

SPECTRUM SPEAKS



The company
newsletter for
Spectrum Coach
& Spectrum
Lawyers

Wow, what an end to the financial year! To say it has been tough for many in the construction industry would probably be quite an understatement. And whilst some may have had a good financial result, the year didn't pass without its challenges. Not only did businesses have to combat lockdowns, shortages on supplies and price increases, but there was also a physical and emotional strain on employees, trades, and clients that many in our industry have not experienced before.

But as an industry, we continue to push through. And whilst we might be feeling tired, stressed and let's be honest, a little bit flat, we all hope that the new financial year will bring with it some happier stories in the not-too-distant future.

We would like to welcome our new clients, and of course, our existing clients to our latest edition of Spectrum Speaks. This newsletter provides articles from both Spectrum Lawyers and Spectrum Coach to provide you with an update across topical areas of the industry.

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Ending a building contract

BY DONNA ABU-ELIAS

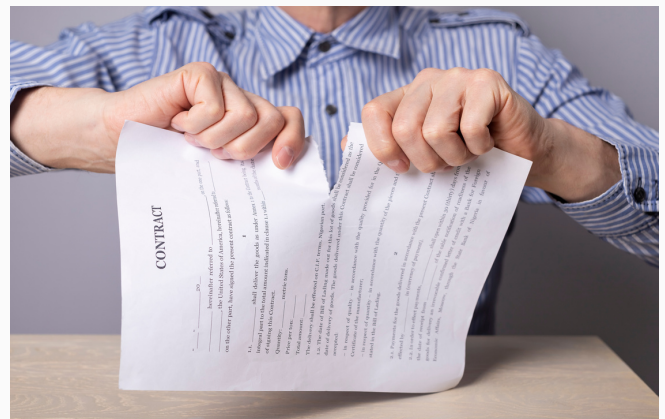
One of the most common questions we have been receiving lately is along the lines of: "I entered into a contract 1-2 years ago and now the prices have skyrocketed. How do I get out of the contract?"

This is not always as easy as it first appears, but here are some tips on what to look for:

- The first question we always ask is – is the land titled? If the land is not titled, then arguably there is no enforceable contract (see article on page 7 written by Maria Fokianos on Ramirez v Sherridon), so your termination options are fairly straightforward in this regard. Please note that the Builder may be entitled to reasonable costs incurred to date that can be supported by invoices/receipts and/or special conditions. This is unlikely to include internal wasted costs for appointments etc unless you have an enforceable special condition.
- The next question is, has the Owner complied with all its obligations under the contract? For example, has the Owner provided finance approval? If not, the Builder may be able to establish that the Owner is in breach of the contract and the Builder may be able to terminate under the provisions of the contract.
- The third question is, are both parties wanting to terminate the contract? If so, you can negotiate a mutual termination by agreement and agree the amount to be refunded for costs incurred to date.
- The fourth question is, are the inclusions originally selected still available or does the Builder need to issue a variation for a change in specification? This will still require the Builder to issue a variation pursuant to the terms of the contract and may result in a dispute between the parties if the alternative product or pricing is not agreed (which may then lead into the final question).
- The final question, and probably the most difficult from a legal point of view, is the contract frustrated? That is, are the conditions so different in the industry now that the Builder cannot build the project for the costs originally bargained in the contract. This is quite a complex area of law and therefore should not be taken to be easy to prove and must be treated as a last resort.

So, there are options for ending a building contract, but they are not always easy to establish. Careful consideration should be given to each option, as if it is challenged, the Builder must be able to support its position. To this end, it is also a timely reminder that if the Builder is going to claim for costs incurred to the point of termination, then the Builder must be able to support these costs with receipts/invoices. Also, any costs that are refundable, for example, if the Builder took out insurance which can be cancelled and refunded then these costs are not claimable. In relation to internal costs, if the contract does not provide any special conditions for reasonable costs being charged upon termination, then these costs are unlikely to be recoverable.

Finally, it is worth noting for Builders that they may wish to consider including a 'termination for convenience clause'. That is, if prior to the commencement of the works either party wishes to terminate a contract, then they may terminate upon giving notice and then the Builder is entitled to costs to date (and you may wish to specify what these costs may include). A note of caution though, many Builders say to our office that they only want the Builder to have the right to terminate and not the Owner – however, be very careful to draft such a clause as this may be held to be an unfair term and held not to be valid as it is a clause that only favours the Builder and not the consumer who may not fully appreciate the importance of such a clause.



