

Building Contracts— Part 2 Disputes

“Building contracts are pregnant with disputes”.¹ These disputes frequently arise in the context of the contractor suing for the price. The suits, in turn, are usually met by claims by the proprietor for abatement of the price, or cross-claims founded on an allegation that the performance of the contract has been defective or delayed.²

Avenues for Resolution

Building disputes occur in single dwelling matters to large commercial constructions. Depending on the nature of the dispute and the circumstances of the parties, the claimant has a choice of forums to institute a claim: litigation, alternative dispute resolution or tribunal.

A. Litigation

- The Local Courts (Civil Claims) Act 1970 (NSW) Section 12 has jurisdiction limited to \$40,000 in all civil cases (excepting personal injury claims where jurisdiction is limited to \$5,000).

The filing fee for a claim:

1. up to \$3,000 is \$50
2. between \$3,000 to \$10,000 is \$67
3. between \$10,000 to \$40,000 is \$124

- The District Court Act 1973 (NSW) Section 44 has jurisdiction limited to \$250,000 in all civil cases (excepting personal injury claims where jurisdiction is unlimited).

The filing fee for any amount of claim is \$345.

- The Supreme Court is governed by the Supreme Court Act 1970 (NSW) and has general jurisdiction in civil cases unlimited in point of amount.

The filing fee for a building dispute claim is \$485.

- The Federal Court only has jurisdiction as is vested in it under the Federal Court of Australia Act 1976 (Cth) Section 19(1).

Before proceeding to court, an offer of compromise in writing should be made and served on the other party. It may then be accepted within the time stipulated. It is to be noted that there may be substantial costs incurred by a party that refuses to accept an offer and proceeds with litigation recovering less damages than the offer.

B. Alternative Dispute Resolution

Mediation or Conciliation

The terms *mediation* and *conciliation* are sometimes used interchangeably.³

In these forums a third party acts to bring the proprietor and the contractor together for the purpose of dispute settlement. The third party will advise them on methods on which the dispute may be resolved.

When these methods fail, the matter is normally referred to arbitration in accordance with the contractual conditions.

Arbitration

Parties may refer building disputes to arbitration for the following reasons:

- it is required under the building contracts (Scott v Avery clause);

¹ Per Lord Browne-Wilkinson, *Linden Gardens Trust Ltd v Lenesta Sludge Disposal Ltd* [1994] 1 AC 85 at 105.

² *ibid*

³ *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (1992) 28 NSWLR194 at 203.

- proceedings are simpler;
- it gives speedy decisions; and/or
- it maintains privacy.

If the claimant selects arbitration, usually the party at fault will eventually have to pay the fees of the arbitrator.

There is a limited right of appeal to the Supreme Court from the decision of the arbitrator.

Disadvantages associated with arbitration are:

- Arbitrators or parties may not have the necessary expertise in the area of law;
- no ceiling of costs for the arbitration; and/or
- procedural errors may occur.

Where the claimant commences proceeding in the Local Court and the contract contains an arbitration clause, the respondent to the claim may apply to the Supreme Court under Section 53 of the *Commercial Arbitration Act 1984 (NSW)* for an order which effectively stops the Local Court action and forces the claimant to go to arbitration. The present attitude of the NSW Supreme Court is to force parties to arbitration when the contract has an arbitration clause.

C. Building Dispute Tribunal

This tribunal was set up under the *Consumer Claims Tribunals Act 1987 (NSW)* with a jurisdiction to \$25,000 to provide quick and inexpensive mechanism for deciding disputes arising from contracts for residential building work

There is a non-recoverable fee of \$100 to lodge a claim.

Legal representation is not permitted except in special circumstances and there is no appeal. A decision of the referee, who hears the matter, can be registered as a judgment of the Local Court and be enforced in the same way.

The Building Disputes Tribunal has some powers which arbitrators and courts do not have. They are:

- The referee may order a contractor or subcontractor to rectify the work.
- The claimant need not be the party actually claiming something from another party.

Similar to arbitration, the Building Disputes Tribunal is private and the press and the public are not admitted.

Choosing the Right Jurisdiction

There is tactical advantages for a certain party to have the dispute heard in a particular forum. There will be differences in cost, time and procedure depending upon which jurisdiction is selected.

The contractor may select to sue in the Building Disputes

Tribunal to avoid the risk of being liable for the other party's legal costs should the claim be unsuccessful. If the claimant has a weak claim the claimant should go to arbitration rather than to court because arbitrators are less likely to dismiss a claim.

In the battle for jurisdiction, it is more advantageous to institute a claim first because the respondent must bring any cross-claim in the same forum in which the claimant has commenced the action. The same claim cannot proceed simultaneously in two separate forums.

Where arbitration has proceeded and then a party to the proceeding commences an action in a court, the court will order a 'stay' until the arbitration is completed. The court will dismiss the action once the arbitrator makes an award.

Where an action has been commenced in a court and then a party to the action attempts to commence an arbitration, the other party can apply to the Supreme Court to stop the arbitration.

Section 11 of the *Consumer Claims Tribunals Act 1987 (NSW)* provides that if a claim is first commenced in the tribunal then the tribunal has jurisdiction to the exclusion of any other forum. But if the same matter is first referred to arbitration or court, then the tribunal has no jurisdiction.

Time

Time is an important consideration in building disputes.

In Arbitration and Litigation, a claim under the *Trade Practices Act* or *Fair Trading Act* must be commenced within three years. A claim for breach of contract must be commenced within six years after the breach of the contract.

When making a claim at the Building Dispute Tribunal, a claim for breach of contract must be commenced within three years after the breach of the contract.

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Important: This is not advice. Clients should not act solely on the basis of the material contained in this paper. Our formal advice should be sought before acting on any aspect of the above information.

Comasters Law Firm and Notary Public

Suite 101, Level 1, Capitol Terrace
743-755 George Street
Sydney NSW 2000, Australia
Phone: (612) 9288 0300 Fax: (612) 9288 0399
Email: comasters@comasters.com.au
Website: www.comasters.com.au