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Legal Bulletin

Mediation

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Mediation well run and augmented early on is the most civilised and cost effective way of resolving a dispute. Any contract worth its salt should have a mediation clause and the contract should provide that this is the first port of call in the vent of dispute. Furthermore the contract should provide that the parties cannot resort to other dispute resolution vehicles unless mediation has at first instance been utilised.

A mediator is ordinarily a qualified lawyer, although s/he may present as building consultant, builder or engineer.

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'être* 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 mediation is confidential and without prejudice. If a matter settles the mediator will ensure that the 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 registrar and the matter is at an end. If the mediation is unsuccessful the case is referred back to the registrar 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 side's view of matters;
- When the opposing advocate presents his client's 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 and the terms of settlement go off the rails. My strongest of counsel is to use 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 always ensure that the 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.

Mediation is the most cost effective way of settling disputes. It requires the cooperation of both parties to the dispute and can be frustrated if either side is not motivated by either cost effective concerns or the desire to maintain site harmony.

A party must use the mediation procedure to resolve a dispute before commencing legal proceedings.

The mediation procedure is:

- The party who wishes to resolve a dispute must give a notice of dispute to the other party, and to the selected mediator, or, if that mediator is not available, to a mediator appointed by the President of the Law Institute.
- The notice of dispute must state that a dispute has arisen, and state the matters in dispute.
- The parties must co-operate with the mediator in an effort to resolve the dispute.
- The mediator may engage an appropriately qualified expert to give an opinion on technical matters. Each party must pay a half share of the cost of the opinion.
- If the dispute is settled, the parties must sign a copy of the terms of settlement.
- If the dispute is not resolved in 14 days after the mediator has been given notice, or within any extended time that the parties agreed to in writing, the mediation must cease.

Each party must pay a half share of the costs of the mediator to the mediator.

The terms of settlement are binding on the parties and override the terms of the contract if there is any conflict.

Either party may commence legal proceedings when mediation ceases.
The terms of settlement may be tendered in evidence in any mediation or legal proceedings.

The parties agree that written statements given to the mediator or to one another, and any discussions between the parties or between the parties and the mediator during the mediation period are not admissible by the recipient in any legal proceedings.

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