

## LITIGATION



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## Latest leaky building decision: wake-up call for directors and officers

Litigation over defective buildings is nothing new. Much of the case law in the recent high profile High Court leaky building decision comes from the slew of cases over defective foundations which occupied court attention in the 1970s and 1980s.

The recent case of *Dicks v Hobson Swan Construction Ltd* is significant, however, as it is one of the first of the leaky building cases to proceed to trial.

Justice Baragwanath's decision represents a comprehensive win for the homeowner, Mrs Dicks, who has been awarded just over \$200,000 in damages. It represents a predictable loss for the local authority, the Waitakere City Council, and an unexpected and no doubt unwelcome finding of personal liability on the part of the director of the insolvent construction company.

### The background facts

Mrs Dicks contracted with Hobson Swan Construction Ltd to buy a piece of land in Hobsonville on which construction of a stucco house had begun in 1994.

Mr McDonald, on behalf of Hobson Swan Construction Ltd, had applied for a building consent which had been duly issued by the Waitakere City Council operating under the

then relatively new regime created by the Building Act and the Building Code.

The judgment is critical of the council's approach to the consent and inspection process - the application for building consent was apparently for a weatherboard home but in fact the house erected was a stucco clad structure. This was not picked up by the council in any of its inspections, nor was the lack of effective seals at critical junctions between the plaster stucco and other elements of the building such as the windows and doors. This absence of seals was the primary cause of water ingress.

The Waitakere City Council maintained that in approving and granting such a flawed application for consent, it observed the same standard of care as other local authorities at the time. The council's case was that its standards may not have been high, but they were certainly no lower than other local authorities.

This did not impress Justice Baragwanath who effectively found that the Waitakere City Council was responsible for 20% of Mrs Dicks' claim.

However, the problem for the council is that Hobson Swan Construction Ltd, the first defendant against whom findings of fault

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were also made, is in liquidation and Mr McDonald is similarly impecunious.

This means that although a 20% finding of liability specific to the council was made, it will end up carrying the whole of the judgment of \$200,000 as the other two liable parties cannot meet their share of the judgment. This is the result of the court finding that the company, Mr McDonald and the council were all joint tortfeasors who have joint and several liability to Mrs Dicks.

### Personal liability of Mr McDonald

Perhaps the most controversial aspect of the case is the finding of personal liability against Mr McDonald. Mr McDonald was a director of Hobson Swan Construction Ltd and it was he who physically performed the construction work on the house throughout 1994.

Mrs Dicks' contract was with the company rather than with Mr McDonald personally. There is a well established principle of law, discussed by the Court of Appeal in *Trevor Ivory v Anderson* in 1992 that even when the company is a "one man band" the natural person that sits behind the corporate veil will not normally be personally liable.

Justice Baragwanath spent a considerable part of his decision assessing the pros and cons of lifting the corporate veil and exposing the individual wrongdoer to personal liability. He concluded that because of the exclusive level of control which Mr McDonald exercised over the construction project, i.e. he was actually the man on the job, he should be personally liable as well as having his negligence attributed to the company.

While recognising a number of factors which told against the imposition of personal liability, Justice Baragwanath concluded:

*"Mr McDonald did not merely direct but actually performed the construction of the house and was personally responsible for the omission of the seals."*

### What can directors do to avoid findings of personal liability?

The key factor in Justice Baragwanath's findings of personal liability was the level of control and hands-on involvement which Mr McDonald had in the construction project. In most large property developments it will be rare for a director to have such a hands on role, but it would be sensible for any director or officer of a company involved in a development to put as much distance as possible between himself or herself and the substantive construction, or indeed choices of materials and methods of construction.

Ultimately, there must be a living breathing person, rather than a corporate entity who does physical work of construction and makes choices that affect the quality of the building. On the basis of Justice Baragwanath's analysis, those individuals are exposed to the imposition of the same personal liability sheeted home against Mr McDonald.

The decision represents something of a wake up call for officers and directors involved in the construction industry. Check your insurance policies now!

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