



Précis Paper

Practical Case Management of Complex Real Property Disputes

A discussion of the complexities of real property disputes, including the obligations of practitioners in dealing with them and the importance of practical case management in resolving them.

Discussion Includes

- What makes real property disputes so complex?
- The importance of practical case management
- Common issues in property disputes
- Real estate disputes and commercial disputes
- Tips to handling real property disputes
- Rights and obligations in law and equity
- Expert witnesses in real property disputes
- Alternative dispute resolution
- Takeaways for practitioners

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Practical Case Management of Complex Real Property Disputes

1. In this edition of BenchTV, Philip Bambagiotti (Barrister – Tenth Floor St James Hall Chambers, Sydney) and Amy Douglas-Baker (Barrister – Fourth Floor Selborne Chambers, Sydney) discuss the complexities of real property disputes, including the obligations of practitioners in dealing with them and the importance of practical case management in resolving them.

What makes real property disputes so complex?

2. Real estate disputes are extremely common and generally there are two aspects that make a real estate matter complex.
3. Firstly, although in most cases the establishment of primary title is fairly easy, there are sometimes secondary interests involved and very often they are poorly documented. It often takes a degree of detective work and judgement to identify them.
4. The second part goes to the nature and availability of documents and witnesses.
5. This is because real estate disputes generally relate to activities which occur over a long period of time and sometimes collecting the documents as well as finding witnesses can be difficult.
6. The complexity is in resolving legal disputes using fine points of law with an inaccurate record of the facts and history.

The importance of practical case management

7. Even though property disputes usually involve substantial sums of money, sometimes they do not. However, because the issues are complex and the time involved in chasing and finding documents can be substantial, the legal costs can often be disproportionate to the amount in issue.
8. Practitioners must ensure that when they render legal advice and services, that their costs are proportionate to the nature of the dispute.
9. This can be difficult when the dispute concerns a range of issues that need to be resolved and that call for an amount of work that can often be greater.
10. Real property disputes are often invested with an emotional component which can increase the difficulty in obtaining evidence and further adds dimension of emotional problems, as well as the legal and financial problems in regard to clients.
11. It is necessary to be systematic because the various sub-disputes that come with a real property dispute are very often of a nature that each of them could justify their own court case.

12. It can be challenging to manage the overall dispute in a way that is not disproportionate to the amount in issue or the nature of the dispute.

Common issues in property disputes

13. The principal issue that arises most often is identifying precisely what the property interest involved in the dispute actually is.
14. This involves identifying correct documents and asking the right questions of witnesses.
15. It is important to retain a degree of diligence as it is easy to become blinded by what the client says and become distracted and pursue issues that turn out not to be redundant.
16. Often, the people who have prepared documents do not have the nuance of real estate disputes in mind and therefore, they may mislabel rights and documents.
17. The mislabeling may lead one to believe that the dispute is about one type of interest when in fact, it is really about another type of interest.

Real estate disputes and commercial disputes

18. A commercial dispute is ultimately about money.
19. Whilst real property disputes also involve money, the money in real property disputes is embodied within real property.
20. If real property disputes and commercial disputes are taken as separate disputes, quite often real property disputes will be nested within a larger commercial dispute.
21. Similarly, a commercial dispute may also be nested within a larger real property dispute.
22. Commercial and real property are two related disciplines.
23. As a result, a practitioner must always focus on the actual problem that the client has come to them for and ensure that the solution offered to the client is the one that they need.
24. They can then use the legal terminology to propose solutions for the client rather than replacing the client's understanding with the legal solutions which does not really help.

Tips to handling real property disputes

25. It is advantageous early on in the engagement, to identify the different factors, pressures and characteristics that are impacting on the dispute.
26. It is essential to determine what the client thinks is their problem and what the client perceives the other side's problem to be.

27. Generally, a topography of the dispute is a good way to begin to explore the issues. This is a good way to determine what the dispute is and most importantly, how many disputes there actually are.
28. It is impossible to convey the importance of nuance to a client. Lawyers must be able to understand legal concepts and explain and translate them into language that people can use and understand.
29. It is important to be able to identify important legal concepts, pursue them in respect of research and fact but not be dependent upon using the terminology that lawyers use.
30. For example, if a lawyer insists on asking a client 'what consideration did you pay?', the client will not be able to give a sensible answer unless they understand what 'consideration' means in law.
31. A lawyer needs to focus on the detail as well as step back and keep it all into perspective, which often requires two different activities to be conducted simultaneously.

