

Rules – Dealing with Builders

Building can be a very stressful time. As with any business relationship you should start as you mean to go on. If you abrogate your responsibility during the process you will end up over budget, over time, dissatisfied with the work or embroiled in litigation. Building disputes are protracted, expensive and to be avoided. There are some simple rules to avoid these problems. You must:

1. properly research the builder;
2. ensure the terms of the building contract are reasonable;
3. be aware of the provisions of the building contract;
4. observe the building works and ensure the implementation of the building contract; and
5. get advice and take action if you have any concerns. Most disputes escalate because the client ignores problems on the site and doesn't want to "upset the apple cart".

Remember you are spending a lot of money with the builder. You cannot control the builder, however, by letting him know you are professional and vigilant, you are less likely to have problems. By making the effort and following these simple rules, you can avoid most of the pitfalls. These rules have been written with smaller commercial or domestic jobs in mind although they apply equally – with some other considerations – to larger jobs.

Properly research the builder

- Obtain quotes from more than one builder. When comparing quotes make sure you are comparing 'apples with apples'.
- Ask them for multiple references for jobs similar to yours. You should review these jobs and pick a job that you want to use as a benchmark for the work on your property.
- Ask who will be the most senior person on site and supervising your job, the period of time the builder has worked with that person and ask for references of jobs that person has worked on.
- Check the references you are given.
- Ask for a list of the usual subcontractors the builder engages and the period of time the builder has worked with each subcontractor and contact some of those subcontractors for a reference on the builder.
- Ask them for evidence of solvency.
- Do an ASIC search of the building company and directors to ascertain whether there is a history of failed companies or whether there have been any winding up applications or other indications of possible insolvency.

Building contract

- The printed building contracts are usually 'builder friendly'. The more recent Fair Trading Building Contract for work over \$5,000.00 is a fairer contract.
- You should always have a solicitor negotiate the terms of the building contract.
- Always insist on a fixed price contract.

- Have a benchmark property in mind. A benchmark property is a property, perhaps completed by the same builder that is used as a reference point for the minimum standard for your job. A special condition can be included in the building contract to provide that the building work must be at least to the standard of the benchmark property.
- **Never** agree to a 'costs plus' contract – it is the equivalent to giving the builder a blank cheque.
- Be aware of whether the contract is a 'design and construct' or 'construct' contract. If the latter ensure that the building contract does not commence until all of the design and approval work has been completed.
- The more detailed and complete the scope of works the better and the fewer the variations.
- All fixed price contracts provide that the price does not include the costs of dealing with any latent conditions discovered once the works are commenced. The usual problems in this regard are unforeseen geotechnical conditions if the existing building is to be demolished or disclosed when excavation is commenced and/or contamination issues. If it is a big job, the way to avoid these problems is by having a detailed geotechnical report and Stage 2 Environmental Report carried out as part of the conditions precedent between exchange and completion of the purchase of the property or before deciding to build. It is far better to spend more on the investigative reports than finding unpleasant surprises when you have committed to the building works.
- Be particularly careful of the clauses relating to variations – the contract needs to be very clear and restrictive on how the builder is entitled to charge for variations – you need to be fully aware of the procedure for claiming variations and enforce that procedure. Remember builders work on a fairly small profit margin and variations are a way to increase that profit.
- One standard provision of a building contract is that the owner of the property gives possession of the property to the builder at the commencement of the contract and it is handed back after the work is completed. You should include a provision that the owner is given reasonable access to inspect the works and to record the progress of those works.
- Make sure that the payment schedule under the building contract and the method of calculating the amount owing at each stage of the works fits in with your funding arrangements.
- Ensure that you have at least 20% more funds available than you expect the works to cost – to be on the safe side. The larger and more detailed the specifications the less you will need in reserve. However, never undertake any building work without some reserves.
- Ensure that the brands and specifications for any of the prime cost items are included in the contract and thoroughly research the expected costs for those items.
- Insist on a liquidated damages clause – which provides that in the event the builder is late completing the works, a specified daily amount of damages is incurred. In connection with this clause the contract should be very clear on what constitutes an acceptable delay.
- Ensure that time is the only allowance for acceptable delays e.g. inclement weather; industrial action, delivery delays etc. Delete any monetary compensation for those types of delays.
- Make it incumbent upon the builder to obtain the certificate of occupancy and make final payment dependant on the issue of that certificate.
- An important part of the building process is the issue of the certificate of practical completion. There are several consequences on the issue of that certificate including the commencement of the defect warranty period and the final payment. At times, after the issue of the certificate of practical completion, a major defect will appear. Therefore, it is a good idea to include a clause that in that event the consequences of the issue of the certificate are suspended until that defect is rectified.

