



LEAKY HOMES REACH THE HIGH COURT

Of recent interest and reported widely in the media is the decision of the Auckland High Court in *Dicks v Hobson Swan Construction Limited & Ors*, a leaky building case. The reason this case has attracted so much interest is that it is the first leaky building decision that has made it to the High Court. For that reason the case has a great deal of precedent value. Of course, the latest news is that the Waitakere City Council, the third defendant but the only one liable to pay, as the first defendant is in liquidation and the builder possibly is impecunious, has confirmed that it will not appeal the decision to the Court of Appeal.

Briefly, the facts of this case were that Maria Dicks signed a contract to buy land and a house from Hobson Swan Construction Limited (now in liquidation). She moved into the completed home in July 1994 and soon after found water coming in through the window frames. She raised this with the builder and it seemed that it was rectified. The purchase was finally settled in December 1994. By 2003, following years of flooding, it became clear that the house suffered from systemic leak problems. Dicks obtained a report from Prendos the construction experts, which led to a settlement being reached with Hobson Swan and its director Robert McDonald. A term of the settlement was that certain restorative work would be done. That work was not done properly and Dicks eventually commenced Court proceedings against Hobson Swan, McDonald and the Waitakere City Council.

The High Court's view was that there was no dispute that water had entered the house and caused rot. It was found that this occurred due to a lack of seals between the plaster stucco and the aluminum window frames. The Court examined the Building Act and the Building Code requirements thoroughly as well as the various experts' opinions about how the house should have been built.

Hobson Swan was found to be liable both in tort for a failure to exercise reasonable care and in contract due to the breach of the settlement agreement to make good.

McDonald was also found liable for the breach of the settlement agreement to make good. In addition, McDonald was found personally liable in tort even though directors of companies are usually protected from this. The reason simply stated is that while he was a director of Hobson Swan he also actually performed the construction of the house. That meant that he personally owed a duty of care to his client and in this case he breached it.

On the Council's part there was no denial that it owed Dicks a duty of care. However, the Council disputed the nature of the duty and whether it had been breached. The Court examined the Council's actions in approving the plans and inspecting the building and found that it had abdicated its responsibilities. It did not require joinery seals to be in place and did not have any system of checking whether or not they had been used. This was considered to be a breach of the Council's obligations under the Building Act and the Building Code.

The Court ordered against the defendants repair costs of \$206,801.00 less \$21,000.00 already paid by the Council, plus interest. The Court also ordered general damages of \$22,500.00, payment of Mrs Dicks' legal costs and the substantial costs she incurred using Prendos as her experts.

6th Floor,
Duthie Whyte Building,
120 Mayoral Drive,
Auckland
New Zealand

Ph: +64 9 379 9464
F: +64 9 309 1536
www.duthiewhyte.co.nz





ALL 2002 PPSR REGISTRATIONS EXPIRE THIS YEAR!

It is hard to believe it is 5 years since registration of charges under the PPSA was made mandatory. Those of you who lodged personal property securities on the Register in 2002 should be aware that they are due to expire this year. If you want to retain the priority of your registration you need to renew your financing statements online before their expiry date. If you leave it until after the expiry date your priority will be lost! This is particularly important if you have a charge or General Security Agreement for funds you have lent to your company or other entity.

Please go to www.ppsr.govt.nz for more information about this. Alternatively, feel free to contact us for more assistance.

FIRM TALK

We welcomed Chris Tompkins in February who joined us as staff solicitor. He is keen to come involved with commercial contracts, employment and leasing matters.

Tamara Liebman has been on maternity leave from mid March and we look forward to her rejoining us before the end of the year. We wish Tamara and her partner Patrick all the very best with this new chapter of their lives. Tamara has already contacted most clients who regularly dealt with her however, please refer any matters in the first instance to the Partner you normally contact. We would be happy to assist with any queries you may have.

Autumn 2007

The material contained in this publication is of general comment only and neither purports, or intended to be advice on any particular matter. No reader should act on the basis contained in this publication without considering and if necessary, taking appropriate professional advice on their own particular circumstances. Duthie Whyte ("the firm") expressly disclaims all and any liability to any person receiving this publication. No liability will be accepted by the firm, any of the contributing editors, or the publisher for any loss suffered by any person relying directly, or indirectly on this newsletter.



6th Floor,
Duthie Whyte Building,
120 Mayoral Drive,
Auckland
New Zealand

Ph: +64 9 379 9464
F: +64 9 309 1536
www.duthiewhyte.co.nz

