

# A BUILDING CONTRACT



When you decide to build a new home the most important considerations are likely to be:

- Selecting a site
- Choosing an architect or draughtsman to design the home
- Finalising the plans and specifications
- Selecting a builder
- Arranging the finance

Last in the list of priorities is likely to be the building contract. After all it simply records the terms agreed upon with the builder - principally the contract price and when it is to be paid. Unfortunately it is not that simple.

There is no standard form of building contract in general use although the Master Builders' Federation has published a building contract for use by its members. Because there is no standard form of contract it is important, as with all legal contracts, to read and fully understand all the provisions contained in the contract. In particular care should be taken with the following:-

### **Plans and specifications**

The contract will provide for the builder to build your home in accordance with the plans and specifications. It is therefore essential to carefully check the plans and specifications so as to ensure that they correctly record your requirements. All amendments or variations should be incorporated in the plans and specifications. Do not rely on verbal discussions with the builder.

If a dispute arises, apart from the difficulty of proving that the matter was discussed, you may find that there has been a misunderstanding as to what was supposedly agreed upon.

### **Contract price**

It is usual for the contract price to be paid by way of progress payments. Do not agree to pay a progress payment until there is work and materials on the site for a sum equivalent to the amount of the progress payment.

If you have been given a fixed contract price check the agreement for an escalation clause. Many agreements allow the builder to pass on increases in the cost of wages and materials.

You may be asked to make a payment before work is started to cover preliminary expenses such as the cost of obtaining the building consent from the Council and the preparation of the plans and specifications. If you find yourself in this position we recommend that you enquire into the builder's financial position.

Any builder who does not have the capital to finance the construction of a home to the stage when you must pay the first progress payment is unlikely to be in a sound financial position. By making a payment before work to the value of the payment is on the site you are exposing yourself to considerable risk. If the builder owes money to creditors on a prior contract your progress payment may be used to pay those creditors. At the very least you should obtain a statement of affairs from the builder's accountant. The statement is similar to that required by a lending institution when you apply for a loan. If the builder refuses to provide you with a statement of affairs and cannot supply you with any other acceptable form of credit reference we recommend you to find another builder.

## Progress payments

The building contract will specify the amount and when each payment is due, for example \$..... when the foundations are laid. If you have any doubts about the amounts of the progress payments obtain advice. If necessary ask a valuer/quantity surveyor to check the figures. At all times it is essential for you to retain sufficient funds to ensure that if for some unforeseen reason the builder does not complete your home you will have sufficient funds to complete construction.

The Construction Contracts Act 2002 provides that a builder may serve a “payment claim” on you requiring you to make a progress payment. A payment claim must:

- (a) be in writing;
- (b) identify the building contract to which it relates;
- (c) identify the work to which the claim relates;
- (d) indicate the claimed amount and the due date for payment;
- (e) indicate the manner in which the builder calculated the amount; and
- (f) state that it is a payment claim under the Construction Contracts Act 2002.

You then have 20 working days (unless the building contract provides otherwise) to respond to the payment claim with what is called a “payment schedule”. A payment schedule must:

- (a) be in writing;
- (b) identify the payment claim to which it relates;
- (c) indicate the amount that will be paid; and
- (d) if the amount to be paid is different than the payment claim give reasons as to why there is a difference;
- (e) if the amount to be paid is less than the payment claim give reasons as to why an amount is being withheld.

If you do not provide a payment schedule within 20 working days you will be liable to pay the whole amount of the payment claim and the builder may go to Court to recover this amount. The builder is also entitled to cease work under the building contract.

If the builder disputes your payment schedule the dispute must be referred to adjudication under the Construction Contracts Act.

## Prime cost allowances

The specifications will include allowances to cover the cost of such items as the stove and wallpaper. Check that the allowances are reasonable in relation to the value of the contract price. If you purchase a stove for an amount which is more than the prime cost allowance the difference will be an extra which will be added to the contract price. If the builder only includes minimal prime cost allowances you will receive a false impression of the true cost of your home. If you are obtaining competitive prices from a number of builders beware of those builders who only make provision for a small prime cost allowance to give the impression that their contract price is the lowest.

