

Know when to man the battlements:

The strategy in defending complaints against Building Surveyors

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It is always a time of great stress when one is faced with a complaint. After all, it is your career that could be on the line, and your professional actions are being called into question.

Belligerence in the face of a complaint is often self defeating. Knowing when to defend a complaint, and when to put your hand up for certain issues and seek the most pragmatic course for the future is the product of a calm and reflective mind.

If a Building Surveyor is faced with an alleged charge or charges, regarding a breach of a provision of the *Building Act* 1993 or other legislation, it will then be a matter for the Building Surveyor whether or not to defend the specific charge, or admit to it and try to explain the conduct.

‘Mitigation’ means just that; the aim of a plea to a charge is to obtain the lightest possible penalty for the practitioner, and possibly setting a course for the future that will avoid a repetition of the problem or the offence.

The probability of successfully defending a charge therefore needs to be considered carefully. Legal fees will be expended in attempting to defend the allegation which needs to be weighed alongside such factors as:

- the chances of success
- the likely penalty to be handed down on a finding of guilt, or after a plea in mitigation

Defending a charge will not always be the smartest option, even if the practitioner feels ‘hard done by’ or believes that other practitioners are going about their business in exactly the same way.

The High Court case of *Cameron v The Queen* [2002] HCA 6 (14 February 2002) is authority to the effect that an early plea of guilt must be taken into account by a court or tribunal when assessing **the severity of a penalty**. So, a party who uses up court resources in **defending** a charge, whether unreasonably or not, can expect to face a more severe penalty on a finding of guilt, than a party who admitted their wrongdoing and presented instead a ‘plea in mitigation’.

The rationale for this is clear. The courts do not wish to encourage the unreasonable use of resources and emotions in undue litigation, when the facts clearly support a finding of guilt. Of course, in some cases a more finely balanced consideration is required when deciding whether or not to defend a charge.

There is no ‘one size fits all’ profile for pleas in mitigation, and much will depend on the specific facts. Key components of a good plea are:

- stressing the practitioner’s previous good record and lack of disciplinary action taken
- explaining the reasons or rationale for the conduct that led to the offence
- explaining what steps have been taken to remedy the situation and to avoid a repetition of the conduct
- describing the practitioner’s work and life scenario, setting out the person’s financial commitments, and
- advising the court or tribunal what would be a reasonable sentence

A submission made for a building surveyor faced with a misconduct charge, will request the lightest possible sentence. The recommendation should however be practical. If the building surveyor has heavy financial commitments already, it may not be wise to suggest a financial penalty.

The Building Practitioners Board has a range of sentencing options. Suspension or cancellation of the Building Surveyor’s registration are ‘worst case’ scenarios, as compared to the imposition of a fine. Other sentencing options include reprimanding the person, requiring the person to give an undertaking not to do a specific thing, and to pay the costs of an Inquiry.

Suggestions for re-training or further education are also a valid alternative.

Before a hearing, discussions with prosecutors may lead to charges being withdrawn, if the building surveyor agrees to ‘plead guilty’ to certain allegations.

The value of good character references should not be underestimated. A practitioner facing a misconduct charge should acquire at least two to three professional references. Bear in mind, though, that a professional reference for a building surveyor that states that he/she is always prepared to assist and ‘fast track’ matters may be destructive rather than helpful. A building surveyor is in a regulatory role rather than acting as a consultant.

This article contains general information and should not be acted upon without specific professional advice based on your own circumstances.

Justin Cotton has practiced in building and construction law since 2002, acting for owners, builders, building surveyors and other construction professionals. His areas of expertise include representation of building surveyors facing misconduct charges in Victoria and NSW, and building and construction litigation and contract advice for builders and owners. Rigby Cooke Lawyers provide advice on misconduct complaints faced by building surveyors and representation.