

UNWRITTEN CONTRACTS MINEFIELD

New Property

By KIM LOVEGROVE

Building contracts lawyer Kim Lovegrove reports on a common trap for the unwary.

FOR SOME inexplicable reason, people still enter into oral building contracts, frequently for large sums of money. This is despite the fact that legislation that makes written building contracts compulsory for residential construction has been around for more than a decade - initially via the House Contracts Guarantee Act, and then the Domestic Building Contracts and Tribunal Act, which was proclaimed last year.

The Government has introduced legislation for the regulation of building contracts for a plethora of compelling reasons. One of the principle laws, the requirement that contracts be in writing to clearly reflect the understanding of the parties, is just plain common sense.

Not surprisingly, the most endemic form of building dispute occurs where there is a lack of clarity in spelling out contractual fundamentals - such as cost, time, variations and quality. In my 10 years experience as a construction lawyer, I have observed that disputes as to time, cost and subject matter are the obligatory, rather than the occasional, bedfellows of oral building contracts.

In the absence of a written contract, there is inevitable argument over what the parties agreed upon as the building cost. In the absence of agreement between the parties, it is very difficult to resolve the issue. The most common method is to get technical experts - at considerable expense - to quantify the value of the work carried out. Frequently, experts disagree with one another as to the value of the work. Such disagreement often culminates in a battle of the experts, and the parties in the dispute will have to hope that their given expert will hold greater sway with the courts than the opponent's experts.

The most horrifying thing about oral contracts is when the matter goes to trial. In the absence of anything solid in writing, oral evidence is paramount. Each party has to give evidence as regarding his or her recollection of events.

The moment of truth generally coincides with cross-examination, where opposing counsel mercilessly cross-examines each party. The tools of the cross-examiner are intimidation, menace and a total lack of empathy and sympathy. All of which are designed to undermine the credibility of the witness.

Unless the recollection is watertight, an astute cross examiner will wreak havoc with the fragile human memory. Little wonder, as many consider cross examination to be one of the most stressful experiences for a human being.

For those that consider I am being alarmist, I am not. These insights are based upon experience. I strongly urge that, when you consider a building contract, take legal advice and ensure that the contract is in writing and complies with the Domestic Contracts and Tribunal Act.

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