

For those contemplating property development, there are potential legal pitfalls to be aware of. This article attempts to identify the pitfalls, outline how to avoid them and how to deal with serious disputes.



## **A. THE POTENTIAL PITFALLS**

The nature of the property development or building process means that difference of opinion and disputes can easily occur. All disputes are usually about money, or money and time. Disputes may arise, in the course of building, between contractors and sub-contractors, between architects and engineers, and between proprietors and contractors.

Many disputes are the result of carelessness over building contracts. Generally, a building contract comes into existence when a contractor's price to do work is accepted by the owner. However, if care is not taken in working through the terms of the contract then one party to the contract could find themselves potentially out of pocket during the course of the contract, or confusion will arise as to how certain tasks are to be carried out.

Liability also exists outside the realm of contract law. Faulty workmanship owing to negligence may cause a building or part of a building to collapse resulting in financial loss and property damage, and in some cases, injury or even death. Negligence is a major source of liability for architects, engineers and other professional advisers, builders, councils and building occupiers. These people owe a certain level of duty of care to the workers and to the public. If this is not upheld, they will accordingly be liable before the law.

## **B. HOW TO AVOID THE PITFALLS**

Buildings are notorious for costing more than the initial estimates. For any new project, a few initial rules should be followed:

- Choose appropriate builders or tenderers.
- Ensure that the scope of the work is described clearly.
- Select suitable terms and conditions of contract.
- Issue the same information to all tenderers.
- Check submissions carefully, and be wary of 'bargain' prices.

## **C. LEGAL ASPECTS TO BE NOTED BY THE OWNER**

### **C.1. RESTRICTIVE CONVENANTS**

Sometimes restrictive covenants are found in a contract for sale of land. The object of the restrictive covenant is to maintain the value of land by dictating aspects of the design of buildings on the land. Purchasers of land are bound by the covenant. In this way purchasers of land in a new subdivision are assured that buildings in the neighbourhood will be of a particular standard.

### **C.2. EASEMENT**

An easement is a right that the owner of land possesses over land owned by somebody else. For example, building under power lines or over sewer mains and other services is restricted.

### C.3. LOCAL COUNCIL

Local councils and other bodies controlling building and development are interested in health and safety, and amenity. There is no doubt that local councils have the power to consider questions of aesthetics as well as compliance with building regulations.

Things to search for at the local council, before commencing a development, include any council development codes, restrictions, guidelines or heritage listings that will apply in addition to the building regulations. It would be advisable to obtain the development application form and building application form.

### C.4. CONTRACT, TORT, AND STATUTE LAW

The law should be viewed as formalising the relationships between the participants in the building industry with the aim of reducing the risk of misunderstanding and dispute. Ignorance of the law is no excuse for breaking the law.

Builders and owners are required to comply with building regulations. There are laws and regulations governing, amongst others, site safety, taxation, employment, industrial conditions and insurance.

The safest way to avoid legal pitfalls is to seek professional legal help before the contract is entered into as well as during the term of the contract. The lawyer should advise you as to what is expected of you as a party to a contract and will have your best interests in mind when drafting or reviewing the contract for you.

### D. HOW TO DEAL WITH SERIOUS DISPUTES

If a serious dispute arises which requires the assistance of a third party, two avenues are available to which one may turn to resolve the dispute: (1) arbitration, and (2) the courts.

Parties to building contracts often agree to settle their differences by arbitration rather than litigation. Arbitrations are private hearings arranged by the parties. The arbitrator is chosen and paid by the parties, and is usually an engineer or architect. Although lawyers may be involved in preparing the evidence and presenting the arguments, arbitrations are less formal than court hearings. The advantages of arbitration are that some disputes may be more expeditiously resolved by an arbitrator who is involved in the building industry as well as the fact that arbitration may be less costly to the participants.

However, the disadvantage of the arbitration system is that the more powerful and well-off party may be able to exert far greater pressure during negotiations to ensure their claims are met.

The courts are available to settle private disputes in which one party (the plaintiff) brings an action against another party (the defendant). Such cases are civil cases and usually involve the plaintiff seeking an award of damages or other remedy. It should be noted that those involved in the building industry may also be liable to criminal charges if an accident on the building site causes serious injuries or death to either workers or members of the general public.

Comasters can advise clients who are wishing to develop property to ensure that they avoid pitfalls.

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