

SPECTRUM SPEAKS



The company
newsletter for
Spectrum Coach
& Spectrum
Lawyers


SPECTRUM GROUP
LAWYERS | BUILDERS COACHES

Well, here we are at the end of 2022 - and what a year it's been!

We welcomed Rosemary, our Executive Assistant to the Spectrum family! Rose is a mother of four, so to balance her busy family life, she works with us part-time on Monday to Wednesday. We are thrilled to have Rose as part of our team and look forward to many clients meeting her in the new year.

2022 also saw us move into our new office space in Douglas Parade, Williamstown. We are now in the hustle-and-bustle of beautiful Williamstown, which means we get to enjoy some lovely local cafes, and work with some exciting new local businesses too.

We would like to thank all our clients who continue to be part of the Spectrum family. We know it has been a difficult year for many, with increased material prices, labour shortages and extreme delays with VCAT, DBDRV and VBA. But you have all made it - and we hope you enjoy a well-earned break over the festive season.

Spectrum Group will also be taking a break over the holiday period. Our office will be closed from Monday 19 December 2022 and will reopen Monday 16 January 2023.

We wish you all the very best for the new year, full of exciting opportunities and growth and look forward to working with you in 2023!

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What are the trends we are seeing at Spectrum Lawyers

BY DONNA ABU-ELIAS

We thought we would take the opportunity to provide a snapshot of some of the areas we are seeing an increase in, so you can keep them at the forefront of your mind as you end 2022 and start the year afresh in 2023.

1. Ending a contract – with the uncertainty in the market and increase in prices, we have seen an increase in parties wanting to end the building contract, both for builders and owners. Therefore, some key elements must be remembered:

- Clearly enter into a document to evidence the intention to end the contract – such as a deed of cancellation – to ensure obligations are ended and to deal with refunds of deposits or claiming monies incurred
- If there is a breach of contract ensure you specifically comply with the notice provisions and ensure you validly terminate the contract so there is no risk that you repudiate the contract and are therefore liable for damages
- If you are claiming 'costs' incurred up until the date of termination (especially where building works have not yet commenced), you must ensure these costs have been incurred. This means that you can prove the costs via receipts, invoices, payment remittance etc. You are generally not entitled to claim internal administration time unless your contract provides for such costs

2. Reviewing your building contracts

- A new year is always a good time to update your special conditions to make sure they are compliant
- It is also a good time to check your processes to ensure that your documentation clearly identifies what is being built
- Owners will always have a high expectation of what you are going to deliver because they have seen a display home, or they have photos from glossy magazines (or social media), so it is important to ensure your documentation has clear disclaimers about expectations and deliverables

3. Defective works

- It is important that the minute you receive a complaint about defective works you take it seriously. Whether you believe the client or not is secondary
- Once you have received the complaint, ensure you respond to it. Again, this does not mean you must agree with it, but if you are denying the claim you want to ensure you start to have your *ducks in a row*. That means:
 - Have someone independent verify your position
 - Take lots of photographs and/or videos of the condition at the time of the complaint (so if the owner does nothing to mitigate its loss for a few years you can show the condition at the start)
 - Document the complaint and your response (and all future discussions) so you can establish the 'paper trail'. Remember to include who is part of the discussion; what was said; and what, if anything was agreed

4. Notices

- If you are experiencing delays onsite, especially with the Christmas break fast approaching and supplies etc, it is important to ensure you provide your owners with extensions of time (and make sure they comply with the contract)
- Ensure if you are rushing to handover a property prior to the Christmas break that you follow the handover process

5. Close off loose ends

- There is always one file or one client you don't want to deal with before the end of the year
- Or, you may have written to them a few weeks ago, so the 'ball is in their court'
- However, it is always a good idea to send a courtesy follow up to ensure there is no delay on your part to attempt to keep something moving along
- Further, if there is no 'moving forward' then you may need to look at how to bring it to an end. Leaving a matter open ended never ends well for anyone

If you would like to chat to us more about this topic, please do not hesitate to get in touch.

Copyright - who really owns the plans?

BY MARIA FOKIANOS

A hot topic of discussion amongst owners and builders is the issue of ownership of copyright in plans.

When Builders enter into design and construct contracts, this means that the builder prepares the design for the project and then also constructs the project. When this occurs, it is common to see the copyright logo in the footer of the plans stating that copyright is owned by the Builder. The intention of this copyright protection is so that all the work and intellectual property in the plans stays with the Builder and an owner cannot take the plan and go off to another builder to have the home constructed.