## Finance

If the contract provides for progress payments and you are relying on a lending institution to finance part of the contract price make sure the lender will advance the loan by way of progress payments. Some institutions will only lend on a completed home. Find out from the

builder when the progress payments will be required and then check on the requirements of the lender before it will let you have a progress payment. It is important to plan in advance in order to avoid any last minute delays in obtaining a payment from the lender. Any delay could prove costly because all building contracts provide for the payment of interest if a payment is delayed for more than five working days after the due date. If you do not have title to the section, for example, you are building on a section owned by the builder or are erecting a home on an "*in-fill*" site particular care must be exercised because no lending institution will lend before you have taken title to the land.

### **Risk**

The building contract must provide for the work to be insured from the commencement date to the completion date to its full insurable value under a contractors all risks policy. The policy should be in the joint names of yourself and the builder. If progress payments are required the interest of the lending institution as mortgagee must also be noted on the policy. Remember to make arrangements for permanent cover to take effect from the expiry date of the contractors all risks policy ***before you take possession.***

### **Extras**

All extras and variations to the contract must be recorded in writing and it is essential for the price of any extras to be agreed upon before work is commenced. In the excitement of building a new home it is easy to get carried away with extras and variations to the contract only to be faced with an unexpectedly large account for extras when you receive the builders final account. Individually the extras may not amount to much but over the months the average home takes to build the extras can soon mount up. Most building contracts provide that you cannot take possession until the contract price and the cost of all extras are paid. The excitement of your anticipated move into your new home will rapidly disappear if you are involved in a dispute with the builder over the cost of the extras.

### **Maintenance**

A standard building contract usually requires the builder to make good any defects in the work which arise from materials or workmanship not in accordance with the specifications and ***which are notified in writing to the builder within one month*** of the completion date. Most building contracts ***do not*** allow you to retain part of the contract price until any necessary maintenance is completed.

### **Correct site**

If the boundary pegs are not visible we advise you to arrange for a surveyor to flag the boundaries so as to ensure that your new home is erected in the correct position. This is essential if you have not previously checked the position of the boundary pegs. We are aware of cases where a home has been built either across or too close to a boundary. The cost of such a survey is very small in relation to the total cost of your home.

### **Contractor's default**

As we noted earlier it is important for a progress payments to be arranged in such a manner as will ensure that at all times you retain sufficient money to complete the contract. If the builder is declared bankrupt, or being a company a receiver is appointed, your building contract should include a provision which enables you to give notice in writing to terminate the contract.

## Completion of work

On the completion of the work it is usual for a contract to require you to inspect the work and to sign a certificate in which you acknowledge that the work has been completed in accordance with the plans and specifications. If in the course of your inspection you find any defects we strongly recommend you to arrange for the builder to remedy the defects **before** you take possession.

While the builder is owed money he is likely to rectify all defects promptly in order to obtain payment of the balance of the contract price. Unfortunately, after the builder has been paid and has started work on another house, it is not always easy to get defects corrected. In many cases the defects will be the responsibility of sub-contractors and, as with the builder, if they are not paid they are likely to act more quickly. Inevitably you will find further defects after you move in but these defects should only be of such a minor nature that if for some unforeseen reason the builder does not rectify the defects under the maintenance provision the defects will not detract from your enjoyment of your new home and, if necessary, you can rectify the defects yourself at little cost.

## Choosing a builder

Many qualified builders do not belong to the Registered Master Builders' Federation. Notwithstanding the television advertisement promoting members of the Federation not all builders who are not members are cowboys. The best way to choose a builder is by reputation. Ask any of your friends who have used a builder if they would recommend the builder. If your friends cannot give you the name of a builder drive through any new housing estate looking for house designs you like and then find out the name of the builder. Ask to see through the house and talk to previous clients of the builder. Having selected the builder make sure you both sign the building contract.

