

DIRECTOR OF BUILDING COMPANY PERSONALLY LIABLE: QCAT

There are two main reasons why most business owners are advised, quite rightly, to trade with a company structure:

1. The flat company tax rate; and
2. The separation of trading risks from the owners and directors personally.

For many years, there have been some limited exceptions to the separation of corporate liability from director's personal liability and we have another article on this topic. In a negligence case, this separation of liability was summarised at a Supreme Court level in the following terms¹:

"[i]t will not ordinarily be the case that directors, even of "small one man companies", will assume personal responsibility to a customer with whom they transact business on behalf of the company. The ordinary expectation ... is that the company, not the individual, assumes responsibility for the consequences of not effecting the transaction with reasonable care."

This separation has been a corner-stone of Australian corporate life for decades.

QCAT: Directors of Small Builders

However, according to a QCAT decision of Member Aaron Suthers² made recently, and relying on some New Zealand cases³, directors of smaller building companies can and frequently will be exposed to personal liability for negligence. Member Suthers pointed to the following factors:

- The director, Mr Wagner was primarily involved in negotiating the terms of the build contract with the owners and prepared the contract;
- The owners signed the contract without first obtaining legal advice;
- The "Builder" in the contract was the building company but the director signed it

"without clarifying that he did so in his capacity as a director";

- The director organised the house plans;
- The director was directly responsible for some of the building work.

According to Member Suthers, this was sufficient to cause for Mr Wagner to assume personal *"responsibility to the [owners] to take reasonable care to avoid causing them loss through defective building work."* In our respectful view, Member Suthers has misapplied the relevant principles in this case. We hope the decision is appealed. Otherwise, it sets a disturbing precedent, where the 'duty of care' owed by a company contracting to perform building work can too easily be imposed also on its director(s) personally.

Previously, personal liability for negligence while agent or employee for a company was limited to well-established circumstances where the individual clearly owed a personal duty of care: e.g. negligent driving; negligent advice from a professional advisor.

Legal Minefield

Operating as a small or medium builder is difficult enough. There are industry specific licensing and insurance requirements and industry specific 'watch dog' regulators⁴, industry specific ATO payment reporting obligations⁵, consumer-friendly legislation in the domestic building context⁶, and recent changes to the notorious Building and Construction Payments legislation.

For assistance with any aspect of the legal 'mine field' affecting the construction industry, please contact:

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¹ *Council of the Shire Noosa v Farr & Ors* [2001] QSC 60.

² *Tracey v Olinardridge Pty Ltd* [2014] QCAT 617.

³ Primarily, *Dicks v Hobson Swan Construction Ltd (in liquidation)* [2006] NZHC 1657.

⁴ *Queensland Building and Construction Commission Act 1991 and Fair Work (Building Industry) Act 2012.*

⁵ www.ato.gov.au/Business/Building-and-construction

⁶ *Domestic Building Contracts Act 2000.*