

The Homeowner's Guide Residential Building Contracts

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Introduction

Planning the build of your new home or investment property is a big deal, and you want to make sure you get your building contract right.

Every build involves unavoidable risks and there are plenty of stories of when things go wrong. However, with the right advice you can minimise those risks and avoid common pitfalls. This guide is designed to help you better understand what you will be signing and where you need advice.

This guide is designed to provide general and balanced information for residential builds. It is not exhaustive and should not be relied on as legal advice. Everyone's situation and contract terms are different, so we customise our legal advice to your circumstances. Cavell Leitch has the skills and knowledge you need to give you peace of mind when building.

The basics

Each build is different, but there are some common general risks when building. These are:

- The build costing more than you expect;
- The build taking longer than you expect;
- The build quality or materials not being up to standard; and
- The builder 'going bust' during the build.

From the start

Getting the right builder for you is important. Price is not the only consideration when finalising your choice of builder. You need to consider how well they communicate and your overall experience in dealing with them (i.e. whether it feels like a good fit). You could seek testimonials from other people who have built with them, look at other builds they have completed, review their trading history and look at any other reviews available. When comparing quotes, you should ensure they include the same level of detail for the building work, materials, fixtures and finish so that you can accurately compare them.



Key steps in the building process

Obtain/review plans and get a detailed quote	<ul style="list-style-type: none">· Ensure you understand your land/ building site, have your lawyer review the title for land covenants and your designer or architect review council planning rules· Do your homework on the builder(s)· Make sure the builder has capacity to work within your timeframes
Get the building contract reviewed and signed	<ul style="list-style-type: none">· You should have a lawyer review the contract to ensure it corresponds with your expectations/ discussion with the builder· Arrange construction insurance (if this is not arranged by the builder)· Sign any third party guarantees (such as Master Builders or Certified Builders)· You should ensure the full and correct final plans and specifications are included in the contract to avoid any unnecessary variations
Get consents	<ul style="list-style-type: none">· Normally this is done by a group home builder, but it would be your responsibility if you are using a separate designer or architect· If you are building in a subdivision then check you have written approval of your plans from the developer before you apply for consent
Progress the build	<p>Make sure you:</p> <ul style="list-style-type: none">· Know the process for making and approving variations· Know who is responsible for the project management, construction monitoring and when and how progress, timing and costs updates will be provided· Communicate clearly. Ideally everything will be in writing, if something is discussed then confirm this in an email later· Ensure you are reviewing invoices and payments
Finish and move in	<ul style="list-style-type: none">· Check you are happy with the building work and make a checklist with any defects or matters to be fixed· Obtain code compliance and move in· Notify the builder of any defects in writing within the first 12 months

Price

When entering a building contract, price will always be a key factor. However, the price on the front page is very rarely the final price you will end up paying. Many contracts are expressed as fixed price, but often these allow the price to increase under certain circumstances and are actually 'fixed price – plus'. The reasons allowing for price increases are usually to strike a fair balance between the builder and the client. But it is important to understand how the price of your build may increase. You should discuss with your builder to what extent they are willing to share the risk of unavoidable price increases, and then have this recorded in your contract.

Provisional & Prime cost sums:

Most building contracts contain an allowance for provisional sums and prime cost sums (often referred to as PC Sums). These are items of work or materials where the actual cost can't be confirmed when the contract is signed. These items are effectively an allowance and are subject to the actual cost becoming known to the builder. As an example, if a prime cost sum of \$25,000 is included for the kitchen but the actual cost of the kitchen is \$35,000 then this will result in a \$10,000 increase to the final price, reflecting the cost over and above the allowance.

Owner Variations (forced & owner requested):

Variations to the build requested by you will usually result in a price increase. It is important to understand how variations are to be recorded and charged. Often owner variations are charged at cost plus a margin. All variations should be in writing and subject to the owner confirming any increase in cost before the variation works are carried out.

Forced variations are where a change to the plans is required due to site conditions, by the council when applying for building consent, where the plans aren't detailed enough or don't work, or for unexpected ground works. Any additional cost incurred due to a forced variation increases the price you pay. If the builder has created the plans and specifications then you should ensure the contract provides for them to pay for any forced variations caused by issues with the plans or specifications.

Unprocurable materials:

If any materials are not available when required (for example, due to supply chain issues) then these can be substituted with other materials of a similar quality and nature. Any additional cost due to the substitution will result in an increase to the price.

Cost fluctuations:

Most 'fixed price' contracts still allow cost fluctuations to be charged to the owner. This means the price you pay can increase to reflect any actual increase in the costs of materials and labour between the date of signing the contract and the date these items are purchased/ expended by the builder. This protects the builder if there are significant cost increases after signing of the contract. But it can mean significant extra costs for you, and is completely outside your control.