If the builder is a registered builder you can apply to Master Build Services Limited, a company set up by the Registered Master Builders' Federation, for a five year master build guarantee. It is important to note however that there are limitations to the guarantee. Among other things the guarantee requires you to:

- Ensure a building consent is obtained;
- Phone Master Build to ensure the builder is a current financial member;
- Sight a copy of the "**contract works**" insurance policy and ensure that your name and the master build name are noted on the policy;
- Ensure progress payments do not exceed the value of the work completed. This may mean you have to bear the cost of having the work valued at each stage;
- Apply for a code compliance certificate from the Council which issued the building consent. The certificate is issued after the Council has made the final inspection and is satisfied your home has been completed in accordance with Council requirements.

If the builder is not a member of the Registered Master Builder's Federation you cannot obtain a guarantee and your remedies are limited to the remedies specified in the building contract, for example, arbitration, and normal contractual remedies such as referring a dispute to the Disputes Tribunal or issuing Court proceedings.

## General

When you receive the plans for your new home it is important to visualise yourself using each room so as to ensure that the layout meets your requirements. Check on the little things such as:-

- The position of the light switches and power points.
- The number of power points in the kitchen.
- The height of the kitchen bench.
- The layout of the laundry - is there sufficient space for the dirty laundry, the washing that is awaiting ironing and the ironing board.
- Location of TV jackpoints and so on.

Because builders are usually men the height of some items, for example, the shower rose may be placed at a level which is inconvenient for a woman. Unless you are very fortunate it is unlikely your new home will be completed without your experiencing some frustrations of one sort or another. If something is done which is not in accordance with your understanding of the contract it will be necessary for you to decide what is important, and must be rectified, as opposed to small items which are more annoying than anything else. In order to ensure that your home is completed to your satisfaction, in our opinion, it is essential to establish a good working relationship with the builder. If that relationship sours then in our experience both parties loose out. For example, we all want the perfect paint finish. Unfortunately a perfect finish requires a great deal of work on the part of the painter and for this reason the standard of finish usually involves a compromise on the amount you are willing to pay the painter.

## Conclusion

As we noted at the commencement of this paper it is essential to check the plans, specifications and building contract. Because there is no standard form of building contract in general use we invite you to consult us immediately if there is anything you require to be clarified in the building contract you are asked to sign. Do not sign any contract until you fully understand all the terms in the contract.

## SPECIFICATIONS

### A CHECK LIST

- What prime cost allowances are included in the contract? Are the allowances adequate? For example, the allowance for carpet is for the cost of the carpet, the cost of underlay and the cost of laying the carpet.
- If the specifications refer to a particular brand of whiteware/taps etc is the brand acceptable? The cost of these items varies significantly.
- Does the kitchen/bathroom meet your requirements? Large amounts of money can be spent on these rooms.
- What is the height of the kitchen bench, vanity unit and any other similar facilities.
- What insulation is provided. Be aware that, for example, the cost of pink batts varies according to the thickness of the batts.
- Is there a sufficient number of light/power points and television jack points. Check that there will be sufficient power points in the kitchen for the number of electrical appliances. Are the switches easily accessible and at the right height? For example, the switch to turn off the refrigerator/freezer should not be behind the refrigerator.
- Is the allowance for light fittings adequate?
- Is there a front door bell?
- Is there adequate storage?
- Is there adequate space in the laundry for your ironing board, dirty washing, washing awaiting ironing etc?
- If the contract includes an automatic garage door/burglar alarm check the brand.
- What material will be used to surface the drive/hard standing area? When the material is laid check that the difference between the height of the hard standing area and the level of the floor complies with the Council building code. This is a particular concern if your house has a concrete floor slab.
- Is there adequate parking?
- What paths are required?
- Does the contract include a clothesline, television aerial and letterbox?
- What provision is made for landscaping?
- Check the location of all outside taps.
- Can you turn off the water supply inside the house for when you have to replace a tap

washer?

- Where underground services are provided take care that they are easily accessible in case repairs are required.
- Is the drainage adequate?

If you wish to carry out any work on the house/supply any materials agree on the cost before you sign the building contract.

### **Code compliance certificate**

When the builder has completed construction and before you take possession ask the builder to give you a copy of the code compliance certificate which is issued by the Council when it is satisfied your house has been completed in accordance with the building/resource consents. Do not accept any excuses. If you have any doubts see the Council and find out why the certificate has not been issued.