How to re-engage lost sales

BY FRED ABU-ELIAS

Even a business with the sharpest of strategies is likely to have potential clients who fall off the map or become disengaged along the sales journey. Perhaps they fill out a form on your website or express interest over email and then never reply to your follow up emails or calls... Sound familiar?

This is a normal part of business and sales. According to HubSpot, 79% of marketing leads never convert into sales – but that doesn't mean all lost sales are completely worthless.

This is especially true for the building industry, where potential clients spend many months on decision making and need time to make considered choices about the type of home they want to build and who they want to build with.

This makes sense. A home build is a huge emotional and financial investment, something many people will only ever do once. As such, they need to take time to feel they are making the right decision. This is all to say that when you are trying to generate leads for new building projects, you're playing the long game. But it's not all bad news. There are plenty of strategies that can be used to remain front of mind while your potential clients are still in the decision-making process and eventually to re-engage lost sales. Keep reading for our top three tips.

1. Start A Brand New Email Campaign

Just because a lead didn't answer your email or respond to your latest marketing campaign, it doesn't mean they don't want to work with you. Decisions over building take time and your potential lead may just be taking a break from their home project, or ensuring they have the necessary finances in place to begin in the first place. They also might have reservations or questions about the design or building processes. This is a great opportunity for you to remind potential clients of your business, what you can offer them and how you can help achieve their unique vision. We often recommend an email campaign to re-engage cold leads with answers to commonly asked questions, completed project showcases and even a special offer – like a free consultation or on-site visit.

2. Targeted Social Media Campaigns

Sometimes re-engaging a lead can be done by simply reminding them that your company still exists. A highly targeted social media campaign on Instagram or Facebook is a great way to do this, appealing to potential clients by targeting their specific interests and needs.

For instance, if your lost sale is an aging couple looking to downsize and build a new accessible home, a post about the benefits of downsizing may be what causes them to pick up the phone and book that initial meeting.

If you've had a few young families disengage from your sales process, a special offer with a free landscaping or home automation package, may be what pushes them over the line.

3. Get In Touch Directly

Sometimes, the best thing to do is contact a potential client directly. This way you can engage with them in a personalised manner, talk to them about tailored services, deals and information relevant to their project.

A phone call is a great way to provide an insight into your personable communication style and your dedication to building strong relationships with clients. Potential clients will appreciate you taking the time to craft a personalised and informed email and will be more likely to respond when it's clear it's come directly from you.

"Looking to re-engage lost sales and take your business strategy to the next level? Get in touch with the team at Spectrum Coach today."

Conveyancing matters

"Can't I just sell my land when I want and on my terms?"

BY HANNAH SMITH

The short answer is, not always! Since Spectrum Lawyers launched their conveyancing services in late 2021, a common request from builders and developers has been, "can you prepare a template Contract of Sale we can use for house and land packages". While the use of template Contracts certainly has its place and can be cost effective and efficient, it is important to consider each transaction on a case-by-case basis and ensure the Contract has been amended to reflect the particular circumstances of the property you intend to sell.

First and foremost, prior to the sale of any property, a Section 32 Vendor's Statement must be prepared. Section 32 of the Sale of Land Act 1962 (Vic) requires Vendor's to disclose particular information in relation to the property by way of a Section 32 Vendor's Statement. It is the Vendor's obligation to ensure the Section 32 is accurate and provides a prospective purchaser with all material information about the property.

Where a Vendor "knowingly or recklessly" provides false information or where they fail to make the requisite disclosure, a Purchaser may be able to withdraw from the Contract prior to settlement and in some circumstances, may also claim damages against the Vendor.

While it might be tempting to provide your solicitor or conveyancer with a copy of a Council Rates Notice and Water Rates Notice that you have received, here at Spectrum Lawyers, we strongly recommend to our clients that we perform independent property searches and obtain the information and certificates directly from the relevant authority. On our view, it is better to spend \$150.00 to \$200.00 on these types of searches when you sell the property and ensure all information is accurate and up to date, than risk the costly process of a purchaser terminating a Contract (no one wants to pay their agent fees and commission when the sale does not settle!) or worse, a purchaser commencing Court proceedings to claim damages.



