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Building Disputes

Builders, developers, owner-builders and tradespeople must warrant that, among other things, their work has been performed with due care and skill. By law a home owner, or subsequent purchaser, can enforce these warranties within certain time periods after the work was completed.

Don't let a disagreement become a bitter building battle that will break your bank. Here are a few ways a dispute can arise between an owner and a builder (or contractor), and the main methods of resolution.

Common complaints

A dispute will arise when there is a claim by either the contractor or the owner. In construction, most complaints relate to defective work, variations to the contract, demands for payment, and delay.

Defective work simply means the work has fallen short of a standard it was supposed to meet. Almost all building works are controlled by a contract that imposes certain standards. There are statutory obligations to include such terms: in New South Wales, under the *Home Building Act*, contracts for housing must specify that all work will comply with relevant building codes. Similar requirements are contained in the Victorian *Domestic Building Tribunal Act*. The general law of contract allows claims for loss or damage arising from breach of contract. In addition, there is the duty of care owed by the builder under the law of tort, or negligence.

Variations are where things don't go according to plan. The scope or character of the building work might turn out differently to that foreseen. Under the NSW *Home Building Act*, any variation needs to be approved in writing and signed by both parties before it can become part of the contract. Contractors can make claims against owners for extra costs for extra work, but they must have had the permission of the owner.

Delay: time is important in building contracts. This means that disputes commonly arise over delay: owners may claim for the builder's unsatisfactorily slow rate of progress, or failure to complete works specified in the contract; builders may claim if owners prolong the construction.

Disputes may also arise over unforeseen circumstances during the construction, or for non-payment by an owner.

If you've identified a legitimate grievance, there are a few available methods of dispute resolution. Some apply uniquely to residential construction; we'll deal with those first.

Home work only

NSW contractors are now required by law to inform owners of the dispute resolution procedure under the *Home Building Act* before entering the contract. Again, a financial penalty will apply if the contractor does not do this (Please note: certain contracts are exempt from this requirement. We can advise you on these requirements).

If your dispute is about the quality of the work, you can refer to the *Guide to Standards and Tolerances*. Produced by the Victorian Building Commission, the Guide will help you understand what standard of work is acceptable. For example, it explains how much shrinkage around timber windows and doors is tolerable.

To safeguard your position under your Home Building Compensation Fund insurance policy, if you become aware of defective or incomplete work, you **must** immediately notify your insurer in writing of necessary information about the nature and circumstances of the loss.

The procedure for dispute resolution is administered by the NSW Office of Fair Trading. Sensibly, the Office recommends that parties try resolving any problems with amicable discussion first. There could just be a misunderstanding. Following this, confirm in writing with your builder what was agreed to be done and by when. Date and keep a copy of this correspondence. Consider using registered post or email, which provide proof that the communication was sent. Make sure you can easily access a record of this correspondence - you may need this later if your dispute remains unresolved.

If this doesn't produce an outcome acceptable to both the contractor and the owner, the Fair Trading Office will then step in.

If the complaint involves defective work, the Office can send an inspector from the Home Building Service. They will visit the site in the presence of the contractor and the owner to examine the work. If they find any damage or defects, they can issue a Rectification Order. This will set out the defects requiring rectification, the conditions under which the rectification work will take place, and a time limit for their completion.

If the Rectification Order is disputed, not complied with, or the owner is unsatisfied, the matter may be taken to the Consumer Trader and Tenancy Tribunal.

Tribunals

Building claims relating to other matters, such as money owing, can also be lodged with the Tribunal by either the owner or the contractor. Unless the Tribunal agrees, the claimant must have communicated their complaint in writing

to the other party and been in contact with Fair Trading before you can claim before the Tribunal.

When hearing claims, the Tribunal should hear both sides and take all relevant evidence into account. It can order the payment of money (including compensation where applicable), relief from payment, the delivery, return or replacement of items. If the Tribunal finds that a builder has breached the Home Building Act, disciplinary action may be taken against the builder. There are time and monetary limits on the Tribunal's jurisdiction: it cannot hear claims over \$500,000 or those more than three years old (seven if the contract action relates to breaches of statutory warranties). This does not prevent you taking your claim to court.

Dispute resolution

If you have a major claim, or a commercial dispute, you can either take your claim to court, or consider alternative dispute resolution. This is where the services of an experienced and qualified lawyer are indispensable, especially for litigation.

Due to the expense and duration of court challenges, alternative methods of dispute resolution may be an attractive option. Three common approaches are conciliation, mediation, and arbitration.

Conciliation involves a neutral party bringing the parties together to work out a process to settle the dispute. Conciliation is the mildest form of dispute resolution: conciliators generally don't intervene in the dispute at all.

Mediation is similar, but mediators are actively engaged in discussions and negotiations, and may make comments as to the respective strengths and weaknesses of each party's case.

Arbitration is the private commercial equivalent of the court system. It involves both parties submitting their dispute to an independent third party to make a determination. Most construction contracts include a general agreement to arbitrate. Be aware that arbitral agreements can be challenged in courts, as courts reserve the power to make conclusive, binding judgments.

A constructive outcome

If you've got a complaint, Martin Bollock Lawyers can explain whether you have a claim, which methods are available to resolve your dispute and which might produce a more favourable result.