bringing together of the disputing parties. The mediator may or may not have power to make any decision or award or to ex-



# TAKE THE DIRECT



press a view on the issues in dispute: the primary focus being to facilitate negotiation. A technique often associated with this process is caucusing. This is where the mediator talks to one party separately (usually in a separate room) to draw out the strengths and weaknesses of its position before having a similar discussion with the other party with a view to helping that other party to understand the relative strengths and weaknesses of its own position. The contents of each discussion are not to be disclosed to the other party.

Tragically, I found out that the Family Court uses mediation not too dissimilar to the mediation procedures often contemplated in a Partnered project. A typical mediation involves the appointment of an independent person who will suggest, either at an initial meeting or by letter, an appropriate procedure for the conduct of the mediation. This will often involve the preparation and exchange of position papers setting out the arguments in support of their view. This approach is a useful way of ensuring the parties sit down and really work on the strengths and weaknesses of their case and that each party has a better grasp of the other's case. Often, where

there is a will to resolve the dispute, this process can create the final push to resolution.

This exchange of position papers is often followed by a mediation hearing which includes a session where both parties appear together before the mediator, each outlining its position to the mediator in front of the other party. Caucusing often occurs during which time the mediator may or may not express their view. The mediator will then put their view to the parties. If the mediator is well chosen and well respected by the parties, this view, even if not binding, can be persuasive. Alternatively, if the parties have opted for binding mediation, the mediator will grant an award.

There are other procedures we could have used such as expert determination, where an expert is asked to come to a view on a point in dispute, usually of a technical nature. But, once again, as the marriage counsellor said, there is little point in embarking on any of these procedures if the other party is not prepared to negotiate seriously or does not, in fact, want to resolve the dispute (perhaps, instead, in a commercial context, wanting to delay payment for, say, cashflow reasons) or is reluctant

to disclose certain information to the other party (perhaps because it is commercially sensitive). In fact, not only is there little point but, worse, you may find yourself incurring costs and delays which will be duplicated when embarking on litigation later.

These alternative dispute resolution procedures are the right approach, but only where the disputing parties are generally committed to:

- doing their best to settle cheaply and quickly;
- having more control over the process;
- an early exchange of information;
- saving executive time;
- informality; and
- preserving an existing relationship.

So, take heed. Unless you are an undertaker, a zoo-keeper or a nuclear scientist, if your other half insists that work should stay at work, think carefully. Disobedience may save your marriage.

*Justin Young is associate solicitor with Dunhill Madden Butler. (Note: the author and his happily married wife wish it to be known that this article, except for the information about Partnering, is pure fiction.)* ■

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Mayne Nickless House Melbourne <b>\$37.6 M</b> Hong Kong	Australia Place Perth <b>\$30.15 M</b> Singapore	Skygarden Sydney <b>\$90 M</b> Malaysia	333 Collins Street Melbourne <b>\$243 M</b> Hong Kong	City Cross Adelaide <b>\$22.5 M</b> Singapore	The Grand Complex Wellington <b>\$48.55 M</b> Singapore	500 Collins Street Melbourne <b>\$34 M</b> Singapore

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