Time

Start date:

Most contracts will contain an estimated start date for the works onsite to begin. There are several factors which can result in delays to the actual start date, such as a delay in obtaining a building consent. Because of this, most building contracts give allowances to delay the start date for matters outside the builders reasonable control.

Progress and completion:

The builder is required to work towards practical completion of your build with reasonable diligence. Practical completion often doesn't mean that all building work is finished. Instead, it means that the building can be used for its intended purpose, but excludes minor fix ups and finishes that won't unreasonably interfere with the use of the building.

Another key thing to understand is that the Building Act restricts you from moving into the house (or using it as a rental) until a Council issued code compliance certificate is granted. The certificate may not issue for several weeks after practical completion, depending on the Council's processing capacity. You can sign a waiver form to get possession of the house before code compliance, however it is very important to discuss the waiver with your lawyer before you sign so you are fully aware of the implications.

Completion date and delays:

Almost all contracts will include an expected or estimated completion date for practical completion. However, in most building contracts the builder does not provide any guarantee that your home will be finished by this date. During the course of the build delay events can arise which are outside of the builder's control, such as a delay in shipment of materials or for bad weather. The estimated completion date will be extended in these circumstances, and sometimes the cumulative effect is that the build is not finished for several months after the initial date given. It is often left up to the builder to determine what is a reasonable cause for delay and how long should be given for such a delay. It is important the contract provides some ability for the owner to review the extensions of time given by the builder. Ideally the contract would also include some clear notice requirements for any extension claim made by the builder.

If having your build completed by a certain date is crucial for you, then you should discuss this with your builder from the outset. You should work with your builder to confirm a fixed completion date and the arrangements which determine what happens if the build isn't finished on time. One option is having the builder compensate you for your losses caused by the builder's delay. It is important to have any arrangements recorded properly in your contract. You should also be aware that most builders will want to 'price in' this additional risk they are taking on. You will need to consider whether being on time is worth the extra cost.



Payments

One of the main risks when building is that your builder finds themselves in financial trouble and goes into liquidation (i.e. 'going bust'). This is an unfortunate reality which is difficult to predict or avoid ahead of time. One of the key ways to protect against losing money is ensuring you have not paid in advance for materials or work that the builder is yet to complete or incorporate in your build.

Structure of payments:

The payment terms for most residential building contracts will be set up as either staged payments or progress payments. With both methods it's important that you are only paying for work when it is actually completed, not just when you receive an invoice. It is often worthwhile having an independent builder or quantity surveyor review payment invoices or the payment schedule to ensure the work and materials you are paying for are finished or installed. Payment is normally due between 5 and 21 days after the builder issues the invoice, depending on the terms of your contract. If you are using bank finance to pay for the build, then you need to check the payment timeframes allow the bank enough time to get funds into your account.

Disputing a payment:

If you don't think that you should be paying an invoice (or a part of it) then it is important to respond to the builder as soon as possible. The Construction Contracts Act has strict form and timeframe requirements for responding to an invoice given under the Act. The form for responding to a payment claim is called a *payment schedule*. It is important that you seek professional advice if you want to respond to a payment claim made by the builder. If you don't respond correctly then you can lose the ability to withhold payment.

Deposit:

Most building contracts require a deposit payable on signing the contract. The deposit is often non-refundable. You should check that the deposit is paying the actual costs of the builder up to that point (such as planning, design and consenting costs), and not solely the builders margin for the project. If you need finance to fund the build then you should ensure that your bank has first approved the building contract. If the building contract is subject to any conditions, such as obtaining building consent or finance, then you should ensure the deposit is only payable when all conditions have been confirmed in writing.

Default

You need to be aware of what happens if you are in default for not paying on time, and what options and processes you need to follow if the builder is in breach of its responsibilities under the contract.

Owner default:

If you fail to make a payment by its due date most contracts will provide that the payment will incur default interest. The default interest rate is often quite high so you should check this. A standard contract will also give the builder a number of other options if you don't pay. These options include:

- Suspending the building works;
- Putting a mortgage over the property; and
- Giving notice to cancel the building contract (and then seek costs for loss of expected profit)

You will need to consider whether it is necessary to remove any of these options, such as if your bank requires the mortgage requirement to be deleted. You should also take advice from your lawyer about amendments to ensure these options are only used appropriately by the builder, and not to put pressure on you during a legitimate dispute.

Builder default:

When the builder is in default normally your only option is to give notice to cancel the entire contract. The threshold for being able to cancel for your builder's default is often set to a very high standard.

For example, the widely used Masterbuild contract requires the builder's default to be wilful, flagrant and persistent. This means that it can be very difficult for an owner to cancel the contract with the builder, even when it seems like they have performed poorly or are miles behind schedule. Amending the contract to reduce the threshold is a good idea.