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- Insist on a defects warranty period of at least 26 weeks and this clause should also provide the time frame for rectification of defects and that the defects are rectified by senior building staff. All too often the defects are put at the bottom of the builder's "too hard basket" and they use the most inexperienced staff to attend to those works.
- Make sure you make a checklist of the important items and dates contained in the building contract.

Supervise the Building Works and the Implementation of the Building Contract

- **Keep a works diary.** You should keep a diary from the date that possession is handed to the builder to the end of the works. This will be very helpful if there are any problems as it is a record of events independent of everyone's recollection and the site diary kept by the builder - which are often incomplete. The more detailed the entries the better. Get into this habit from the time of the earliest discussions with the builder. Note in it inclement weather days, holidays, general comments about the works, any specific discussions you have with the builder about:
 - Any rain days or partial rain days;
 - Rostered days off;
 - Any days works are not carried out for any reason;
 - Any discussions about variations or any variations you notice;
 - General comments about the progress of the works;
 - Notes of any site or other meetings;
 - Dates that any Council officers, engineers etc attend at the site;
 - Keep the dates that all requests for progress payments are issued by the builder and any variations;
 - Any specific discussions you have with the builder about problems or potential problems, delays in supplies, changes in any item such as tiles, PC items etc., practical completion and problems with Council; and
 - Any other detail whatsoever you for any reason think should be noted down.
- Keep a section of the works diary for recording variations.
- Take photos or videos. Before, during and after the works are carried out. It is MOST important that you take detailed pictures and/or videos of the works. The record you keep of the progress is another great aid in the case of a dispute or to resolve a potential dispute.
- **Confirm** any discussions with the builder in writing as soon as practical after those discussions have taken place, particularly if they refer to costs, time, variations, problems or potential problems. Email is simplest way to do this. You need to start as you mean to go on and if you show the builder you are organised, practical, clear, definite and thorough you will limit the potential for problems.
- Check that all of the work claimed in each progress claim has actually been completed. If your funder has certain requirements before advancing the moneys to pay each progress claim, be very cognisant of those requirements. You also need to comply with your obligations and the progress claims must be made in accordance with the terms of the contract.
- There is a process by which builders can enforce payment of their claims under the *Building and Construction Industry Security of Payments Act 1996* provided the accounts clearly state that they are being issued under that Act. If invoices include a note that they are being issued under this Act, there is a strict regime for dealing with them or you are liable and must pay. So contacting your solicitor immediately on discovering a discrepancy or problem with any progress claim is imperative.

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- Never pay any money to the builder in advance - it is quite common for a builder to ask for money in advance just before they go broke.
- Be fully aware of the requirements for any variations to the contract and ensure they are followed.
- Be aware of the requirements for practical completion and whether you have any concerns that the works have not been completed or the requirements for practical completion have not been satisfied when the certificate is issued. If in doubt, contact your solicitor immediately. This is very important because the defects period commences on the issue of the certificate and the balance of moneys are payable on its issue.
- On taking possession of the property after completion of the building works inspect the property thoroughly or engage a professional to inspect the property for defects. Notify the builder of these defects and get a firm commitment of when they will be rectified.

During the defects period

- Be very aware of the date the defects period expires and the builder's obligations to fix those defects:
 - Write down even the most minor cracks, painting inconsistencies etc.;
 - Take pictures and/or videos of the defects and then again after the builder has rectified those defects;
 - Submit them to the builder in accordance with the requirements of the contract; and
 - Insist on them being rectified in a timely manner.
- Make sure you get copies of the Council approvals and all certifications. In particular, get a copy of the Occupation Certificate, any survey that is prepared for the purpose of obtaining a building certificate and the building certificate issued by the Council or the certifier.
- **Keep a folder after the works have been completed** containing copies of:
 - The Development Consent for the works;
 - The builder's licence;
 - The certificate of Home Warranty Insurance;
 - The occupation certificate;
 - Survey; and
 - Building Certificate
- **Don't forget** - if any serious defects appear after the defects warranty period in the contract, you may be able to make a claim under the Home Warranty Insurance, so continue to keep a list of defects that appear.
- Building works are notoriously stressful for the property owner. You **must not** leave anything to chance or hope for the best. Never adopt an attitude that "I won't mention the problem until after the works are completed or the builder might walk off the job."
- When in doubt contact your solicitor.

Contact us at CLS Legal at info@clslegal.com.au for further information, to discuss your building contract or building issues, or if you have any questions about the contents of this document.

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