

Avoiding Pitfalls: What Developers & Builders Need to Know Before Entering Lift Contracts for Residential Developments

Many lift contractors maintain standard form terms and conditions which are out dated, have not kept pace with legislative changes and fail to recognise changing customer needs and procurement methods. Exclusion clauses and limitations of liability are a particular feature which require careful identification and risk management assessment.

In the case of residential developments, developers and builders should be aware that:

“... any work that involves the installation or maintenance of any fixed apparatus such as a lift, an escalator, an inclinor or a garage door by means of which persons or things are raised or lowered or moved in some direction that is restricted by fixed guides ...”

is not covered by the *Home Building Act*.

This places an onus on developers and builders to protect themselves by ensuring that any contracts for lift or elevator work contain express warranties, and also ensure that those warranties are transferable to subsequent owners.

Insurances

Similarly, developers and builders may want to give some thought to whether, in addition to the usual contractor insurances, they require some form of warranty insurance, akin to Home Owners Warranty insurance, from the lift contractor in the event of insolvency. This is not usually offered, nevertheless for some installations, such as those for expensive high-rise works a risk assessment may identify the need for special insurance measures.

Payment for materials off site

One of the relevant risk factors is the usual requirement for large up-front payments. This is a consequence of the need to finance large items of equipment prior to the commencement of works on site. However, any monies advanced need to be secured with appropriate “materials off site” provisions in the contract, including the transfer of property rights, and if possible a bank guarantee. The party expected to make the payment needs to be enabled to make full use of Personal Property Securities legislation.

Maintenance contracts

Lift contractors will often attempt to pair contracts for installation or upgrade work with contracts for ongoing maintenance. This may enable the installation contract to be negotiated on more favourable terms as maintenance work can lock in a predictable income stream for the lift contractor for years ahead. However, there are problems with developers and builders entering into such maintenance contracts.

Firstly, there is the fundamental issue of attempting to bind subsequent owners to a contract they are not a party to. Privity of contract principles prevent this, and could render the developer or builder liable to the lift contractor for loss of profits if subsequent owners see to disown the maintenance agreement.

Sometimes, in the context of strata schemes, developers may attempt to overcome this by using their voting power within newly registered owners corporations. This is fraught with danger. As every developer should know, there are restrictions on such conduct within the 'initial period' as defined by the *Strata Schemes Management Act (NSW) 1996*.

For example, an owners corporation must not, during the initial period, incur a debt for an amount that exceeds the amount then available for repayment of the debt from the administrative fund or the sinking fund. The NSW Court of Appeal has held that a debt in this context is incurred when the relevant contract is entered into. Where such conduct occurs the developer could be exposed to a major claim for damages.

Clearly enough the legislation is intended to protect consumers from unscrupulous developers or builders, who might, for various reasons, be motivated to seek to lock subsequent owners into unfavourable long term contracts. But in the area of lift maintenance this sets up a potential quandary. A developer or builder will invariably find it necessary to make some arrangement for maintenance in the strata scheme's "initial period", but may find they are unable to obtain for the discounted prices that would otherwise be available were the owners in a position to be able to commit to a longer term maintenance contract.

One of the ways in which this is often handled is by the lift contractor initially providing a maintenance warranty from handover for limited period, of say a year, until such time as the "initial period" has expired, thereby allowing the owners an early opportunity to negotiate a longer term maintenance term contract on commercial terms.

The most common complaints regarding this early transitional period involve the transfer and maintenance of documentary records relevant to lift operation, specifications, service requirements and available warranties. This can be particularly serious in relation to the operation of emergency procedures, such as any documentation required by the relevant telco to transfer rental of the emergency phone line in the lift car.

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