

Meltzer Mason Heath

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UPDATE + NEWS + REVIEW

May/June 2007

Laughter is the sun that drives winter from the human face.

Victor Hugo

As our glorious Indian Summer draws to a close, we are getting ready for the move to our new premises, and to understand new legislative changes, plus the introduction of KiwiSaver. We will continue to update you on these, in this and following newsletters throughout the year.

New Premises

As from 25 June 2007, Meltzer Mason Heath's offices will be located at Level 16, 7 City Road, Auckland Central.

Phone, fax and postal address are unchanged.

Director's Personal Liability

Rachel Mason

Many of you will be aware of the recent leaky homes case—*Dicks v Hobson Swan Construction Limited (In Liquidation) and Others*—where the director of the company which built Mrs Dicks' house was found personally liable in negligence for the loss Mrs Dicks had suffered. (The Court attributed 80% of the responsibility for the defects to the builder, but due to the impecuniosity of the company and its director, the judgment will be met by the Waitakere City Council.)

The judgment is noteworthy because it upholds the 1984 High Court judgment in *Morton v Douglas Homes Limited*, regarding director's liability. Directors should be aware that the Courts will apparently continue to impose personal liability on directors of companies where the director is negligent and has breached his/her duty of care.

The reason the builder in the Dicks case was held to owe a duty of care to Mrs Dicks was because he performed virtually all the construction work and he controlled the operations of the company.

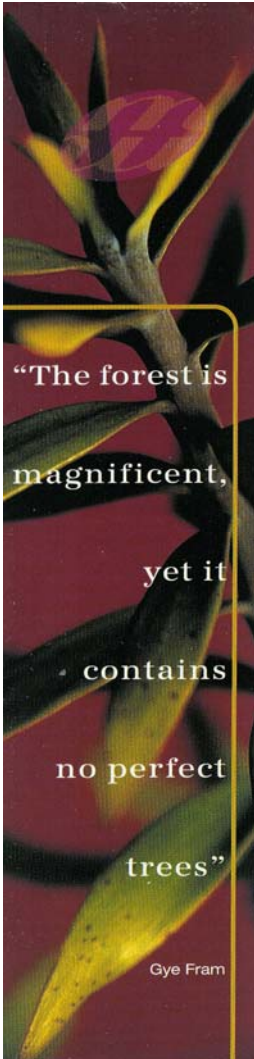
The Judge in the Dicks' case stated that the director:

"did not merely direct but actually performed the construction of the home and was personally responsible for the omission of the [window] seals. His carelessness is ... a breach of duty of care owed by him to Mrs Dicks. He is therefore personally a tortfeasor (as well as having his conduct attributed to Hobson Swan as its tort)".

The case shows that a director of a company may be held personally liable where the director exercises a substantial degree of control over work undertaken by the company.

Directors of smaller companies are more likely to be closely involved and to have a greater amount of control over performance of their company's work and therefore may be more likely to be personally liable for breach of duty of care where the director's own actions were causative of the loss.

Note: This is Rachel Mason's last contribution to the Newsletter for a while as, having completed her law degree at Auckland University, she is taking leave of absence for 12 months in order to complete her professional law qualifications.



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Director's Duties

Arron Heath

The Companies Act 1993 detailed director's duties in statutory form for the first time. The duties specified are:

- a) to act in good faith and in the best interests of the company (Section 131);
- b) to exercise powers for a proper purpose (Section 133);
- c) not to act or allow the company to act in contravention of the Act or the company's constitution (Section 134);
- d) not to agree to the business of the company being carried on in a manner that is likely to cause a substantial risk of serious loss to the company's creditors (Section 135);
- e) not to agree to a company incurring obligations in the absence of a belief on reasonable grounds that the company will be able to perform that obligation (Section 136);
- f) to disclose personal interests (Section 140);
- g) to disclose company information except in certain circumstances (Section 145);
- h) to disclose share dealings (Section 148).

The standard of care that applies to a director when carrying out his or her duties is set out in Section 137 of the Companies Act 1993:

"A director of a company, when exercising powers or performing duties as a director, must exercise the care, diligence, and skill that a reasonable director would exercise in the same circumstances taking into account, but without limitation:

- a) *the nature of the company; and*
- b) *the nature of the decision; and*
- c) *the position of the director and the nature of the responsibilities undertaken by him or her."*

The duties are owed throughout the period a person acts as director of a company.

Section 301 of the Companies Act, where a company is in liquidation, allows a liquidator (and certain other persons) to apply to the Court for an inquiry into the conduct of a present or former director to determine whether that person *"...has been guilty of negligence, default, or breach of duty or trust in relation to the company..."*

Insolvency Law Reform

Arron Heath

In our last newsletter we advised that the insolvency law reform legislation was expected to be operational in mid-2007. We are now advised by the Ministry of Economic Development that the new legislation should be in operation by the end of 2007. However, no implementation date has yet been set.

Between the professional staff at Meltzer Mason Heath there is over 100 years insolvency experience. This means that any problems or uncertainties facing your clients are likely to have been seen by us before. Please call us, and as always we will offer you and/or your clients a free one hour consultation.

Jeff Meltzer, Karen Mason, Arron Heath, Mike Lamacraft, Lloyd Hayward, Rachel Mason & Trish McLennan.