Rights and obligations in law and equity

32. It is necessary to identify the various rights and obligations in law and equity.
33. It can be useful to identify these issues separately for legal analysis.
34. Once there is a topography of where the dispute is lying, then a practitioner can apply the legal filter.
35. For example, the practitioner can begin to ask at this stage, whether there is an equitable interest in property and against who are those rights directed.
36. After the interests have been identified, the principles must be identified. Then, in light of the interests and principles, a practitioner must look at the facts.
37. Once this analysis has taken place, a practitioner should have a good idea of where the problems are going to lie.
38. If a practitioner identifies the issues, the rights and obligations it will lead the practitioner to determine the causes of action.
39. Very often, practitioners focus on documents too much in property law. This can be difficult if a given document is incomplete or subsequently amended or by mutual decision abandoned in some way.
40. As a result, the documentary evidence to a cause of action is the start of the inquiry and not the end.
41. Other evidence which can be important in real property disputes are oral evidence, real evidence such as photographs and circumstantial evidence such as inferences which can be used to fill the gaps in the documentary record can be important.

Expert witnesses in real property disputes

- 42. The use of expert evidence is intriguing in real property disputes as there can be both lay and professional experts utilised in the disputes.
- 43. The role of lay experts is often forgotten and they can be quite useful, cost-effective and advantageous form of proof.
- 44. For property disputes, there is a whole range of potential evidence because of the interaction with planning law, building and construction, financing and company law and tax.
- 45. The types of experts that might ordinarily be encountered in a property dispute are valuers, engineers, quantity surveyors, architects, building surveyors, planners, real estate agents, heritage consultants, experts in conveyancing, accountants, tax experts and experts in foreign law.
- 46. Experts are limited by their own expertise and it is essential that the expert witness stays within the parameters of what they are expert at.
- 47. Experts are also limited by the nature of the retainer, assumptions that are given, assumptions that are relied upon and whether or not the instructing party can make those assumptions good by other evidence.
- 48. There is always a tension in the nature of expert evidence because of the interaction between expertise and the law of evidence itself.
- 49. This is because it is easier to conceptualise the questions being put to the expert by reference to general issues and this can lead to two issues.
- 50. Firstly, the expert may answer the question on 'the ultimate issue'. This is because sometimes, it may be difficult for the expert to distinguish between the steps that lead up to the ultimate issue and the ultimate issue.
- 51. However, expressing ultimate issue evidence is not bad unless the rest of the picture is painted.
- 52. Another danger is the prospect of experts who feel comfortable within their expertise who wish to express opinions that are justified or validated simply by the fact that expert says or holds that opinion.
- 53. That is, that the justification or basis for the opinion is that the expert says it and the expert is an expert
- 54. Due to the limitations imposed on lawyers with respect to obtaining expert evidence, in that a lawyer can direct a question and look at issues such as whether or not what is being said is admissible, but they cannot influence the evidence.

Alternative dispute resolution

- 55. Giving legal assistance involves resolving problems, disputes and issues and given the nature and sophistication of alternative dispute resolution it is almost inevitable

that alternative dispute resolution should at least be considered in real property disputes.

56. It is a rare case that cannot benefit from an attempt at alternative dispute resolution such as mediation, a limited determination such as arbitration or expert determination on particular issues, the use of single experts and structured negotiation.
57. Due to the difficulties in evidence, the cost and because ultimately, neither party has an academic interest in the pure nature of a beneficial interest in a discretionary trust property, alternative dispute resolution is often successful in real property disputes.
58. That is because all the parties care about is what they are arguing about and how to resolve it.
59. In almost every case, the assistance of a professional to bring the parties together will either resolve the dispute or at least limit it to the point of which if there needs to be an adjudication involved by a court or arbitrator, the range of issues is smaller.

Takeaways for practitioners

60. Even though it is tedious and difficult, the benefits of doing homework far outweigh the advantages of expediency.
61. Apply systematic analysis at the beginning of a dispute because once this has been done, creativity can be utilised.
62. A client will get a greater sense of confidence if a practitioner does also.

BIOGRAPHY

Philip Bambagiotti

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Philip Bambagiotti was admitted as a lawyer in 1992 before being called to the NSW Bar in 1997. He is a leading authority on the law relating to building disputes and is an author of Building Disputes and The Home Building Act 1989 (NSW). He is also a member of a number of international organisations including the Union Internationale des Avocats, the Italian and French Chambers of Commerce and Industry and the French Australian Lawyers Society.

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Amy was called to the NSW Bar in 2009. She previously worked in judges' chambers in the Supreme Court of New South Wales and the Federal Circuit Court of Australia. In 2015, Amy was recognised for achieving excellence in her areas of practice as a finalist for the Women Lawyers Association of NSW Woman Barrister of the Year Award. She practises in commercial, equity and administrative law, with particular expertise in property, statutory product liability, trade practices and consumer law, professional negligence and disciplinary proceedings and commissions of inquiry. She is briefed by solicitors and in-house, corporate and government counsel.