

HOW TO IMPROVE YOUR CHANCES OF RECOVERING YOUR DEBT

As a builder, if you don't get paid by your client you have a number of options to recover your money. If you have used a standard Certified Builders contract without any modifications, then you should have the deposit to fall back on, together with a right to suspend work, charge interest, recover your legal fees, refuse to hand over any documentation (other than your record of work), cancel the contract in certain circumstances, and register a caveat against the owner's title.

If the client disputes your entitlement to the money, then you have a number of ways you can resolve the dispute, including negotiation, mediation, the Disputes Tribunals (our small claims courts), arbitration, adjudication under the Construction Contracts Act ("CCA"), or the regular courts.

Personally I don't place a lot of store in any of those dispute-resolution methods, other than adjudication under the CCA. That is why the Certified Builders contracts say that CCA adjudication is the only way you are allowed to resolve disputes, although you can use mediation if both parties agree, and you can't stop your client going to the Disputes Tribunal if there's a genuine dispute involving \$15,000 or less.

Suing in the courts is hopelessly complex, time-consuming and expensive, and arbitration (unless it's a special short-form arbitration) is not much better. **Where your client is too stubborn or emotionally charged, mediation is usually just an expensive talkfest that gets you nowhere, and the Disputes Tribunals are dangerous because they typically favour the homeowner, they don't have to follow the law, and the Referees don't have experience in construction projects.**

CCA adjudication, on the other hand, is reasonably quick (if you make the effort you can get it done in two months), much less expensive than the courts, and the decision is made by a construction expert so there is much less chance of a rogue decision. If the adjudicator decides that some or all of your claim is payable, that sum has to be paid within two working days after the decision.

But what if it's not? What if the client simply refuses to pay? You will then be in the position of being an "unsecured creditor". That means you are owed a debt, but you don't have much leverage to force your client to pay, at least in the short term.

If you are extremely patient you can register the debt with one of the credit agencies, and wait for your client to one day apply

for finance (and get refused). Or you can appoint debt collectors. However a stubborn or emotionally charged client is just going to ignore them, and once you have appointed debt collectors they can claim a large percentage of your recovered money even if they weren't involved in recovering it. You may as well cut out the middle man (the debt collector) and lawyer-up, straight away.

However what I encourage you to do is transform yourself from an "unsecured creditor" to a "secured creditor".

Secured Creditors: your best bet

Secured creditors (like the Banks who hold a mortgage) have all the power because they can either take possession of a tenanted property and intercept the rental, or they can simply sell the property and recover the debt out of the sale proceeds.

If your client goes bust before paying up, the secured creditors in most cases get to pick over the carcass ahead of everyone else. So how do you, as a humble builder, get to become a secured creditor? There are two main ways.

The first is to rely on the "agreement to mortgage" under the Certified Builders building contracts. This provides you with such powerful leverage, that it is usually the first provision the owner's lawyer asks you to cross out, if they are asked to review the contract. In situations where the agreement to mortgage is not crossed out, then it is almost as good as a bank mortgage (although you will be the second mortgagee, not the first).

Rather than registering your mortgage on the owner's title, what you typically do is register a caveat against the title instead. This stops the owner from selling the property, and will cause their bank some consternation, so sooner or later it results in payment. This is equally effective against residential clients, or commercial clients, as long as they own the property you are working on.

The second method is to apply to the CCA adjudicator for what is known as a "charging order". This can only be done if it was a commercial rather than a residential project. If your commercial client owns the building site, and the adjudicator decides that you are indeed owed part or all of your claim, then they have to grant you your charging order.

Then you get that sealed by the District Court, before registering it against the title. It then has much the same effect as a caveat. You can even get a charging order where the building site is owned by an "associate" of your client. Typical situations where you would qualify for a charging order are where the land is owned by a company (as long as it isn't a trustee for the occupants), or a developer, or the property is tenanted, or it's a commercial property.

A charging order isn't quite as good as an agreement to mortgage, because it doesn't allow you to appoint a receiver to intercept the income from the property. All it does is stop the owner selling or mortgaging the land while you apply to the Court for permission to sell the land yourself, within the next two years. And you need to move quickly if you want a charging order, otherwise the client can take steps to defeat you.

For example they can sell the property before the adjudication decision comes out or before you get the charging order registered (although a bogus sale to an "associate" won't work). **Nevertheless, when they don't want to sell the property, a charging order can be a very powerful weapon in your armoury.**

ABOUT THE AUTHOR



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It's no overstatement to say Geoff is one of New Zealand's foremost authorities on construction and commercial law.

With forty-plus years of experience, Geoff invariably knows what the answer is and his client's chances of success.

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