Why 'Fessing Up' Trumps Defeat in the Trenches: The Need to Present Convincing Mitigation in Building Misconduct

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Recent case law in NSW over building practitioner misconduct highlights the critical importance of mitigation.

This is not merely a case of waving the white flag. A plea in mitigation takes some craft and ideally should be presented by a legal advocate. Lawyers versed in the misconduct jurisdiction are the best prepared for this. Too often litigation lawyers man the trenches with denials of liability, even where liability cannot be escaped – or worse, even where liability has already been ruled upon and the hearing is now about penalty.

Moreover this imperative is particularly true for building practitioners charged with the maintenance of building standards and regulations, as the community necessarily must place confidence in building surveyors and accredited certifiers to ensure minimum benchmarks are attained.

In the case concerned, in the Administrative Decisions Tribunal (ADT) of NSW, an accredited certifier had been found guilty of professional misconduct in regard to his role as the PCA (Principal Certifying Authority) for two separate developments. The breaches occurred at both the construction certificate and occupation certificate stage, and involved both fire safety and disability access requirements.

The first case at the ADT upheld the view of the Board below it, that this was a case of *professional misconduct*. Under the NSW laws, this means an incidence of *unsatisfactory professional conduct* of sufficient seriousness to warrant either suspension or cancellation of accreditation.

There was then a second case to decide the penalty that should be

imposed. Acting as prosecutor, the Building Professionals Board sought orders whereby the accreditation was cancelled for 5 years, that the certifier was disqualified from being an accredited certifier director of or in involved in the management of an accredited body corporate for 5 years, plus a fine of around $25,000.

After hearing from both sides, the ADT decided to impose a penalty along the same lines sought, except the cancellation and disqualification would instead run for 2 years, and the fine was $12,000. These were significant penalties.

In doing so, some account was taken of the accredited certifier's disciplinary record (25 disciplinary orders from 23 prior separate proceedings), and the fact that the current case involved 2 non-domestic class 2-9 buildings and such matters as fire safety and disability access.

By the time of the second ADT hearing in late 2010, the case was about penalty and mitigation. On those grounds, mitigation was required to argue that the penalty should be as favourable as possible to the practitioner. The idea is to strike the right balance between deterrence and maintaining public confidence, but also only going as far as is necessary to adequately protect the public. There is always a hope to also 'rehabilitate' the practitioner; so as to preserve their skills for the industry if possible.

At this hearing the certifier presented a character reference that had said words to the effect that he should not be made into a 'matryr' for "venturing into areas where others had feared to tread". This attracted criticism from the Tribunal as it suggested that the certifier was also adopting the view that he was a martyr. This may not have been perceived as contrition. This underlines how crucial it is to only tender references that hit the right notes.

Furthermore, issue was taken with arguments over matters that seemed to contradict the earlier findings on liability. It was made clear that a plea in mitigation was not the time to be seen to be disputing findings of fact on liability. In similar vein, the Board at the first hearing had found the certifier to be 'belligerent and unapolegetic'.

This was also illustrated by the certifier's explanation in regard to a measurement to the boundary for required setbacks at a 45 degree angle

rather than straight on at 90 degrees from the relevant wall. The Board had found this form of measurement to be 'eccentric' and was equally concerned that this inspection method had been used on many other projects over many years. The ADT shared this view at the final hearing.

In fact, the Tribunal found that much of the positive material that the certifier produced about being an industry leader of good repute, could in fact be looked at in another light. That is, effectively, a view that "if you are a leader, you should know better". It was said by the Tribunal:

"Consequently, disciplinary orders may be harsher where the failure is that of a very experienced practitioner, especially one who occupies a leadership role or comports himself/herself in that way. They are more vulnerable to orders that reflect the need for general deterrence than an ordinary member with a small practice or a junior member of a profession in the early stage of a career."

Finally, the Tribunal conceded it was true that given the long career, the strike rate of disciplinary orders was only around 1 in about 150. But they said, this is a 'risk management' view rather than one that looks more deeply at the role that private certifiers play. The Tribunal opined:

"The accredited certifier is not merely a privately practising professional, but is administering a public office under the law of the State…..The public must be confident that certifiers will rigorously enforce compliance with the minimum standards required by the conditions of a development approval."

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If the reader is interested in finding out more about how to do a good plea in mitigation the four minute film 'Doing a Plea in Mitigation' provides a summary of the ingredients that assist with pleas of mitigation. Click here to view the video.