Building Disputes – whether to mediate, arbitrate or litigate

If you are in dispute with your builder, you have probably started to review your contract carefully and have found yourself towards the back of the document, where what happens in the case of a disagreement is usually found.

Most standard form domestic building contracts contain clauses that if a dispute between the homeowner and the builder arises, the parties will attempt to resolve the dispute under certain agreed steps before either of them issues legal proceedings. Collectively, they are called “alternative dispute resolution” (or ADR for short) and they tend to fall into three categories, namely conciliation conferences, mediation and arbitration. Some contracts go so far as to require them to be attempted in order, so for example, if a conciliation conference occurs but fails, a mediation must then be attempted.

What is the difference between them?

A **conciliation conference** is usually just a meeting between the builder and the homeowner, with that meeting often hosted by a neutral third party. The third party has no particular involvement other than the hosting of the event and is unable to force the parties to reach any agreement.

A **mediation** is different to a conciliation conference in that a mediator has certain roles, rights and privileges which a conciliation conference facilitator does not. Whilst a mediator is still unable to force the parties to reach any agreement, they have considerably more involvement in the negotiation, may meet with each of the parties separately (but subject always to full confidentiality) to better understand their case and position and may generally "carry" offers between the parties or otherwise assist with the negotiations.

Arbitration is different to both a conciliation conference and a mediation in a number of ways, the key one being that whilst it is still an alternative to litigation, the arbitrator has the ability to impose an outcome on the parties in the event that their negotiations do not lead to an agreement. It is different to litigation in that the arbitrator is usually an industry expert and the issues the subject of the arbitration are often of a specific, technical type of dispute rather than a broad dispute with multiple factors. Examples are whether a product matches its specification or whether work has been so substantially completed that it entitles the builder to a progress payment.

Obviously, if a conciliation conference or mediation fails, then litigation is the final option. Litigation is fundamentally different, in that the parties have completely opposite views on a topic and ultimately it is the judge who decides which party has the more correct position and enters a judgment accordingly. It is not an agreement or negotiation between the parties at all, but rather a reliance upon them both on the Court to determine what the appropriate outcome should be.

The question, however, is can you jump straight to litigation? If you are fundamentally opposed and no agreement is possible, what happens if the contract sets out that you must try a conciliation conference or mediation first? Are you bound by those terms?

The answer is somewhat tricky, and the answer depends to some extent on the nature of the dispute and what the contract itself says. It is a good reason to have a lawyer review the contract *before* you sign.

In the matter of *Felmeri Builders and Developers Pty Ltd v Tonway* [2023] SASC 54, the parties had entered into a domestic building contract which contained dispute resolution terms providing for "conciliation" and arbitration. The contract was a domestic building work contract within the meaning of, and was governed by, the *Building Work Contractors Act 1995.* A dispute arose, in respect of defective or incomplete work and whether payment was due.

The builder sought an order from the Magistrates Court whilst legal proceedings were already on foot that the dispute be referred to arbitration pursuant to section 8 of the *Commercial Arbitration Act 2011 (SA)*. That request was dismissed on the basis that the homeowner contended that the arbitration provisions of the building contract were rendered void under section 42 of the *Building Work Contractors Act 1995*, which prohibits any purported exclusion, limitation, modification or waiver of a right conferred, or contractual condition or warranty implied, by that Act. A portion, but not all, of the homeowner's claim for defective work was based on a breach of statutory warranties pursuant to section 32 the *Building Work Contractors Act 1995* and the associated remedies available to the Court under section 37 of that Act, as well as questions of the contract having been harsh and unconscionable (section 38) and the rights of termination (Section 36). The remainder of the homeowner's claim were at common law, for breach of contract, and as such were arguably not captured by section 42 of the *Building Work Contractors Act 1995.*

The builder then appealed to the Supreme Court.

In the Judgement of the late Justice Blue, his Honour found that a party to a domestic building contract who wishes to have determined a dispute concerning the terms and performance of the building work, whether pursuant to the *Building Work Contractors Act 1995* or at common law, would be able to do so by choosing litigation. That does not prevent the parties from *agreeing* to an alternative form of dispute resolution, but if agreement is not reached, it is not an absolute barrier to the right to litigate.

That said, the ability to litigate a building dispute is not automatically the best path

forward. Just because you can litigate doesn't necessarily mean that you should. If a building dispute is looming and the option to enter into a conciliation conference, mediation or arbitration arises, then those options ought to be given serious consideration. They are often cheaper, quicker and easier alternatives to litigation, and may allow the building works to resume more quickly. However, Justice Blue's decision in *Felmeri Builders and Developers Pty Ltd v Tonway* largely opens the path for homeowners to insist on their right to litigate, in the event that there is good reason to reject alternative dispute resolution as the first option.

Our building and construction disputes team at Andersons is able to guide you through the options available to you, should you require that assistance.

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