

# Not personally responsible

The High Court recently threw out a case where a council pursued a company director who provided paperwork about a property subsequently subject to a leaky home claim.

**COULD A DIRECTOR** of a building company be liable for information supplied to a territorial authority when the council was considering whether or not to issue a Code Compliance Certificate (CCC)? This was the subject of a recent High Court decision - *Derwin v Wellington City Council*.

## **New owners sue council**

The case involved a leaky home built in 2001-02. In 2005, the house obtained a CCC. Shortly after, it was purchased by new owners. In February 2012, the new owners learned of defects with the property and sued the Wellington City Council.

The council then joined the director of the original construction company, a Mr Dallas, to the proceedings. The council settled the claim with the plaintiffs but proceeded to trial to seek judgment against Mr Dallas for contribution.

Mr Dallas had never carried out any construction work at the house or any supervision of the building works. His role was to manage the administration side of the construction company's business.

The High Court noted that this case was distinguishable from the usual case where a builder is responsible and a territorial authority has lesser responsibility.

## **Provided producer statements**

Mr Dallas's involvement with the property only arose in 2004 when the then owner sought to obtain the CCC from the council. The owner and the council were in dispute about whether or not the certificate should be issued, and the owner had approached Mr Dallas as the manager of the construction

company to see if the company could help him resolve the issues with the council.

Mr Dallas contacted contractors, suppliers and manufacturers to obtain producer statements before he sent a letter to the council dated 21 February 2005 providing information on the items that the council said needed to be attended to.

## **Was there a duty of care?**

The council's case against Mr Dallas relied on a number of causes of action. It said that Mr Dallas was a concurrent tortfeasor with it for the plaintiffs' damage and that Mr Dallas was liable for negligent misstatement and breaches of the Fair Trading Act 1986.

The council's first cause of action against Mr Dallas failed because the Court found he did not owe any personal duty of care to the plaintiffs as subsequent purchasers of the property.

In 2004, the original owner of the house had not asked him to investigate whether there were any defects with the house or to rectify any defects. He only wrote to the council as the managing director of the

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building company in response to the specific queries that the council had raised before it said it would issue a CCC.

If Mr Dallas owed any duty in respect of this response, he only owed this duty to council. There was no evidence that the subsequent purchasers ever relied on Mr Dallas's advice to the council in any way. Mr Dallas could not, therefore, be a concurrent tortfeasor with the council in respect of the plaintiffs' damage.

**No negligent misstatement**

The council's other causes of action also failed. Mr Dallas was not liable for negligent misstatement because the Court found that he had never assumed any personal responsibility to investigate whether the building was weathertight and he never said that it was. He only assumed responsibility for the specific responses he gave to the council.

As far as those responses went, a statement that some work had been completed by a

plumber was not sufficient to attract liability. The council needed to be satisfied that the building complied with the Building Code.

The information that Mr Dallas provided only conveyed that a plumber had done the work. He did not say he had checked the plumber's work or that there were kick-outs installed, which was the issue.

Mr Dallas proposed that a site visit take place, and this occurred. Whether or not kick-outs were installed would have been visible on inspection. In all of these circumstances, the Court found that it was not reasonable for the council to rely on a statement from Mr Dallas that lacked any detail.

The council also could not establish that Mr Dallas's statements about the windows at the property were incorrect. The Fair Trading Act claim failed for similar reasons.

**About the information, not the building**

In summary, the High Court noted that this case was distinguishable from the usual case

where a builder is responsible and a territorial authority has lesser responsibility. This case was not about the original construction of the house.

The claim was not against the building company for negligent work or against the person who supervised the building work.

The case was only about whether or not Mr Dallas was personally responsible for information that he supplied to the council at the time that it went to issue a CCC. The High Court accepted that the information the director supplied was intended to be the subject of further discussions and inspection and that the information that he provided was not actually wrong. ◀

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