

Acting without consent

Make sure you are up to speed with the consent provisions of the Building Act and know what is and what isn't an exemption. Failure to do so could be costly both financially and professionally.

They may look appealing but if you're constructing a yurt, you need a consent.



THERE WAS A STORY in the press recently about television presenter Miriama Kamo and her husband pleading guilty to charges of carrying out illegal building work.

The couple had carried out DIY work at their Waiheke Island property since 2009 without required building consents. The works apparently included the construction of two Mongolian yurts.

Strict adherence

Stories like this are timely reminders of the Building Act's strict requirements when it comes to complying with a building consent. Section 40 of the Act provides that a person must not carry out any building work except in accordance with a building consent.

The section goes on to provide that a person who does so commits an offence and is liable upon conviction to a fine not exceeding \$200,000. There is a further fine of \$10,000 per day if work continues.

The offence under section 40 is a strict liability offence. This means it is not necessary for the prosecution to prove that the defendant intended to commit the offence. A naïve homeowner will, therefore, be caught.

Onus on builder to check

Of course, builders who carry out work without a building consent will also be caught. In the case of a building party, it will not matter if a building contract states it is not the builder's responsibility to obtain the building consent. It is the builder's responsibility to check that a consent exists before starting any building work that requires a consent.

The fines actually imposed by the Courts for offences under section 40 are significantly lower than the statutory maximum. Recent examples include a fine of \$6,000 for undertaking work 3 weeks before the building consent was obtained and an \$8,400 fine for building work on three yurts by a couple.

Professionals expected to know better

Fines may be reduced by factors such as subsequent cooperation, efforts to promptly seek consent after the issue arises, apologising and pleading guilty. Professional developers, on the other hand, have received higher fines where the scale of a project has been significant and undertaken for significant profit. Professionals are expected to know better.

For professional parties, however, the fallout from failing to ensure compliance with the legislative requirements may be much wider than conviction. Professional builders who incorrectly advise clients about the need for a building consent may face claims for providing negligent advice or, if a licensed building practitioner, may become subject to a complaint.

Cost not only financial

The exercise can also be costly in terms of:

- remediating any non-compliant work
- assisting the client to obtain a Certificate of Acceptance
- managing client disappointment
- rectifying damage to reputation both with a client and with the building consent authorities
- dealing with negative publicity and embarrassment for getting it wrong.

Take care with exemptions

As most builders will know, the Building Act provides a range of circumstances where a building consent is not required. Exempt building work is set out in Schedule 1 of the Act. It is important, however, to check the exemptions very carefully.

If there is any uncertainty about whether or not an exemption applies, the safest option is to ensure that the owner applies for an exemption from the council or for a building consent.

The general maintenance and replacement category is perhaps most likely to raise questions if there is any suggestion of a performance failure, for example, a replacement is not like for like.

It is also important for builders to recognise that, in many cases, a homeowner will not know the requirements of the Building Act and will expect guidance to advise if work should not commence.

Be vigilant about variations

Finally, builders also need to be vigilant in circumstances where a variation to a contract may have an impact on the building consent. Once again, a builder should inform their client if any changes they wish to make will require them to approach council for approval to amend their building consent.

It may seem obvious, but check that consents have been obtained before carrying out any building work. Take a careful approach to exemptions. ◀