

NEWSLETTER

November/December 2001

BUILDING CONTRACTS- ISSUES FOR THE UNSUSPECTING

For many New Zealanders a house purchase is their largest investment. It involves risk and potential cost if the purchase does not proceed to plan. For this reason it is important to see a lawyer before committing to a contract. The same precautions should be taken when contracting a builder. Although the builder might be perceived to be 'on the same side' and the contract devoid of 'fine print', people can overlook the fact that there are two parties to the building contract who have competing interests.

Building involves a range of practical and legal issues, which need to be thought through. This article is not long enough for a full discussion of those issues, but some common issues that need to be considered are discussed below.

All information in this newsletter is to the best of the authors' knowledge true and accurate. No liability is assumed by the authors, or publishers, for any losses suffered by any person relying directly or indirectly upon this newsletter. It is recommended that clients should consult a senior representative of the firm before acting upon this information.

Finance

It is important that the availability of bank finance coincides with the need for progress payments. This seems a relatively simple matter, but it is imperative to ensure the level of funding approved can be drawn down as required.

People who do not seek legal advice may over look that the bank will require security before making any advances. If the security is a mortgage over the section where the house is being built, this will need to be registered. This is a problem if the house is being built on a section in a new subdivision where the boundaries may have been pegged, but the title has not been issued - which is quite common. No mortgage can be registered in this case and no advances will be made.

If the building contract is unconditional, this situation can be embarrassing and costly for the 'homeowner'. The builder will generally want a legal arrangement to be put in place to guarantee payment. The builder may also require payment of penalty interest for late payment of instalments.

Solvency Issues

In many 'buy and build' packages the house is built on a section that is not yet owned by either the builder or homeowner. The purchase of the section occurs when the house is built, by contemporaneous

CONTENTS

BUILDING CONTRACTS-ISSUES FOR THE UNSUSPECTING 1

<i>Finance</i>	1
<i>Solvency Issues</i>	1
<i>Plans and Specifications</i>	2
<i>Alterations</i>	2
<i>Foundation Work</i>	2
<i>Maintenance Periods</i>	2
<i>Conclusion</i>	2

THE FAIR TRADING ACT 1986 - MISLEADING & DECEPTIVE CONDUCT 2

<i>What is Misleading or Deceptive</i>	2
<i>Making a Complaint</i>	2
<i>Penalties Under the Act</i>	3

BANKRUPTCY ISSUES 3

<i>Receiving an Inheritance During Bankruptcy</i>	3
<i>Leave to Enter into Business During Bankruptcy</i>	3

FENCES 4

<i>Obligation to Fence</i>	4
<i>Placement of Fences</i>	4
<i>Liability to Contribute to the Cost of Fencing</i>	4
<i>Procedures</i>	4
<i>Servicing Notices</i>	4
<i>Failure to Agree</i>	4
<i>When to Proceed</i>	4
<i>Contribution Where Immediate Work is Required</i>	4
<i>Fencing Agreements and Covenants</i>	4

settlement. That is, the builder buys the section from a developer, and on the same day on-sells it to the homeowner. Problems arise if either the developer or the builder becomes insolvent after the house has been substantially built and paid for, but before the settlement.

Similarly, if the builder has not been paying for materials from the instalments, suppliers may have claims to recover materials from the site.

There is an inherent risk involved in making payments for an item before it is completed. However, the risk can be minimised by caveating the title, sighting copies of prior contracts, and investigating the reputation of the builder.

Plans and Specifications

Always agree on the plans/specifications before construction starts, **and** have them recorded in writing. Most builders are working on a number of projects at any one time, and use sub-contractors to carry out much of the work itself. While the builder will genuinely intend adhering to verbal agreements to deviate from the plans, verbal agreements are easily overlooked, particularly by sub-contractors who were not party to the relevant conversation. The risk is that the alteration will not be able to be incorporated, or worse still, that the builder will treat it as an alteration at additional cost to the homeowner.



Alterations

While there is minimal risk in making alterations, homeowners need to be aware that the cost of changes to the plans during construction are often more costly than anticipated. What may seem a simple change to the design may add significant cost to the final bill.

Foundation Work

Does the contract price include all necessary foundational work?

Often any foundation work beyond a certain cost or a certain type is an “extra” that the homeowner has to pay for. The cost of additional foundation work on soft soils can add significant cost to the end price of the house, particularly if an engineer needs to be called in. If additional foundation work is to be an extra, the contract should be conditional upon the homeowner investigating and being satisfied with the likely additional cost.