However, what happens where the contract is terminated either before the works begin or once the works have started? The question which needs to be answered is who owns copyright in plans – the Builder who has prepared the plans and put the copyright logo on the plans, or the owner who has paid for the plans?

In general, copyright of a drawing is owned by the person who does the actual drawing. A major exception to this rule of thumb are employees – that is, if an employee creates copyright material as part of his or her job, the employer owns copyright (unless they have made an agreement between themselves to the contrary).

However, if the person paid an invoice for an architect, draftsman or builder for the preparation of those drawings, then that person has an implied licence to use the plans for the purpose for which they were commissioned to be drawn. In other words, they can copy and reproduce those plans by constructing a three-dimensional home in accordance with those two-dimensional plans on the building site for which they were drawn. That does not however mean they can take the plans and sell them to another builder, or build on a different property.

This is supported by the clause in most building contracts that if the contract is terminated an Owner can engage a third party builder to complete the building works.

This also implies that that third party builder has the implied licence to use the plans to continue with the building works to complete the project.

The Courts in Australia have found that if the invoice for the architect has been paid, then there is an implied licence that the owner can build the house (as drawn on the plans) for the purpose of being able to carry out construction work. Whilst this is implied, if there is an express term in the contract that overrides this, then the implied term would not apply, and the express provision shall apply. Therefore, it is extremely important to check whether the building contract provides any express terms about the ownership of the copyright of the plan (especially if there is a termination of the contract).

Whilst copyright in the drawings remains with the architect, the Court will often look at the engagement between the parties to use the material for the purpose for which it was contemplated it would be used for at the time of the engagement. In the case of *Beck v Montana Constructions Pty Ltd* (1963) 80 WN (NSW) 1578 it was held that without any express limitations to the contrary, the owner has an implied licence to use the plans for the purpose of being able to carry out construction work.

With that in mind, it is important to remember that not one case is the same as the next, and so it is important to consider where copyright materials are created by one person for another, all the surrounding circumstances must be taken into account to decide what the parties intended, and in this case the relationship of the architect to the other parties. Therefore, if there is a clause in the Building Contract, which entitles the owner to engage another builder to complete the work, it may be argued that this express right to engage another builder to complete the work, creates an implied licence of copyright to use those plans to complete that work on the land.

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

7 Tips to close a sale that won't fail

BY FRED ABU-ELIAS

Lets face it, everyone knows when they are about to get a sales pitch. You walk into a retail space because you are keen to look at a product and you see the sales person walking towards you. You either say hello or you avoid them because you know you are about to get 'sold'. All you want is the information so that you can make an educated decision on what you are looking at putting your hard earned money towards. They go straight into their sales spiel and you immediately put the walls up, you give them short answers and try to avoid giving them your personal details. Why is this the case? Because we have all heard it before. We have all sold something in our lives, whether it's a product or service or even selling ourselves in a job interview. Sales pitches are getting 'old' now and all we want is to speak to someone that is real and understands what we need without the cookie cutter questions and techniques.

So how do we close the deal without coming across as a hungry sales person?

Here are some tips that every sales person needs to adopt that will help in closing the sale without making the 'hard' sell.

1. Focus on building a relationship

I've encountered so many sales consultants that go straight into what they are selling without taking the time to get to know the customer's needs, interests, or goals until its too late. They have already done their presentation and now they are encountering objections. If you focus on the customer first, not only do they feel as though you understand them, but they will also feel like you are giving them a customized service and not a standard service. We all want to feel special right? By creating the relationship first, you are also putting yourself in a position of helping the customer and not just selling to them.

"How do we close the deal without coming across as a hungry sales person?"

2. Be passionate about the product you are selling

Apart from the obvious, knowing your product and being able to present it well, if you as a sales person aren't convinced yourself then this always shows in your presentation and the client will feel your hesitation and back away. Being passionate about what you are selling and everything about your offer, product, price, service and value will make the customer excited that they are being offered the opportunity to purchase from you. Getting them so excited that they will be asking you how to sign up!

3. Don't be afraid to ask the deeper questions

Creating a rapport with the client will open up conversation so that you can understand their needs, challenges or concerns. By asking the deeper questions you will get down to the core of why the client was motivated to contact you which gives you the advantage of closing the sale easier.



4. Be prepared for all the objections

If you have worked in sales for a while, you would have heard all of the usual objections such as 'We don't have the budget right now.' We are not ready to make a decision.' By compiling all potential objections you may hear when attempting to close and preparing responses in advance, you will be in a better position to close the sale. You may even want to address any objections in your presentation before it even comes up. For example, when selling a product that is at a higher price point, you can point out that the price is higher for x reasons and highlight the value proposition.