We also commonly see where a client has purchased vacant land (particularly where the land in a new estate which is subject to Design Guidelines) that their purchase Contract will restrict their ability to sell the property, not only in the event they wish to on-sell the Property before they settle their purchase, but sometimes even extending to after settlement of their purchase Contract. It is therefore important that your solicitor carefully reviews your purchase Contract and provides you with advice as to these ongoing obligations and/or restrictions (if any) so that you don't get caught out when you decide it is time to sell.

For example, we were recently instructed to prepare a Contract of Sale and Section 32 for a house and land package. Upon reviewing the Special Conditions in the purchase Contract, we noted a condition that stated: *"If the Purchaser at any time before the later of the date on which the Purchaser has completed construction of a dwelling on the land and 12 months from the settlement date, has or intends to enter into a contract for the sale or transfer of the property, the Purchaser must..."*

This Special Condition went on to impose numerous obligations including that our client was required to obtain the Vendor's consent to the proposed sale (yes! Even after settlement of their purchase Contract when they were the legal proprietor of the property!), and was not allowed to erect a "for sale" sign. In addition, the new Purchaser of our client's property was required to enter into a formal Deed with the original Vendor agreeing to comply with obligations otherwise imposed on our client in their purchase Contract and pay the Vendor's legal costs for the preparation of the Deed. Given the nature of these obligations, it was important for all these matters to be addressed and included in our client's Contract of Sale by way of carefully drafted Special Conditions as a failure to do so may have been a costly exercise.

So don't be caught out. You can sell your property on your own terms, until you can't. Feel free to contact Spectrum Lawyers should you require assistance with your Contracts, or Special Conditions.



Hiring a Sales Consultant Is it worth it?

BY FRED ABU-ELIAS

Feel like you're ready to take your building business to the next level? You might consider enlisting the skills of a sales consultant. An expert in converting potential leads into paying clients, a sales consultant can equip you with the skills and processes required to get new customers over the line.

Why recruit a consultant

You might have spent many years refining your skills as a builder or carpenter. While company owners can be very talented at their craft, sometimes they might choose to outsource the sales element of the business to an expert in the field for coaching and support. When this building expertise is combined with sales acumen, suddenly your business becomes unstoppable.

Converting leads into sales

Word-of-mouth is a powerful tool for any builder, but there are times when your workflow might need an extra boost and you need to actively generate interest. Are you receiving a healthy number of new enquiries but not seeing them convert into sales? If so, a sales strategist can teach you specialist techniques to get potential customers over the line, time and time again. They will identify clearly defined steps from the initiation of the lead to the entire journey the customer will go on through the sales process. The implementation of a strong, logical sales process from end to end – from identifying opportunity to pricing, securing resource and finally, closing off the deal – will ensure longevity of your success.

A long-term investment

A quality sales consultant is worth their weight in gold, and the initial outlay can achieve long-term results for your business. Once you've implemented the guidance, strengthened your sales processes and added these skills to your repertoire, you can enjoy the dividends for years to come. You'll also be equipped with the know-how to juggle existing projects while generating new leads, keeping your project pipeline running smoothly.

A bespoke solution

Sales strategies for one building business may not work for another. Elements such as geographical location, team size and current processes all need to be taken into account. It's the job of the sales consultant to identify areas of improvement to maximise business performance. Who are your potential customers and how can a rapport be built quickly to give them the confidence to progress? Why should that individual hand over their hard-earned money for your services? These are all questions to consider while constructing your sales plan.

Why choose Spectrum Coach

Unlike a generic sales consultancy, Spectrum Coach specialises in the new homes industry.

Principal coach Fred Abu-Elias has worked with a number of small and large builders across Australia during his 20-year career, and is experienced in creating localised strategy that generates optimum results. Together with his team – who all have extensive building trade experience under their belts – Fred fills a gap in the market to provide builders with the tools required to sell their skills, while having a detailed understanding of the challenges of the industry.

If you're interested in learning more about how the sales consultancy services Spectrum Coach offers can transform your business, give us a call on 0447 062 990.



