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LOVEGROVE & LORD LEGAL BULLETIN

TO PLEA OR NOT TO PLEA, THIS IS THE QUESTION.

By Miro Djuric, Building Practitioner Advocate

Practitioners can be investigated for professional misconduct matters and if there are grounds for disciplinary redress the matters will invariably find their way to the Building Practitioners Board

The Nature of the Hearings

Hearings are held in the ADT. They are generally presided over by a senior judicial member, but sometimes the member will be aided by a member that possesses particular expertise in the matter that goes under scrutiny. One of our principals, Kim Lovegrove, has appeared in the ADT in a number of matters and he can recount that the setting is not court-like in appearance, lacking the intimidating and austere atmosphere which is more characteristic of the Courts.

In the main legal representatives are permitted to appear as advocates and in 30 to 40 percent of instances they do in fact appear. Without sounding like a “hard sell”, I consider it paramount that legal representation be brought to bear in such matters. Reason being one’s ability to practice is brought into question and matters of livelihood and reputation are at stake. Being a lawyer I am very jealous and protective of my good name because that is part and parcel of being a professional and I cannot fathom how any practitioner could be relaxed or cavalier about the protection of his or her good name.

Advocates particularly those that have expertise in construction law and practitioner misconduct “legal nous” are in rare supply but their utility cannot be underestimated. Professional misconduct is a hybrid of common law, it has its own onus of proof and in some respects the tests are more akin to criminal

burdens. After all, many of the offences under the *Building Act* are prosecutable offences.

Like matters of the criminal persuasion, a board member will have regard to the matter of whether a respondent has any "form" ie, prior convictions. Like the criminal realm, there exists the concept of an admission of guilt complimented by the concept of pleas of mitigation or, to put it another way, explanations or circumstances that may explain why a "slip up" occurred.

To Plea Or Not To Plea

In my experience as an advocate and practitioner having had conduct of matters in Victoria, New South Wales and the ACT, I can attest to the fact that in the overwhelming majority of instances a practitioner has a case to answer. Having been a "from time to time prosecutor" I can vouch for the fact that prosecutors, be they police, municipal building surveyors or the building commission for that matter, do not embark upon a prosecution or referral to the building practitioners board unless they are satisfied that there is a prima facie case to answer. Yes, from time to time, the prosecutions case does not stack up and hence fails, but this is well and truly at odds with the traditional "form guide".

The Advocate's Rigour

When I am briefed on a matter, first of all I develop intimate familiarity with the facts in order to satisfy myself whether there is a prima facie case to answer. It is never my objective to tell the client what he or she wants to hear, rather it is my objective to tell the client the facts and the truth, unpalatable as it may seem.

If I form the view that there is a prima facie case to answer, the recommendation is made to "own up" and admit guilt at the earliest possible opportunity, for this is not an arena for "chancing one's arm" and raising esoteric technical if not silly points designed to muddy the waters. It is a forum for candid, frank or deferential advocacy.

Why Plea?

Assuming there is a prima facie case to answer, there is nothing to gain from protracted time delaying advocacy. In fact it is dangerous, there are many seminal authorities that stand for the proposition that an early plea, contrition and remorse translate into penalty discount. If one is intent on frustrating the process, raising cute technical points then one is repudiating one's ability to display remorse, contrition and decorum appropriate for this serious arena.

What Does Good Advocacy Entail?

- Not beating around the bush, coming to the point quickly, "fessing up" and facing the music.
- The advocate will invariably be deferential, polite and cooperative and will instil that culture into the respondent team.

- The advocate will be totally on top of all of the facts
- The advocate will also focus on the little things, s/he may insist that the client dresses conservatively, respectfully
- The advocate will have ensured that the client is able to tender good references from relevant referees, references that have been generated in recent times. It is paramount that the referees are well regarded individuals or professionals in their own right.

Mitigation

Useful arguments in mitigation are along the following lines.

- It is useful if the offence is a "one off", against a backdrop of an otherwise impeccable career. The aim is to satisfy the board that the errant conduct was indeed a one off, an aberration of sorts.
- It is useful to be able to give evidence that the experience has been sobering and has resulted in a "work place revolution". By this is meant systems and practices have been instituted to ensure that the environment that created the transgression has changed in a profound sense.
- It is important to shed light on the financial position of the respondent because an arbiter will have regard to the financial restraints of the client and the magnitude of the penalty when matched up with those constraints.
- It is paramount that the advocate can say with all sincerity that his client is remorseful and has found the experience in some respects life changing so that the arbiter is satisfied that the respondent appreciates the gravity of what has been done.
- Mention should be made of the impact of a conviction/suspension on the respondent's future career, livelihood and/or dependents.

Conversely beware the below cardinal sins.

- Arrogance, lack of contrition
- An "everyone else is to blame but me" approach.
- Aggression or intemperance
- Representing oneself. After all, the old adage one has a fool as a client if the client is the advocate wasn't coined for no reason.
- Failing to communicate in a timely fashion.
- Failing to commit the time and resources to ensure that the best possible plea that can be generated.
- Using advocates that have no familiarity with the peculiar subtleties of construction law and practitioner misconduct
- Using advocates that are in the habit of "running with the esoterics", not seeing the wood for the trees.

Conclusion

Practitioner misconduct is a serious and stressful arena because so

much is at stake and in this day of instant and wide spread communication everybody knows about the blackening of one's name very, very quickly. The penalties ranging from fines to practitioner cancellation can be quite severe and people do get "rubbed out". Therefore, only use those who have the skill sets and the experience to best protect you. If you find yourself on the receiving end of a practitioner enquiry, be vigilant in your search for such expertise.

About Miro and the Lovegrove & Lord Team

This article is prepared by Miro Djuric, senior associate and practitioner advocate at Lovegrove & Lord, lawyers. Miro is part of the inter-jurisdictional practitioner advocacy team of Lovegrove & Lord and he can accept referrals in the ACT and New South Wales. He works closely with Kim Lovegrove and is ably assisted by Paul Berrill, also in the practitioner advocacy section. Miro has more than 15 years experience as a lawyer, and for the last few years has had conduct of practitioner advocacy matters in both Victoria and New South Wales. He is an expert in construction law and OH&S. He brings to bear, as do all of the Lovegrove and Lord team, cross-jurisdictional experience, and intimate familiarity with building regulations and has been involved with cases that have become seminal cases. Kim Lovegrove was the lawyer who was engaged by the NSW government to advise on the development of part 4 f the EPAA, the model building Act and the Victorian Building Act. He is also a past "2IC" in the ABCB. Our team has purpose built expertise tailored for helping building practitioners, which is frankly second to none.

If you are ever in trouble, in need of help or clarification, contact Miro or Paul on:

Phone: (03) 9600 3522
Fax: (03) 9600 3544
Email: mirod@llcc.com.au
paulb@llcc.com.au