You should always discuss any default action you plan to take with your lawyer first. If you cancel the contract incorrectly then you might void any Master Builders (or similar) guarantee, and even be responsible for paying the builders losses, including their loss of profit.



Warranties and guarantees

Standard warranties:

The contract and/or the Building Act provides an owner a number of standard warranties. These standard warranties include that the works will be completed in a proper and competent manner in accordance with the plans and building consent. The builder is required to carry out the works with reasonable care and skill. All materials used must be suitable for their purpose, and new unless otherwise stated. If you are expecting (and are paying for) a high-quality build then you should arrange for additional warranties from the builder specifying a high standard of finishing, workmanship and materials.

All contracts should include a defect warranties period of 12 months from practical completion. During this timeframe you can give notice requiring the builder to remedy the defect and the builder is required to fix the issue within a reasonable time.

Guarantees:

Many builders will also offer a third party guarantee which you pay for. These are guarantees provided by organisations such as Master Builders or Certified Builders and act as an insurance policy against losses in certain circumstances. These guarantees provide an owner protection outside the Building Act warranties, such as cover in the event that your builder becomes insolvent and is unable to complete the build, and extended structural and weathertightness warranties.

You should review the terms of the guarantee carefully as there are a number of conditions for making a claim and limits on cover, similar to any insurance policy. If you are intending to take out a third party guarantee you should ensure that it is signed at the same time as the building contract. It is important that you obtain confirmation the guarantee has been registered with the relevant third party provider prior to the start of the build. For example, with Master Builders you will be given a written confirmation from Master Builders Services, that includes your guarantee number for future reference.

Owner Responsibilities

As the owner of the property you have certain responsibilities under a building contract. It is important you understand these obligations in order to avoid unexpected costs. The main obligations to be aware of are:

Obtaining building and resource consent:

Normally this is the owner's obligation when using an architect or draftsman for the house plans. If you are using a home building company for the house design then you should check the contract says the building company is responsible for getting the building consent, resource consent and code compliance sign-off.

Access to the site:

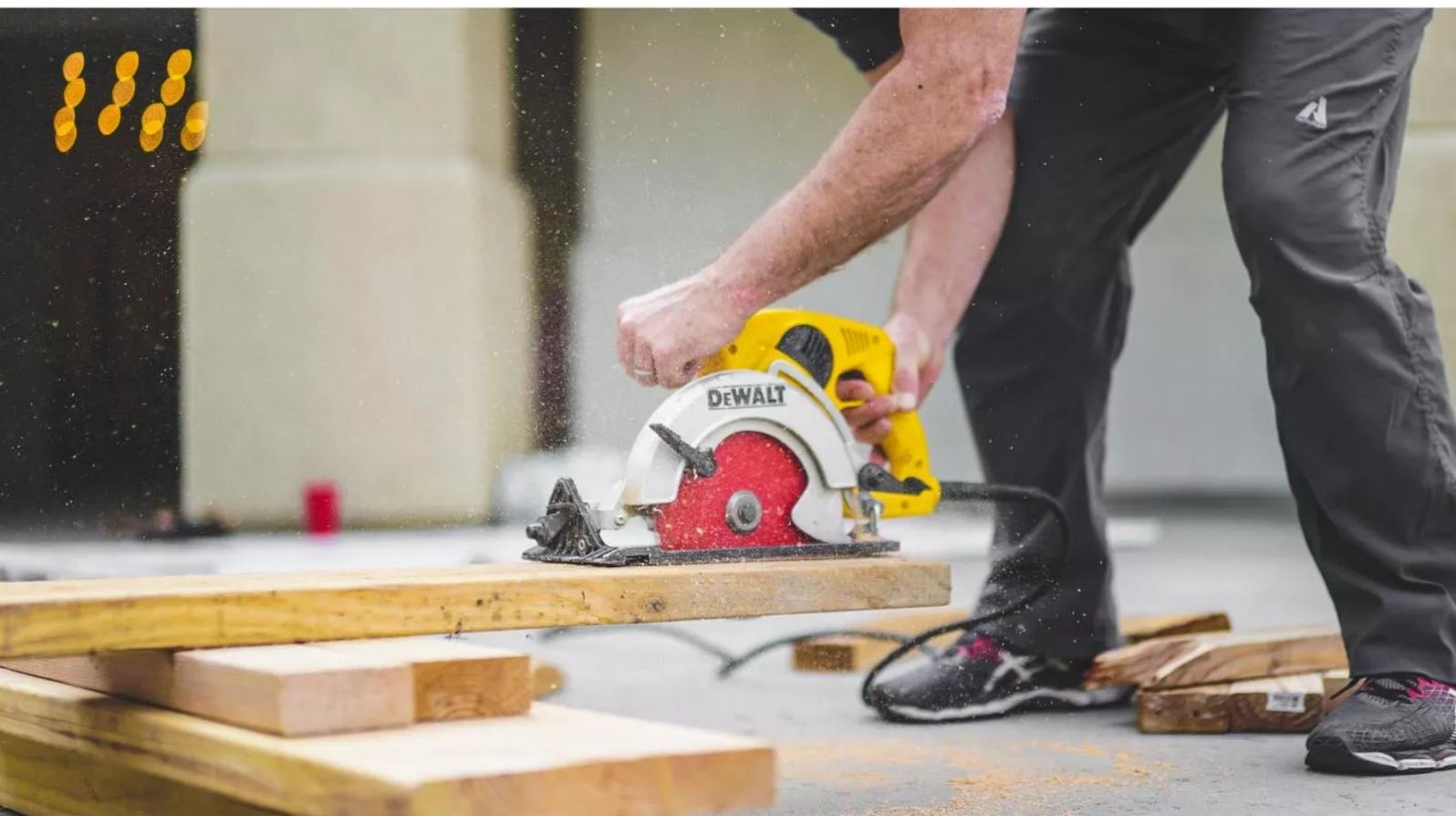
You are responsible for ensuring the builder can access the site, this may include arranging access from neighbouring properties if this is set out in the builder's quote (most common with hill properties).