Deposits for building works: When are they due? Can a Builder keep deposit monies if a contract comes to an end?

BY MARIA FOKIANOS

There is a misconception in the construction industry that builders are allowed to keep the deposit an owner has paid them in the event a building contract comes to an end.

The law governing this is that owners are not required to pay their deposit until a builder has obtained a domestic building insurance policy for the property. This seems straight forward, however more than ever before we are often asked with this question. Can a builder keep the deposit paid by the owner if a contract comes to an end? The short answer is no.

Recently here at Spectrum Lawyers, we were successful in bringing a claim for a first-time homeowner against a builder at the Victorian Civil Administrative Tribunal (VCAT).

The case of *Ramirez v Sherridon Pty Ltd (Building and Property)* [2022] VCAT 405, relates to a domestic building dispute where the builder refused to refund the owners their deposit when the building contract was ended.

The Facts

The Owners purchased a house and land package for \$393,000. The Owners were advised that the land was an unregistered plan of subdivision and was expected to register in July 2018. The Owners then entered a domestic building contract with the Builder on 31 January 2018 to build a home on the land for \$260,395 ("Building Contract"). The Owners paid the Builder a deposit of \$13,065.75 under the Building Contract ("Building Deposit"). On 31 January 2018, the Owners also signed a Sale of Land Nomination Form which had the effect that HBK Image Pty Ltd, as purchaser, nominated them as substitute purchasers under a Contract of Sale to purchase the Land ("Land Contract") for an amount of \$123,000.

The same representative from the Builder that signed the Building Contract, signed the Nomination Form on behalf of HBK Image Pty Ltd and the Owners paid a deposit for the land of \$6,150 ("Land Deposit"). The Land Contract was dated 15 December 2017 and was conditional upon the plan of subdivision being registered within 24 months from the date of the Land Contract. However, the plan of subdivision did not register within this time, so on 29 April 2020, the Owners sought to terminate the Land Contract and the vendors under the Land Contract agreed to refund the Land Deposit to the Owners.

On 4 May 2020, the Owners advised the Builder, that they had terminated the Land Contract and could not proceed with the Building Contract. The Owners requested the reimbursement of the Building Deposit less any costs the Builder had incurred to date. The Builder refused to return any portion of the Building Deposit.



At the time the Owners paid the deposit to the Builder, the Builder had not obtained the mandatory domestic building insurance. Therefore, the Owners claimed that they paid the Building Deposit under a mistaken belief, as they believed the deposit was payable when it in fact was not, and therefore the Builder should reimburse the Building Deposit.

The Owners also sought an order for interest on the amount of the Building Deposit from the date the payments were made and their costs of the proceeding.

The Builder disputed the Owner's claims saying the Building Contract is binding on the Owners and that all necessary insurances required at the time were held. However, the Builder did acknowledge that domestic building insurance could only be issued in the name of the owner of the land (which obviously could not occur until the Owners settled on the land, which did not occur in this case). The Builder said that the Owners wrongfully terminated the Building Contract.

The Owners' Claims

VCAT considered a few issues which were in dispute. Accordingly, Member Feeney found:

1. Under Division 3 Part 9 of the Building Act 1993 and pursuant to clause 7 of the Building Contract, a domestic building insurance policy was required, sometimes also referred to as builders warranty insurance. The Building Contract was for domestic building works in accordance with the Domestic Building Act and the price of the Building Contract was \$260,395 therefore it was an "insurable building contract." Member Feeney considered the amended Domestic Building Insurance Ministerial Order dated 28 May 2014 (the Order).

2. In accordance with Schedule 2 of the Order, an insurance policy had not been issued in relation to the Building Contract.

3. Given a domestic building insurance policy had not been issued, the Building Deposit was not payable, therefore no monies were payable under the Building Contract until a domestic building insurance policy had been issued. Member Feeney was satisfied that there was no evidence that the Owners received any benefit from these works or costs, or that the Builder incurred those costs because of the receipt of the Building Deposit and the Owners are entitled to the reimbursement for the Building Deposit.

Member Feeney also held that there was no enforceable contract as there was no domestic building insurance.

