



SOLICITORS

BUILDING CONTRACTS

There are many advantages in building, not the least of which is that people believe they can end up with precisely what they want and are not restricted by the type of properties they may find available in the market place. The second major reason is that people can retain the "developers margin or profit" for themselves and thus often acquire a property of far better standard or quality for a lesser price than they would achieve in purchasing in the open market place. There are also many other ancillary advantages such as depreciation allowances for investments and the saving of stamp duty.

All of these advantages are to be considered, however advice should be sought from your Solicitor and Accountant as to the structuring of your transaction in order to ensure the maximisation of these benefits and the effect of them on a subsequent sale.

It is perhaps trite to say that one of the great certainties in life is the incidence of tax. While taxation advantages may be acquired through depreciation of fixtures and fittings in the building, a person entering into a building contract with such savings in mind should also bear in mind that any "profit" made on the depreciated value of such items will be taxable as written back depreciation.

Apart from the various financial benefits (which you are strongly recommended to consult an expert about) there are many pitfalls and problems to be encountered in playing "the building game".

There are a number of standard form contracts available which are in use by builders. Perhaps the two most common of these are the Building Services Authority standard form and the Housing Industry Association form.

It should be realised by all potential owners that these contracts are standard form contracts and as such are drafted for standard form transactions. This "standard form" is perhaps one of the greatest misnomers of all time as all contracts and all buildings are totally individual and unique. You are strongly advised to consult a Solicitor **before** entering into or signing one of these contracts, even though you may be assured that it is "only a standard form contract".

Building contracts normally consist of three main documents. These documents form two separate and individual contracts. The first of these is the preliminary contract. This will state the initial work to be carried out by a builder and the prices to be paid for these works. The "works" usually involve items such as:-

1. The testing of the soil to ascertain engineering specifications.
2. The drafting of final "slab" plans.
3. The obtaining of council approvals and a site survey to locate the house correctly on the site.

The preliminary contract usually provides the payment of a small deposit which is non-refundable should the work

not proceed beyond this initial stage. It is therefore important to ensure that you do wish to proceed with this contract before incurring even these preliminary costs. The preliminary contract places no obligation on either party to enter into the final contract and is really a feasibility exercise to enable the builder to obtain final costings.

FIXED PRICE CONTRACTS

Often times the builder will quote a fixed price prior to undertaking the preliminary contract. If this is the case the standard form contract requires "standard form" alteration to delete from it all the escalation and variation clauses which could involve the owner in additional costs. These additional costs can sometimes be quite large.

THE STANDARD CONTRACT

The standard contract consists of two main documents. These are firstly, a schedule to the contract and secondly, a booklet containing the standard terms and conditions. To these documents must be appended the plans and specifications of the property being built.

A common shortcoming of most building contracts is that an owner is not provided with full working drawings, plans and specifications at the time of executing the contract. This is usually because the builder has not obtained council approval or indeed has not obtained proper engineering specifications for the foundations.

The standard contract is a complete contract and no extraneous information or documentation can be included. Any alteration to the plans and specifications as attached to the contract will be considered as a variation and will incur you in additional costs. Building disputes arise not so much from legal interpretation but from misunderstanding between the parties as to what items are included in the contract and what the costs of these standard items are.

Sometimes items may not be specifically listed in the specifications but they should be at least allocated a prime or provisional cost ("PC cost"). These PC costs set the bench mark of the standard of fixture and fitting to be provided by the builder. Should you require a more expensive item then you must pay the cost which is in excess of the PC provided. Similarly if a particular item specified is not available and an alternate item purchased then this too can alter the building cost. You should be fully aware of what PC costs are attributable to what materials.

VARIATIONS

Variations are another of the areas which cause a great deal of dispute between owner and builder. It is therefore important to make sure that the variations clauses do not give the builder any rights to increase the building cost without the owner being first made aware of them and being in control of the decision making process.

A copy of plans should be maintained on site and any amendments or variations noted on the plans and SIGNED AND DATED BY ALL PARTIES. You should also ensure that where any variations are envisaged that costs are noted on the plans. This avoids problems later as it provides concrete evidence as to what has been agreed to.

COPYRIGHT

Copyright exists in any item of words or drawing and thus copyright exists in the plans to a home. Copyright exists in the person who created the drawings in the first place and in most instances belongs to the builder or the architect. In order for you to be able to utilise the plans the builder has to grant a license to you. This is achieved in the standard form contract by the way of a grant of licence for a small fee (which is included in the purchase price).

Any owner should be particularly careful of "the poaching" of other builder's, developer's or architect's plans.

INSURANCE

The standard form contract provides for the builder to effect an "all risks" builder's policy. You should note however that you are still liable as owner of the land for any costs or damages and thus you should consult with your insurance broker to ensure that your potential liability as owner of the property is fully covered. Public liability insurance is one of the cheapest forms of insurance and quite high cover can be obtained at little cost.

FINANCE

Most people require finance to effect the construction of their home. It should be noted that the contract is **specifically not subject to your obtaining finance**. The schedule to the contract does list a lending authority from whom finance is to be obtained, however the purpose of this is merely to allow the builder to liaise with the lending authority for progress payments and is not to allow the owner to back out of the contract should they not subsequently obtain finance.

If you wish your contract to be subject to obtaining finance this must be specifically inserted. Mostly builders require that finance is obtained in the preliminary contract stage and thus this is where the finance provisions would be inserted.

PROGRESS PAYMENTS

The building industry is a heavily regulated industry and the Building Services Authority regulations contain a schedule of recommended maximum progress payments. These progress payments can (and often are) varied by the builder. In agreeing to a variation of the standard progress payments you should ensure that sufficient funds are retained to allow completion of construction and that the progress payments correctly reflect the stage of progress which the building has reached.

LIQUIDATED DAMAGES

Liquidated damages is a legal term which is used to describe the parties "best guess" as to the loss that may be incurred if the building is not completed on time. This excludes you from further claims for actual loss over and

above the amount stated as "liquidated" loss. Obviously it is important to assess this as accurately as possible.

Liquidated damages are often calculated on the basis of an alternative rent cost or additional borrowing or holding costs incurred. You should realise your loss may go further than this and may include the costs of a "double shift". The standard form contract only allows for liquidated damages to be paid on the basis of "working days". Your loss is obviously going to be incurred 7 days a week 24 hours a day. It is with this in mind that you should pay particular care when calculating your liquidated damages.

WET DAYS

Whilst the builder is required to pay liquidated damages for any delays, you should appreciate that often times builders are unable to proceed with the works due to inclement weather, lack of materials or strikes. The standard contract provides an allowance for these days however there is a specific mechanism which must be followed before the builder is able to rely upon these provisions.

EARLY POSSESSION

You should be aware that should you occupy the home before final completion then you are deemed to have accepted the works and the defect liability period is waived. Should you envisage occupying the property earlier please seek legal advice as to how this will affect your rights.

GENERAL

There are many advantages to be obtained from building your own home however as with all areas of law you should ensure that any advice you seek is given by a fully qualified adviser who is aware not only of all aspects of the construction industry but also the legal interpretation of the documents involved.