

Domestic building disputes

A commercial or therapeutic approach?

The old adage that a man (or woman's) house is their castle could not be more relevant than in the context of domestic building disputes.

In most commercial disputes, while often complicated and tainted with ego or 'principle', resolution is usually a mathematical equation to a settlement figure that both parties can accept as reasonable. However, when the matter involves an individual's home, and if their way of life is compromised and placed in limbo due to complications with a builder, emotions run high and trust is quickly lost. The level of such emotions compound contractual difficulties and engaging in litigation seems to be the breaking point in many cases.

Disputes between homeowners and builders are primarily litigated in the Queensland Civil and Administrative Tribunal (QCAT) jurisdiction and sometimes, when necessary and appropriate, the District Court or Supreme Court.

Unlike the courts, QCAT has no monetary limit in terms of the quantum of an owner's or builder's claim, enabling issues involving defective building work, costs of rectification and validity of contract termination to be litigated in one forum, regardless of the value of the contract or claim.

QCAT has a positive and proactive approach to the early resolution of matters enshrined in its legislative provisions. Established to deal with matters in an informal and quick way that is accessible, fair, just and economical,¹ QCAT encourages speedy resolution of matters, often through alternative dispute resolution processes.²

Compulsory conferences (QCAT 'jargon' for a form of mediation) are conducted relatively early in the litigation life of a building dispute. Their purpose is to identify and clarify or narrow the issues in dispute and promote settlement of the matter,³ amongst other things. The question then becomes how willing owners and builders are to negotiate and compromise when their personal relationship has substantially deteriorated and is entrenched with disappointment and mistrust.

The feelings vs the money and the work

A building contract between an owner and a builder can be likened to a new relationship. Both parties are positive and excited about the prospect of creating something. Owners want to embrace a builder in their vision of the end result. Builders want to woo owners with good prices, promises of quick construction periods and a happy outcome at the end of the project. After the commitment to be monogamous is given (with the signing of the building contract) work commences and both parties are keen to work together harmoniously for the benefit of both.

However, as with relationships that break down, it sometimes happens that owners (like a nagging partner) become picky or too involved, or begin to demand things outside of the scope of the work, or refuse to sign off on or pay for variations, all of which a builder may not agree to or may not handle with particular patience or agreement. On the other hand, some builders become complacent and do not progress the works diligently, do not undertake the works in a competent manner or to the appropriate standards, or simply fail to acquiesce to the owner's demands.⁴

An application to QCAT by either an owner or a builder usually occurs following a termination of the contract by one (or both) parties. Such termination usually occurs after a period of dispute about work or money, with temperatures running high and congeniality running low. The emotions of parties are further inflamed when statements filed by the other party tell a version of events that the opposing party does not agree with or takes to heart as a personal attack.

One of the challenges for users of QCAT's process is that, while the sentiment of early resolution is an optimistic outlook, it is compulsory and requiring unwilling parties to attend mediation may result in little progression of the matter. This is very typical in the case of domestic building disputes in which owners and builders can barely be in the same room together, let alone talk about possible ways to move forward with their relationship.

It is hard for an owner to consider conceding some items of dispute, when those items are connected to feelings of anger or hurt at being deceived by a builder's broken promise. It is equally hard for a builder to accept responsibility for defective building work when they may have an inflated opinion of the quality they achieve or admit agreement to accept delayed payment when payment has been withheld in past instances.

The challenge: Which approach to adopt?

Holistically, mediation is a process best served by willing parties who are prepared to invest time and effort into reaching a satisfactory outcome. The participation of unwilling parties, for the sake of 'face' or procedural necessity, is unlikely to result in a positive outcome.⁵

The timing of QCAT's compulsory conferences usually coincide with both parties being appraised of the other party's position and the reality of the strengths and weaknesses of their own (and the other's) case and prospects.

Notwithstanding, the QCAT mediator must not only navigate complicated legal and building issues, but also the fragile relationship between the parties – which is sometimes more of a barrier to resolution than a difference of opinion on legal issues. Parties themselves are required to attend and participate in the conference process; however, legal representation is permitted (either by consent or by application)⁶ in the compulsory conference when appropriate.

Given the emotions that often characterise domestic building disputes, a therapeutic approach may assist the path to resolution. Report by **Mardee Campbell**.



Given that the compulsory conference is only allocated a two to three-hour block of time,⁷ in most instances, the 'lawyerisation' of the mediation process in QCAT can be beneficial for facilitating objectively articulate discussions based on facts and issues, rather than emotive matters that bog down discussion.⁸ This commercial approach, allowing very little time for venting before moving straight to the legal issues in dispute, can be successful, but lacks the element of parties feeling like they have been heard and participated in the process.

Notwithstanding the resource and personnel pressures which QCAT is obliged to manage, perhaps a more therapeutic approach could be beneficial in some matters, allowing more time for the parties to have a genuine opportunity to express freely their side of the story and the emotional impact the dispute has had on them.⁹ Being able to elicit apologies or acknowledgement of hurt feelings can remove barriers, enabling parties to look at issues and break them down into manageable stages for potential resolution.¹⁰

Allowing parties this opportunity to air their grievances, rather than being quickly pushed to commercial negotiation, may result in some more workable, realistic and satisfactory outcomes for owners and builders, and the completion of the 'castle'.

This article appears courtesy of the Queensland Law Society Alternative Dispute Resolution Committee. Mardee Campbell is an associate at Crouch & Lyndon Pty Ltd and a member of the committee.

Notes

- ¹ Section 3(b) *Queensland Civil and Administrative Tribunal Act 2009*.
- ² Section 4(b), *Queensland Civil and Administrative Tribunal Act 2009*.
- ³ Section 69(a) and (b) *Queensland Civil and Administrative Tribunal Act 2009*.
- ⁴ These 'examples' are very limited reasons why building disputes eventuate.
- ⁵ John Tyrill, 'Practical Commercial Mediation Issues' 1996, *Australian Construction Law Newsletter*, Issue 46, 32.
- ⁶ Section 43(2)(b)(iv) *Queensland Civil and Administrative Tribunal Act 2009*.
- ⁷ This time limit is not provided for in legislation or any practice direction, but is the generally accepted period of time that the majority of QCAT members will spend with the parties, unless discussions are progressing, further time is needed and all parties are willing and able to continue.
- ⁸ John Tyrill, 'Practical Commercial Mediation Issues' 1996, *Australian Construction Law Newsletter*, Issue 46, 36.
- ⁹ Lisa Toohey and Daniel Toohey, 'Achieving quality outcomes in community titles disputes: a therapeutic jurisprudence approach', *Monash University Law Review*, Vol.37, No.1, p308.
- ¹⁰ *Ibid*, p309.



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