4. The Owners were entitled to an order for interest on the amount of the Building Deposit. Member Feeney considered section 97 of the Victorian Civil and Administrative Tribunal Act 1998 and was satisfied the test that collectively the following factors are "fair" to award interest:

- The Owner's whole claim was successful.
- The Builder's whole defence was unsuccessful as there was no domestic building insurance issued.
- The Tribunal rejected the Builder's Claim for breach of contract. As there was no domestic building insurance there was no enforceable contract.
- The entire Building Deposit was payable when the Owner's made their claim, and it is reasonable that that amount should not be eroded by the passage of time.
- The delay in repayment by the Builder of the Building Deposit following demands for its return and then the issuing of the proceeding, means that Owners have lost the use of the money that has been found to be owed to them in this proceeding, during the period of the delay.

5. The Owners were also entitled to claim a portion of legal costs.

It is important for builders to know that domestic building insurance should be issued, otherwise a building contract is not valid, and no monies are payable by the owner under a building contract.

**If you want to chat to us
more about this topic,
please do not hesitate to
contact our office.**

2022 Winter Holiday Basketball Camp - Official sponsors

We were proud to be official sponsors of the 2022 Winter Holiday Basketball Camp, presented by Altona Sports Centre over the recent school holidays. This camp allows hundreds of kids to get together, create memories, make life-long friends and have fun in a healthy, and safe environment. Each session of the camp covers the fundamental skills of basketball with a particular emphasis on shooting, defense and/or ball-handling.

Our Principal Lawyer, Donna actually played basketball at the Altona Sports Centre as a child, so it was extra special for us to be able to support this program.

We were so delighted to see all the happy faces and received some wonderful feedback from kids who attended the camp.

We feel very honoured to be able to support programs like this and looking forward to providing assistance for similar programs in the future.

"Thank you for setting up another one of these camps. I really had lots of fun and learnt a lot of new skills. I made new friends and got to see friends I made at the Easter camp again. Thank you to all the coaches for helping me." - Blake, ASC Member



SPECTRUM LAWYERS & CONSULTANTS

Spectrum Lawyers provide legal services with legal expertise across all areas of building & construction law.

Building and construction law

- To assist builders and/or owners efficiently resolve building disputes
- Developing streamline procedures and training to manage the spectrum of challenges in today's market
- Advising consultants and contractors on their legal obligations under the Building Act and Building Regulations
- Advising building surveyors on compliance issues
- Debt recovery
- Dispute resolution at private mediations, DBDRV, Tribunal and Courts
- Reviewing building contracts and advising on rights and obligations

Conveyancing

- Assisting clients with the purchase or sale of residential or commercial property

General Counsel Services

- Reviewing and advising on procurement contracts and licenses
- Advising on general business law and day-to-day business operation issues
- Drafting policies
- Reviewing and drafting policies and terms and conditions
- Negotiating contractual documents
- Providing training (contract law, Australian Consumer Law, advertising, warranty, etc.)

Probate, Wills and Powers of Attorney

- Administering estates
- Drafting Wills and Powers of Attorney to protect your family and assets

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SPECTRUM COACH

Spectrum Coach provides 5 core areas of service, Sales, Marketing, Operations, Home Designs and Business Coaching. They are designed to understand your business intimately, this allows us to provide the focused, dedicated support that we hold to high standards to all our clients. We understand that every business is different, and will have different needs. Choose one of our services or choose them all – whatever works for you and your business.

Sales

Without sales, you don't have a business. Our training gives you guidance at a micro level, arming you with specific strategies that are proven to close sales.

Operations

Your front end and back end operations are key to turning a profit. From taking the initial sale to getting to a site start, we have designed processes that improve efficiencies, increase profits, and that are easily adopted, helping you to manage your jobs more effectively.

Design & Drafting

Our extensive design library has a range of plans you can use to sell your new homes, and are fully customisable. Our training will equip you with the tools you need to sell these plans based on their respective features and benefits. Need a custom design? We can do that too.

Marketing

You're busy doing what you do best – building homes. Let our in-house team help you market your business so you can do more of what you love. We can guide you through marketing your brand, generating leads, and can even help you build a website. We can also manage your social media, including writing content and posting on your social media pages.

Business Coaching

We get it - running a new homes business is complicated. As the business owner, you have to be across every aspect, and not all of them are going to be your specialty. Our general business coaching gives you a team that are skilled in all areas of business, from construction to finance.

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