YOUR FREE, ONLINE RESOURCE

One of Australia's most comprehensive collections of articles on the commercial and construction industry can be viewed by visiting our eLibrary at www.lovegrovesolicitors.com.au

LOVEGROVE
Solicitors

P: +613 9600 1643
F: +613 9600 3544
E: reception@lovegrovesolicitors.com.au

Issued 09 July 2010

Legal Bulletin

Dispute Resolution and the VCAT

By Lovegrove Solicitors

The primary forum for resolution of building disputes in Victoria is the VCAT. There is also the BACV, a dispute resolution forum that is co-hosted by the Building Commission and Consumer Affairs. This particular forum ordinarily deals with smaller building disputes. The main focus of this chapter will be on the VCAT because this afterall is the forum within which we have had the most experience, and the other forum does not ordinarily lend itself to legal advocacy.

The DBCA provides that residential building disputes have to go to the VCAT for resolution. In fact, s57 provides that the VCAT is the forum primarily responsible for resolving domestic building disputes.

A domestic building dispute is a dispute to do with the construction of a home.

To initiate an action in the VCAT the applicant has to file an application in the prescribed form with the prescribed fee at the VCAT.

The Listing Registrar may then order a directions hearing or may direct that the matter go straight to mediation. Parties can appear without lawyers but in the main they prefer to retain them.

The directions hearing

The directions hearing is where a Tribunal member will, in co-operation with the parties and their advocates, generate orders as regards the way by which the matters will proceed and the time lines for the passage of such matters. In the main a mediation date will be secured. The member may also set down orders that the applicant file a statement of claim, i.e. an instrument that spells out the nature of the dispute and the relief sought. The member may also order that the respondent generate a statement of defence. Times for the filling and dispatch of these interlocutory instruments will also be forthcoming.

The mediation

The Tribunal appoints a mediator at no cost to the parties. The mediator is ordinarily a qualified lawyer, although s/he may be qualified as building consultant, builder or engineer. Indeed Kim Lovegrove's father, the late Dr. Malcolm Lovegrove, was a mediator and a retired educationalist, having obtained his doctorate in Child Psychology.

Mediators are trained in the art of facilitation and the brokering of compromise. They endeavour to impress upon disputants the virtues of early settlement and by the same token the dangers of protracted litigation. They are not permitted to provide a dissertation on the law or the likely winner. Rather their *raison d'etre* is to encourage, through conciliation settlement.

They will ordinarily impress upon the parties that respective positions and stances may need to be moderated and in the main matters only settle where both parties are prepared to compromise.

The mediator will also be at pains to impress upon the parties that what is said at a mediation is confidential and without prejudice. If a matter settles, the mediator will ensure that a terms of settlement document is entered into and executed. It is the responsibility of the parties to adhere to the terms of settlement. Once a matter has settled the mediator notifies the Tribunal registrar and the matter is at
an end. If the mediation is unsuccessful the case is referred back to the VCAT to be listed for a further directions hearing.

How to approach mediation

- Go in very well prepared;
- Be represented by a construction lawyer;
- Be prepared to compromise;
- Be prepared to listen and take cognisance of the other sides view of matters;
- When the opposing advocate presents his clients case have the good courtesy not to interrupt;
- Don't be hostile and belligerent as an intemperate disposition may sabotage settlement;
- Do your mathematics and factor in the cost of trial visa vie the cost of an early mediated outcome;
- Never be motivated by vengeance or "the principle of the matter" and if you are, be mindful of the old Italian adage, "if you want revenge dig two graves";
- In my experience financial settlements are normally the best ones.

Sometimes matters settle on the basis that the builder will come back to rectify alleged defects. Frequently when this occurs, further disputes ensue, the terms of settlement go off the rails and the matter goes back before the Tribunal.

Our strongest counsel is to use your very best endeavours to settle at mediation, the economies are generally compelling because a great deal of legal expense can be saved. That is not to say that one should capitulate in circumstances where one has a very strong case, save for one important caveat, which is that you should always ensure that your opponent is "a man of means" not "a man of straw".

There is little to be gained and much to be lost if one invests significant legal revenue in pursuing financially defunct parties.

What next if the matter does not settle?

If the matter does not settle the matter goes back to a Tribunal member at a directions hearing. If the member hasn't already done so the following types of orders will be generated:

- The date for filling the statement of claim;
- The date for filling the statement of defence;
- The date for filling of a reply to the defence;
- The date for filling of expert witness statements;
- The date for filling of an affidavit or list of documents. This list divulges all of the documents that are related to the building dispute;
- A possible date will be generated for a compulsory conference;

The member may generate a trial date.

Discovery and the list of documents

When there is an order for discovery the parties have to generate a
comprehensive and accurate list of all documents that will be relied upon. Parties cannot be selective about which documents they wish to include and which they wish to admit. All documents of whatsoever nature that relate to the building project have to be listed and made available for inspection. One is not allowed to dispense with or destroy any such documents.

The process of discovery is tedious and expensive but must be dealt with, with a high level of exactitude.

The compulsory conference

Sometimes Tribunal members order a compulsory conference. These
conferences are very similar to mediations in that the better part of a day will be put aside to resolve the dispute. There is one key difference however. Whereas at mediation, a mediator is not allowed to provide an opinion as to who is likely to win, the convenor of a compulsory conference, i.e. a Tribunal member, can and generally does. This can be a very powerful settlement inducement.

Although we are all fans of mediation and compulsory conferences, there are some caveats. “It takes two to tango” and unless the other party is genuine in its desire to settle a matter, then mediations and compulsory conferences can be frustrating and expensive

Trial

It is indeed a sad state of affairs if a matter has to go to trial. The Tribunal has a well documented history of successfully mediated outcomes. Indeed a comfortable majority of cases settle at mediation.

If a matter goes to trial take cognisance of the following:

- It will be very expensive;
- Ordinarily a solicitor and a barrister will be required to appear;
- Expert witnesses, at considerable cost, will be retained;
- The daily cost of trial could range from anywhere between $2,000-8,000 a day;
- The trial may run for weeks;
- There is no guarantee of victory;
- Just because you win it doesn’t mean to say that you’ll be guaranteed success costs, although the winner is generally awarded costs;
- Only in the rarest of circumstances does the winner get 100% of the costs back.
- Ordinarily it is between 60-70%;
- One needs to ensure that if and when judgement is forthcoming, the defendant has the capacity to pay;
- The decision may be appealed, although this is unusual;

The trial will be very stressful and will test one’s financial and emotional resolve.

For more information, please contact Kim Lovegrove
Phone: (03) 9600 1643 | Fax: (03) 9600 3544 | Email: *reception*@lovegrovesolicitors.com.au