Maintenance Periods

The maintenance period is the period of time after construction is complete, during which time the homeowner might identify defects that require fixing, at no extra charge. It is important to allow sufficient time to get over the euphoria of a new home, and for the new house to be ‘used’ so that any problems can be identified. While many building contracts will allow 30 days, it is preferable that a longer period of 60 to 90 days be specified.

Conclusion

Building a home involves issues that most people do not come across every day. A building contract is a contract like any other - it involves two parties with competing interests. The consequences of ‘getting it wrong’, even if it is a problem that can be resolved, can be costly. A visit to a lawyer should be considered an investment, just as much as the investment in the house itself.

THE FAIR TRADING ACT 1986 - MISLEADING & DECEPTIVE CONDUCT

The *Fair Trading Act 1986* protects against a number of specific kinds of business or trade malpractices, and also prohibits conduct in trade that is, or may be, misleading or deceptive. The Act offers protection to both consumers and other traders from misleading or deceptive conduct. Section 9 of the Act provides that “no person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive”.

What is Misleading or Deceptive

The terms ‘misleading’ and ‘deceptive’ are not defined in the Act and are given their ordinary meanings. The Commerce Commission has interpreted ‘mislead’ to mean to lead astray in action or conduct, or to lead into error. “Deceive” is interpreted as meaning to cause to believe what is false, to lead into error, or to take in. The test as to whether conduct is misleading or deceptive is objective with regard to the circumstances and the persons likely to be affected.

A complainant does not have to suffer loss or be directly affected by the trader’s misleading or deceptive conduct. The Act not only applies to conduct which has actually misled or deceived somebody, but also to conduct likely to mislead or deceive.

Making a Complaint

What options are available if you have been misled or deceived by a trader?

1. *Approach the Trader*
You can first try approaching the trader directly. If the trader is willing to address the conduct complained of to your satisfaction then the matter is at an end. If not there are a number of further options.

2. *Court Proceedings*

Where misleading and deceptive conduct by a trader has caused financial loss, the aggrieved party can take the trader to Court and seek compensation for the loss caused.

3. *Apply for an Injunction*

You can apply to the High Court for an injunction, which is an order by the court to the Trader to stop the conduct being complained of. This course of action is appropriate, for example, where a trader refuses requests to refrain from misleading or deceptive advertising.

4. *Complain to the Commerce Commission*

The Commerce Commission proactively polices the conduct of traders, as well as acting on complaints it receives of misleading or deceptive conduct. The Commerce Commission becomes involved where there is a blatant abuse of the law, or there is significant detriment to either traders or consumers, or a precedent needs to be established.

Penalties Under the Act



A trader who breaches the general prohibition against misleading or deceptive conduct can be ordered to stop, to carry out corrective advertising, and/or to pay compensation. If the trader breaches other provisions of the Act, criminal penalties may also apply. Companies can be fined up to \$100,000 and individuals up to \$30,000, plus costs. Action under the Act can only be taken within three years from the time the alleged breach occurred.

I can advise on all aspects of the Fair Trading Act 1986, so please contact me if you have any concerns or questions.

BANKRUPTCY ISSUES

The effects of bankruptcy include the passing of most of the bankrupt's property to the Official Assignee for distribution amongst creditors, and a prohibition against the bankrupt continuing in business. This article looks at two interesting issues that arise out of these aspects of bankruptcy.



Receiving an Inheritance During Bankruptcy

The legal definition of property in relation to bankruptcy includes an inheritance. On the face of it property of a deceased person, which passes to a bankrupt, passes to the Official Assignee. What then is the position when the bankrupt person is not due to receive the benefit of the inheritance until he or she has been discharged from bankruptcy?

The legal position is that the inheritance passes to the bankrupt person at the time of the death of the person leaving the property, not at the time of the distribution or the administration of the estate. If the person leaving the inheritance dies during the bankruptcy of the person receiving the inheritance, the property passes to the Official Assignee for distribution among creditors. It does not matter that the distribution or administration takes place after the bankrupt is discharged.

