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Practice matters in ADR

Dispute resolution in building matters in country Victoria

Joseph Sierra

My aim is to say something about my experiences as a mediator in country Victoria. But first I would like to say something about the cultural setting within which I live and work.

There appears to be a belief among the Melbourne building fraternity that anything planned for construction outside the city environs must cost more. This can be quite misleading. The extra costs due to certain non-standard type materials, and goods and services, are largely offset by savings in labour costs.

In each country or rural town there is a strong trade culture involving the local carpenters, bricklayers, plumbers and so forth who have settled for a simpler and cheaper lifestyle than in the city. Because of this small but very active trade community, competition is good and the quality of workmanship is often better than in the city. A bad operator will, of necessity, have to leave town!

Litigation rarely used

In East Gippsland, where I live and work, litigation is rarely used in resolving building disputes, chiefly because of the cultural setting in which the parties operate. And mediation — in a formal sense — is not used frequently.

Regarding the cultural setting, the tradespeople are small operators who work directly on the tools during the day. At night, they prepare their tenders and do their planning and administration, often with their spouse's help (while trying to keep the family together). As a result, it is not uncommon for a contractor — when reminded of his right to a claim for a variation — to reply, 'Look, we are a small happy community. We all know

each other. The job is running well and we are achieving our margin. Why should we bother with claiming a variation?'

On the other hand, there are some builders who like to leave variations until the end of the project. These builders take the view, 'The owners are good types and if our margins are down at the completion of the works, that is when we will approach the owners with a claim'.

While this 'good faith' approach generally works, and can be cost effective, problems can occur with the larger jobs (in excess of \$300,000) when the cost of significant overdraft finance begins to take its toll. This can put significant pressure on contractors and sub-contractors not conversant with contract administration.

In over five years, I have had approximately six mediations referred to me in the East Gippsland area by the Victorian Civil and Administrative Tribunal (VCAT) (and by its predecessor, the Domestic Building Tribunal). While all have settled — as would be expected given my earlier comments — it has been difficult getting across to the parties what mediation is all about.

In one instance, the parties who were both represented and well acquainted with each other socially, got tired of the whole process after two hours and asked to be left to themselves in a separate room. They later returned, having reached a private settlement, leaving both their representatives and myself out in the cold! To this day, I am not aware of the settlement terms, even though I know that the amount in dispute was high. On another occasion, one of the parties — after hearing what the process of mediation involved —

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replied how disappointed they were as they thought the mediator was there to make an order!

At another mediation, after obtaining one party's agreement to make a specific offer of settlement, the party making the offer had a change of mind while I was submitting the offer in a separate room. The party making the offer called me out, told me that he had just spoken to his wife on the mobile phone and that she had threatened him with divorce if he did not immediately withdraw his offer. (I was even invited to come home and talk to his spouse!) This occurred even though both parties had confirmed having authority to settle the matter at the start of the mediation.

Having given some brief insight as to the background and 'goings on' of mediation in country and rural areas, I would like to outline some of the

rank second to his or her standing in the local community.

Disadvantages

In country areas, little is known about mediation, the role of the mediator, and the process. Even when information is made available, it may be incorrect. (For example, recently the local newspaper published an article emphasising the importance of arbitration in resolving domestic building disputes in preference to litigation. However, in Victoria the *Domestic Building Contracts Act 1995* makes arbitration clauses in domestic building contracts void. The article made no mention of VCAT and mediation.)

Access to a broad range of experts is limited and expensive (particularly if they have to commute from Melbourne).

The 'hand shake' or good-faith principle that still operates in the country makes mediation an attractive mode of dispute settlement.

advantages and disadvantages of mediation.

Advantages

The informality and easy going nature of the people involved in disputes helps define the manner in which a mediation should be conducted (that is, in an informal, non-legalistic spirit that is focused on finding a practical solution).

The 'hand shake' or good faith principle that still operates in the country makes mediation an attractive mode of dispute settlement. This principle contributes to a positive outcome for mediation.

There is respect for the mediator throughout the process.

The venue is normally at one of the country court houses. This eliminates the stress involved in commuting to Melbourne.

The mediator's formal qualifications

The parties' communication skills may be weak. This may not be conducive to a fair and just outcome if the mediator is not up to the mark.

Conclusion

If mediation is to be successful in country and rural settings, the mediators need first and foremost to have very good 'people management' skills. They also need training in the role of mediator and they need to be recognised as a person of good standing in their industry/profession and in the local community. ●

Joseph Sierra is a quantity surveyor, chartered building professional and private mediator who lives at Lakes Entrance. He conducts VCAT mediations, principally in the Domestic Building List. He can be contacted on 03 5156 5880.