TREAT YOUR BUILDING CONTRACT LIKE A LIVE HAND GRENADE

We spend most of our time advising builders or building owners on what to put in their building contracts, and how to resolve disputes with each other. When it comes to a dispute, we try to find "quick and dirty" ways to resolve it, rather than the traditional way of spending a lifetime and a fortune in court, or arbitration.

Those traditional methods just aren't affordable for the average small-medium builder or homeowner. Fortunately for builders and building owners alike, ever since 2002 they have had a fast and economical alternative available to them, which is called "adjudication" under the Construction Contracts Act (the "CCA").

CCA adjudication is great for a number of reasons. First, there are very tight time limits, so you generally get a result within two months. Secondly, there are no drawn-out procedures before you even get into arguing your case, and no hearings where lawyers stand up and argue their case at all. Instead, one side simply sends in their written claim and supporting evidence, the other side sends in their written response and supporting evidence, and the adjudicator reads them both and then issues a written ruling. Thirdly, the adjudicators are experts in the building industry or construction law, so the outcome is usually reasonably sensible. Fourthly, adjudications cost a lot less than court proceedings or arbitration.

We have done many, many adjudications for builder clients and most of them have been very successful. **You never get 100% of what you are asking for, but anything above 75% is a great result. In fact as long as you get more than you spent in legal and experts' costs, then you are winning, because you wouldn't have got anything at all otherwise.** However there are a few adjudications where the builder is bitterly disappointed at the outcome, and the purpose of this newsletter is to explain why, so you can avoid falling into the same trap.

The CCA adjudicators are in a difficult position. Unlike the Referees in the Small Claims Courts (officially known as the Disputes Tribunals), they are not allowed to reach a decision that they think is fair and reasonable, if that is incompatible with what the law says. They have to follow the law, and in their case, that means strictly applying the terms of the building contract.

After all, the law assumes that whatever the contract says, represents the bargain that the building owner and the builder knowingly and willingly agreed to at the outset. It doesn't matter if one or both parties didn't know what was in it or didn't understand it. The law assumes that you did.

It's not so bad if the building contract was a Certified Builders or a Master Builders contract, because those Associations understand that most of their members don't have teams of in-house lawyers, quantity surveyors, and contract administrators, so their contracts don't place unrealistic expectations on them. The problem arises when you are forced to use a contract such as one of New Zealand Standards' contracts (the most common of which is NZS 3910), or one of the New Zealand Institute of Architects' contracts. Those contracts are designed to be used in the biggest construction or infrastructure projects imaginable, where the clients and contractors are huge corporations, and the contract price is in the hundreds of millions.

Consequently the NZS and NZIA contracts impose very strict rules on the contractors and subcontractors. If you want to be paid extra for a variation, you have to identify the variation in advance, you have to price it, and you have to document it, all within strict time frames. Similarly, if you believe you are entitled to a time extension, you have to say so as soon as the delay is foreseeable, you have to seek permission in writing, and you have to justify it. If you don't do those things, you won't be granted your variation or your time extension. You will have to bear the cost yourself, and still finish by the original deadline. Or face the consequences, which is that you will have to pay damages to your client or your head contractor. And those can deprive you of your entire profit on the job.

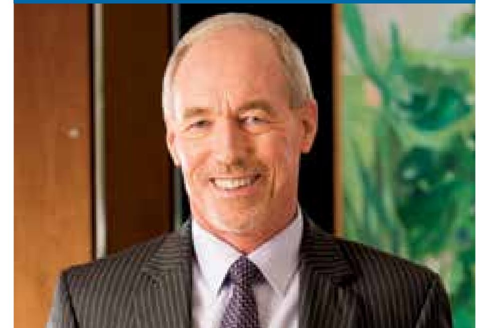
This is what catches out most small-medium builders. They don't know these contracts word-for-word, they aren't familiar with the complex rules, and they don't follow the proper procedures. What that means is that when it comes to an adjudication, the Adjudicator has no choice but to hold the builder to the terms of the contract.

That can result in the builder losing something like $50,000-$100,000 or more, which is obviously crippling to someone who doesn't earn much more than that and is struggling to put food on the table. What it also means is that the builder has voluntarily donated $50,000-$100,000 worth of free building work and materials to a wealthy building owner, who doesn't have to pay a cent for it, even though he got the benefit of it. Obviously from a fairness point of view it doesn't seem right, but from a legal point of view, if you didn't follow the rules then you have to suffer the consequences.

The essential point of this newsletter is this. Building contracts are not pieces of paper to sign and then put in the bottom drawer. They are like a time bomb waiting to go off. If you don't have the resources to understand them and comply with them, then refuse to sign them. And if you are forced to sign them, then get to know them intimately and comply with them.

That is a big ask for a builder who doesn't have a team of experts on his payroll, but there are other ways of dealing with it. Law firms like ours know these contracts inside and out, and we can train you in their requirements in a matter of hours. The cost of that won't break the bank, and if it's going to save you $50,000-$100,000, you don't need to be Einstein to work out that it's a fairly good investment.

ABOUT THE AUTHOR



GEOFF HARDY
PROPERTY PARTNER

It's no overstatement to say Geoff is one of New Zealand's foremost authorities on construction and commercial law.

With forty-plus years of experience, Geoff invariably knows what the answer is and his client's chances of success.

If you need help with commercial or construction law contact Geoff directly on 09 379 0700 or email geoff@martellimckegg.co.nz

© Geoff Hardy February 2016. This newsletter is not intended to be relied upon as legal advice.