A practical concern for creditors is that the bankrupt person may not disclose an inheritance, particularly if the payment of the inheritance is to be made after the bankrupt has been discharged. This concern is remedied by Section 60(b) of the Insolvency Act 1967 which imposes a duty upon the bankrupt to disclose to the Official Assignee as soon as practical, any property that has been acquired by the bankrupt before being discharged. A bankrupt person who fails to disclose this information may face

severe penalties including imprisonment.

Leave to Enter into Business During Bankruptcy

A bankrupt is prohibited from carrying on business during the term of the bankruptcy. The rationale behind this rule is not the punishment of the bankrupt but the protection of the commercial community. A bankrupt can however seek the permission of either the court or the Official Assignee to carry on business during the term of bankruptcy.

The term "carrying on business" means that the business or operation is carried on for the livelihood and/or profit of the bankrupt and that the bankrupt is involved beyond being a mere wage earner.

The bankrupt must apply to the Official Assignee or court, setting out the reasons for the application, whether the business is a new business, what capital is intended to be put into the business by the bankrupt or any other person, and any other particulars required.

The following are some of the factors that will be taken into account in deciding whether to allow the bankrupt to carry on business:

- The protection of the interests of the public.
- The interest of creditors of the bankrupt.
- How the person became a bankrupt. For example, if the bankruptcy resulted from previous business dealings, it is unlikely that permission to carry on business would be granted. In exercising his or her discretion to refuse or grant leave, the Official Assignee must consider the interests of the bankrupt, of the creditors, and of the community.

FENCES

Fencing is often the subject of dispute between adjoining property owners. Two issues that commonly arise are:

1. Whether or not there is a legal obligation to fence.
2. Whether or not occupiers are liable to contribute to the cost of fences erected by their neighbours.

Obligation to Fence

An occupier of land is under no general duty to fence his or her land from a neighbouring property or from public access ways. A duty to fence may arise from the use of the land, for example, if the absence of fencing may cause a nuisance to neighbours or the public. Adequate fencing is required on farms to prevent stock wandering.

Fencing is also required around swimming pools. The rules set out below do not apply to swimming pool fences.

Placement of Fences

The middle of the fence must be on the boundary line, except where a fence is supported by posts. Then the posts must be placed on the boundary line or as near to it as practicable.

Liability to Contribute to the Cost of Fencing

Neighbours may be obliged to contribute up to half of the cost of the fence bordering their property, providing the landowner wishing to build the fence follows certain procedures set out in the Fencing Act.

Procedures

If you want a neighbour to contribute to the cost of a fence, you must serve a notice on the neighbour setting out:



1. The boundary along which the work is to be done.
2. The nature of the work proposed and the materials to be used.
3. The consequences of failure to comply with the notice.

A neighbour who objects to proposals set out in a notice may, within 21 days after receiving the notice, serve on you a cross-notice. The cross-notice must set out any objections and counterproposals. Any work proposed in a cross-notice must be specified the same way as is required in the original notice.

If a cross-notice is not served within the 21-day period, the neighbour is deemed to have accepted the proposals in the original notice.

Serving Notices

Notices and cross-notices must be delivered personally or by registered letter addressed to the person at his or her last known address or business in New Zealand.

Failure to Agree

If an agreement cannot be reached within 21 days after the date of service of the last notice or cross-notice, the matters in dispute may be determined by a District Court or Disputes Tribunal.

When to Proceed

Where a person serves a notice under the Act in respect of work on a fence,

he or she may proceed to do the work:

- a. After the expiration of 21 days from the date of the service of notice if he or she is not served with a cross-notice; or
- b. If he or she is served with a cross-notice, as soon as all the differences between the parties are resolved either by agreement or by the court.

If the work is done prematurely, the neighbour is not liable to contribute any costs incurred erecting the fence.

Contribution Where Immediate Work is Required

If any fence is damaged or destroyed by sudden accident or other cause and requires immediate work, either of the adjoining occupiers may do that work without any notice, and may recover half the cost thereof from the other occupier. This rule does not apply where the destruction of the fence is the fault of one of the occupiers, in which case, that occupier will be liable for the full cost of the work. If you have any doubts contact me first.

Fencing Agreements and Covenants

A fencing agreement or fencing covenant can be drawn up to protect occupiers from being liable for contributing to costs of work on a fence. If the person selling land to you retains adjoining land (for example in a subdivision) then the seller may as a condition of the sale exempt the seller from liability to contribute towards the cost of fencing.



Please call me if you would like further information on newsletter items.