

Owners as head contractors

Be alert but not alarmed if an owner takes on the role of head contractor. There are a number of things you can do to protect yourself if the project is not managed well and problems emerge.



Keeping a note of events could prove invaluable at a later date.

PROPERTY OWNERS WHO engage labour-only builders may take on responsibility as head contractors. This means that they could be held responsible to subsequent property owners for any defects at a property.

On the other hand, builders who perform work on a labour-only basis need to take particular care to manage the contract. If a builder is only being paid for a limited role, they will not wish to find themselves taking on any liability for a wider role during the course of the works.

When is an owner a head contractor?

Whether or not a property owner is a head contractor is a question of fact. It may depend on how the works have been carried out.

It is clear that simply using a builder on a labour-only basis may not mean that an owner is a head contractor. The courts will ask how significant an owner's organisational involvement and input into the works actually was.

Factors that the courts say may point towards an owner being a head contractor include the owner:

- having significant property development experience
- attending site meetings
- being involved in the process of applying for consents, permits and having input into drawings and specifications
- arranging for council inspections
- assuming a supervisory role over the various tradespeople engaged on a labour-only basis.

Inexperienced owners could cause problems

A labour-only builder may find themselves in difficulty if a property owner is inexperienced in building projects.

The property owner may be looking to save costs on their project but not have the skills to properly manage the works.

In these situations, the labour-only builder may be placed in a difficult position if the owner starts to rely on the builder to make key decisions or other tradespeople look to the builder to make any project management decisions.

A further difficulty is defects often only revealed years later. As the owner's role will be a question of fact that depends on what they actually did during the works, who is held responsible for defects might depend on the recollection of various individuals about who said and did what during the works.

How to avoid problems

Some key ways labour-only builders may seek to protect their position include:

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- ensuring a building contract clearly identifies each party's role
 - taking steps to document the decisions made during the course of a building project - a diary noting key events may be invaluable at a later date.

If an owner does relay an instruction, it may also be prudent for the builder to confirm the owner's instruction back to them in an email or to ensure that site minutes are taken and circulated.

Once the job is complete, the builder should ensure that the documents for the project are kept for at least 10 years. ◀

Note ▶ This article is not intended as legal advice. For further information, contact the Harkness Henry Building and Construction team on (07) 838 2399 or email build@harkness.co.nz.

Landmark decision on council liability

Past *Build* articles have discussed the divide between a council's liability for residential buildings and commercial buildings. A recent decision has changed the playing field.

Until recently, the courts did not accept that councils owed a duty of care to commercial property owners under the Building Act 1991. This all changed with the Supreme Court's October decision in the Spencer on Byron litigation involving a leaking Takapuna building that was predominantly a hotel but also contained residential units.

COURT OF APPEAL

The Court of Appeal had held that the former North Shore City Council did not owe a duty of care for either the hotel units or the residential units and struck the claims out. It found that the council's duty of care was restricted to residential owners.

SUPREME COURT RULING

The Supreme Court decided that the Court of Appeal was wrong to strike out the claims and found that councils owe a duty of care regardless of the type of building involved.

The Supreme Court's decision means that the Spencer on Byron claim is restored into the court system. Owners now need to prove that council was negligent in carrying out its statutory functions. The Supreme Court's decision is likely to extend to claims made under the Building Act 2004.

However, that question remains for another day. ◀