5. Just knowing about your product isn't enough

It just simply isn't enough to know your product. Today's clients are informed clients and will conduct research online before they call or visit. Be up to date in your industry by knowing market trends, your competitors and their offerings, environmental conditions and how it impacts on your ability to sell. You may need to change your presentation accordingly. By being an expert in your industry you will impress the client, build their trust and you will be in a great position to close the sale.

6. Have a positive attitude

It can be discouraging when you get a few knockbacks but remember not everyone will be in the position to purchase from you straight away. If you make a great impression the first time, they will most likely come back to you when they are ready. By staying positive, you can improve your close rate with clients. Remember, clients want to buy from people that ooze happiness and confidence.

7. Be Persistent

Don't give up after the first or second objection. If a client likes the idea of purchasing from you they will eventually find a way to buy. Follow up with a phone call, send an email and ask them when the best time to follow up is. You will be surprised how many people will give you a time and date to call them back. Persistently asking for the sale could eventually lead to a long and fruitful working relationship.

Feel free to contact us for an obligation free chat on how we can help enhance your selling game.



Licence Lending – what is it and is it illegal?

BY HANNAH SMITH

In June 2022, the Victorian Building Authority issued an industry alert about a concerning increase in licence lending. Licence Lending occurs where one registered building practitioner knowingly “lends” their builder’s licence and/or domestic building insurance to another person or company to arrange, carry out or manage building work. The registered builder practitioner usually receives a fee from the other party in return. While this might seem like a beneficial arrangement, substantial and serious risks arise for the registered building practitioner.

A builder who is nominated on a building permit is responsible for any defective works and compliance with enforcement actions instituted by the relevant building surveyor. The registered building practitioner may also be liable for potential action at VCAT in the event of a dispute.

In Victoria, it is a crime for an unregistered builder to carry out domestic building work or use the title of a “registered builder”. It is also an offence for an unregistered builder to enter into a major domestic building contract and fines for doing so can be up to \$108,000.00.

Section 246 of the Building Act 1993 (Vic) clearly states: *“A person must not knowingly make any false or misleading statement or provide any false or misleading information to a person or body carrying out any function under this Act or the regulations”.*

If the unregistered builder fails to complete works or where defects arise, the registered building practitioner is potentially liable for damages sought by the owner but may be further liable for engaging in misleading and deceptive conduct in contravention of the Australian Consumer Law.

In the case of Hill v Bastecky [2007] VCAT 2663, the registered building practitioner was found to have acted in a manner which was misleading and deceptive by signing building contracts and applying for domestic building insurance. The registered building practitioner also held themselves out to be the “builder” to owners which was not the case. The registered building practitioner was personally liable for damages suffered by the owners and accordingly, was not protected by builder’s warranty insurance.

More recently, in the case of Theodor v Noonan [2015] VCAT 1390, VCAT identified a “joint venture” between a registered

builder and third-party builder in circumstances that might have been considered a licence lending scheme. The facts concerned a building contract that was executed for works to a holiday home near Mt. Buller. The third party signed the contract on behalf of the builder whose registration could have been considered to have been “lent”, which contract was ultimately terminated.

VCAT found that there was a legitimate “joint venture” between the third-party builder and the registered builder, and therefore found there was a valid building contract between the registered builder and the owners. The finding of a joint venture was largely due to the builder’s evidence that there was a verbal joint venture in the past and that he had contemplated one when putting in an application for warranty insurance. Importantly, VCAT found that the registered builder had to accept responsibility for the works performed under the contract even though he did not perform or direct them and had no involvement in such works.

In the case of Draper v Building Practitioners Board (No 2) [2017] VCAT 1402, the Tribunal considered whether the registered building practitioner (Mr. Simonds, the Registered Building Practitioner of Simonds Homes Vic), was “negligent, unprofessional and unethical” for being the company’s registered building practitioner in circumstances in which it was alleged that he had no personal involvement in the building process. In VCAT, Senior Member Riegler found that the process of: “delegating responsibility for managing and supervising each of the many building projects undertaken by a corporate builder to district managers and site supervisors is not licence lending.”

As such, a building company may rely upon and use the licence of a registered building practitioner working within the building company if correct procedures and legal relationships are established and documented. In summary, licence lending which falls foul of the legislation carries substantial risks and may result in disciplinary action which can include but is not limited to cancellation of the builder’s registration and significant penalties.

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, which 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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