Survey pegs and utilities:

As owner you are responsible for ensuring the boundary pegs are visible and in the correct location. Most building contracts allow the builder to require you to get a survey completed at your cost if there is any question around the site boundaries. An owner is also responsible for ensuring the builder has access to water and power to the site boundary.

Ground conditions:

The owner is responsible for the condition of the ground. If there are issues when clearing the ground or building the foundations then, more often than not, it is the owner's responsibility to pay the extra costs. If you need a Geotech report then it is better to have this completed before signing the contract and finalising the contract price.



Our Building Contract Experts are:

We offer fixed price initial reviews for most contracts. All you need to do is contact the team at Cavell Leitch to keep you moving forward.



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Jeroen has a wealth of experience helping homeowners get their building contracts right, giving them the confidence and knowledge to complete a successful project. His clients value his pragmatic advice and the building industry insight that he provides.



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Elliot advises clients on a wide range of residential building contract matters. Elliot has great attention to detail and a focus on giving clients the right advice for their project. His clients appreciate his dedication and great advice.

However you're stuck, we are a Christchurch law firm that is here to help, not make it harder. That's why our legal advice is simple to understand with a clear point of view, so you can make decisions you're sure about and get moving again.

Key Words

There are some common terms used in this guide and in building contracts. Here's what they mean:

Code Compliance Certificate	Council's final sign-off for the build. Once this document is provided you can move in
Default	Is a failure by a party to fulfil an obligation or responsibility under the contract
Defect	Is a fault or flaw in the workmanship or materials supplied by the builder. The flaw or fault must be outside the industry standard or tolerance
Deposit	The amount you are required to pay on signing the contract. This may or may not be refundable depending on the contract
Due date for payment	Is when you need to pay an invoice or payment claim, check the contract for timeframes. This date is important to avoid default interest and for your ability to dispute payment
Expected Start Date	The date your builder expects to start work on site. This isn't a guaranteed date and can be extended for matters outside the builder's control (such as consent not issuing)
Estimated Completion Date	The date your builder expects the build will be finished. This date can be extended for a range of reasons outside the builder's control and shouldn't be relied on as a 'move-in date'
Extension of time	Where the builder is allowed more time to complete the build because of delays caused by matters outside its reasonable control. These affect the estimated completion date
Payment Claim	Is an invoice issued by the builder under the Construction Contracts Act 2002. A payment claim needs to include the required disclosure information
Payment Schedule	Is an owner's formal response to a payment claim, required if you aren't paying the whole invoiced amount
PC Sum (also prime cost or provisional sum)	A part of the build where the supplier or subcontractor is yet to finalise costs and only an estimate can be given in the contract. The actual cost of that work or material (plus margins) will be the price you pay

Practical Completion

Is when the builder has completed all the works except for minor defects or issues which don't stop the house being used for its intended purpose and won't cause significant inconvenience to the owner

Progress Payment

Progress payments are regular payment times during the build (normally monthly) where the builder will invoice you for the work completed during that timeframe

Staged Payments

A staged payment is a list of different stages of the build (such as foundation down, roof on, windows in) and the payment amount is due on completion of that stage (often listed as a percentage of the total price)

Variation

Is a change to the building works from what is provided in the plans and specifications. A builder is normally allowed to charge you their costs and margin on these changes
