

## Be Careful who you Contract with

You should always use a written building contract, even if the contract price is less than \$30,000 or it is a handyman job. That is because it is better to have the rules spelled out rather than having to spend money arguing about what the rules are if a dispute arises. And regardless of what contract you are using, there is always a space to insert the name of your client or customer. The purpose of this newsletter is to explain to you how important it is to get that right.

As a general rule, always contract with the owner(s) of the land in question. No-one else has the right to authorise you to come onto their land and make changes to it. That is the reason why, in an insurance project such as a Christchurch earthquake repair, you should contract with the owner(s) rather than EQC or the private insurer or their project administrator. The insurer is just the owner's financier. It doesn't have the authority to allow you to allow you to enter the land and start demolishing or repairing the building. Only the owner(s) can do that.

There is only one safe way to find out who owns the land in question, and that is to do an online search of the land title through Land Information New Zealand (**LINZ**). The title (these days known as a "unique identifier") is the most accurate source of that information. In fact the Government guarantees its accuracy. So whenever you complete a building contract, always get a copy of the title of the land you will be building on.

Unfortunately there is no other reliable source of that information. Although the local Council records the owners of all land within its territory for various purposes, it won't let you have that information unless you are authorised by the owners. And why wouldn't you simply trust the person who has hired you, to tell you who the owners are? Because amazingly enough, people often get it wrong. They assume they know, but the precise detail isn't important to them. In all the construction contracts that come across my desk, I would say that no more than half of them accurately describe the owners. And this is why it is important that they do.

The building contract only becomes relevant when a dispute arises. Until then it can stay in the bottom drawer. But when a dispute arises, it is a lifesaver for both parties. For the owner, it spells out the rules for resolving disputes, and that in turn avoids uncertainty and reduces cost. For the builder it can be the difference between you recovering that final progress payment, and writing that payment off. So you don't want to give an unscrupulous or embittered client any loopholes they can use to get out of paying you. And an inaccurate description of the owner(s) in the building contract, is one of those loopholes.

Why? Because it gives the owner's lawyers one more argument they can use against you, one more area of uncertainty they can exploit. And even if you overcome that obstacle, it costs money to do so.

The most common mistake is not to name all the owners. It is often the case that one of the owners does all the negotiating and it is simply their name that is entered into the contract. What that means is that when you finally get that judgment or that adjudication award, only that person is bound by it - and he or she may not be the wealthy one. Why have only one person liable to you, when you could easily have had two or three? You can run an argument that the person you were dealing with was an agent for the others with the authority to bind

them to the contract, and although that is invariably true, you would be amazed how difficult it is to prove when they deny it vehemently.

The second most common mistake relates to trusts. It is a very common misconception that a trust is a separate legal entity. And so you see contracts that describe the owner as the ABC Trust. The problem is, there is no such thing (in law) as the ABC Trust. So you have contracted with a fictitious party. What the contract really should have done is name the individual trustees. The proper description is Alan Smith, Beatrice Smith and Callum Cartright as trustees of the ABC Trust. If you look on the title, that is exactly the way they will be described, except that there won't even be any mention of the trust.

A similar rule applies to partnerships. There is no such thing (in law) as the ABC Partnership. Once again the proper description is Alan Smith, Beatrice Smith and Callum Cartright as partners of the ABC Partnership. The land title will show them by their full names, and once again it won't make any reference to the partnership, although there is no harm in doing so in the building contract.

The third most common mistake is to get the builder's name wrong, often by using the trade name instead of the legal name. If you trade through a company called Boring Name 2012 Ltd but the trading name you promote to the marketplace is Choice Homes, then the name that you insert into the contract is Boring Name 2012 Ltd, not Choice Homes. If you are in any doubt, it is the name that your company is described as on the Companies office website. And don't be misled into putting in your own name either, if in fact you trade through a company. In one case where the builder innocently did that, an adjudicator ruled that the builder had actually intended to put his company to one side on this occasion, and become personally liable for this particular project.

If you are in any doubt about any of these rules, then read the fine print underneath the spaces for the parties' names on the first page of the schedule in the building contract (you should be doing that anyway), because it tells you what to do. Then once you have the owner(s) correctly described, the second step is to get them all to sign the contract. That is just as important as describing them correctly in the first place.

There are two more important reasons why you should make sure you are contracting with the right parties. The first is that if it's a commercial construction project and you get an adjudicator to confirm that the owner(s) owe you money, the adjudicator can grant you a charging order over the property (similar to a mortgage), which gives you very powerful leverage. The second reason is that if you are using a Certified Builders contract with the full wording, and it hasn't been modified, then it contains an agreement by the owner(s) to grant you a mortgage over the property as security for payment. You can then put a caveat on their title, as an interim measure. But the important point is, neither of those remedies works if you haven't contracted with the right parties.

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