Driving change as developers take the wheel

Legal matters

Kim Lovegrove

IN EARLIER, more genteel times developers and builders resolved building disputes by getting together and thrashing out a deal.

They then put the matter behind them and talked about future deals.

Litigation was by far the last resort.

Then came the late 1980s when our society became more adversarial and litigious.

Relations became strained and the phrase — "if you want to get paid see you in court" became a new mantra.

This heralded a wave of construction lawyers who were used to wage battles that sometimes degenerated into long and costly wars.

And there were casualties — empty pockets, destroyed commercial relationships, rancour and disillusionment.

So litigation became the main way of resolving building disputes, and there was a cultural shift from "one-on-one negotiation" to "all out" legal war.

This philosophy held sway for much of the 1990s and the early 2000s.

Over the last couple of years jaundiced property players, battle weary from one too many a dispute, decided there must be a better way of doing things.

Drawn out litigation can cause financial haemorrhage, down time and the obliteration of commercial relationships.

They determined to change things, spend less money on lawyers and protect their commercial relationships.

The emerging culture has a lawyer engaged to issue legal proceedings at the earliest possible juncture.

But after the preliminary legal steps are complied with (a filed statement of claim and defence), senior management from both sides, get together to thrash things out.

Sometimes it is done in a quiet restaurant, sometimes it's done at company headquarters.

But senior management, rather than the lawyer resumes control of the steering wheel.

The deal is crunched and then the lawyers document the deal. It's very much a case of the client telling the lawyer what to do rather than the other way round. This in itself is a marked change.

But it still begs the question why don't they do a deal before issuing proceedings?

It's because things haven't yet gone full circle.

The culture of dispute resolution in the building industry is still such that unless you sue, you are not, in the main, taken seriously.

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So you sue, then you talk.

Because when you sue, it means you aren't going to be taken for a ride.

Even so the "sue then cut the deal approach" is a marked improvement on the 1990s way because senior management assumes control of the dispute resolution dynamic early on, which gets the dispute back into the hands of the businessmen.

Once the deal is cut, the business relationship can be left intact and the combatants can put away their weaponry, and get back to the business of doing business.

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