

June 2009

“LITIGATION TRENDS”

Barry Dacombe writes:

There have been a number of recent cases of legal action being taken against former employees of architectural practices that have gone out of business. In these cases of alleged negligence the claimants are seeking recompense for damages from the former firms, but because of the firms' impecunious nature and unlikely possibility of any recovery, the claimants are turning to sue the former employees who actually carried out the professional work.

Not fair you say? - Perhaps - but that is the legal climate we and the international community are now exposed to.

For employees the trend is somewhat disturbing and for those caught up in the actions there is little they can do but to attempt to defend the allegations against them - the cost in anguish, time and money is considerable. To do nothing, hoping it will go away, is not an option. Remember you are working for another business and being distracted from your ongoing employment obligations.

Those caught up are quite naturally asking what can be done to protect themselves against such possibilities.

In this article I will attempt to outline some possibilities.

Firstly, *NZACS* has taken proactive response on such issues as they relate to the employer and employee. From the very early days *NZACS* sought a form of insurance cover for practices that gave the employees protection as joint-insured parties with the firm.

The existence of a current policy at the time of the claim provided the practice, its employees, shareholders and directors with cover under its terms and conditions and limitations, less the applicable excess. In other words, if a valid claim was made the Insurer undertook to conduct the defence on behalf of the firm and the other joint- insured parties (*including any employees*) and then attend to any agreed settlement as appropriate.

The policy went further in that it provided an ongoing protection for all these parties *including any past employees*. This was in the form of non-subrogation wording included in the policy preventing the insurer from seeking recovery from the employees found to be responsible.

All this is great except that for it to work the firm's insurance has to be current. In the cases referred to above currency of insurance is missing therefore leaving the door open for the kind of actions now being initiated.

In the circumstances where a firm has suffered a forced liquidation (*as opposed to a voluntary liquidation*) there is normally no funding available to purchase run-off cover which would continue the currency of insurance, thereby providing the ongoing protection needed in these circumstances.

Recently (*refer to the July 2008 Communiqué*) **NZACS** announced a further protection for employees of previous **NZACS**-insured firms who did not have ongoing cover and transferred to a new employer or set up their own new practice, if a current **NZACS**-insured firm, a “*portability of cover*” that subject to the terms of the policy and payment of a small premium maintained insurance protection. (*NZACS is currently considering a direct purchase arrangement for this insurance protection to be made separately available to former employee architects.*)

These initiatives are further persuasive factors that contribute to the value and demonstrate the worth of the **NZACS** arranged insurance scheme.

NOTE:

Please be aware that NZACS is not offering advice in any areas relating to good employee/employer relations and disclaims any assumptions that may be taken from this article, which might infer appropriate or inappropriate terms of employment between employer and employee.

“GREENWASH”

Greenwash (*a portmanteau of “green” and “whitewash”*) is a term used to describe the perception of Consumers that they are being misled by a Company regarding its environmental practices. The Commerce Commission has become concerned that claims made in recent marketing activities by some businesses may constitute a breach of the Fair Trading Act 1986.

As a result the Commerce Commission has released guidelines in a publication entitled “*Guidelines for Green Marketing*”. In the publication the Commission classes environmental or green claims as being statements concerning environmental sustainability, recycling, carbon neutrality, energy efficiency, used of natural products, and impact on animals and the natural environment.

Members making environmental or green claims should ensure that their claims are scientifically sound and appropriately substantiated. Consumers are entitled to rely on any environmental claims and they must be truthful and not misleading, otherwise there is a potential for a breach of the Fair Trading Act 1986 with the civil and criminal actions that may ensue.

WEATHERTIGHTNESS FAULTS – AREAS OF CAUSE

In the *February/March 2009* issue of *Build* there was an article by Jeff Montgomery, Manager Weathertight Services Group of *DBH* regarding the Weathertight Homes Resolution Service.

He advises that as at 30 November 2008 5,627 claims had been notified for 6399 properties and assessments had been completed for 5,934 properties. As at 1 December 2008 some 3,703 properties were subject to claim.

What is of particular interest is the list of the most common causes of leaks as determined by the assessments. Be aware of these areas and take them into account when considering your designs. Make sure your detailing and specifications are comprehensive, accurate and full-proof.



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The most common causes of leaks arising from the assessments are:

lack of, or inadequate flashings

reliance on sealants for waterproofing

insufficient clearance of cladding to the ground or over a deck/roof surface

uncapped flat-topped parapets

absence of eaves

lack of movement control joints

lack of adequate threshold between inside and outside

skylights

penetrations through claddings, wall and roof junctions

balconies that are non-drained, have no overflow or have a lack of fall

So be conscious of these issues to reduce your risk

TIPS FOR RECESSION SURVIVAL

In a recent newspaper business page article Sir John Anderson and others offered tips for recession survival. Those most relevant to firms offering professional services, and which happen to make good business sense as well, were:

- 1. top priority is cash flow**
- 2. prepare budgets, monitor them monthly, and understand your profit and loss position**
- 3. control and review costs and cut costs where necessary**
- 4. chase up delinquent debtors relentlessly, talk to your major clients, check their viability**
- 5. ensure you have enough capital**
- 6. keep the bank informed**
- 7. make sure you have a strategic plan**
- 8. make the hard decisions, it's a lot about survival rather than growth**
- 9. focus on service to clients**
- 10. try to renegotiate your lease and /or deals with suppliers**
- 11. watch out for destructive fee cutting**



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The *December 2008* Communiqué alerted Members to the risks associated with fee cutting.

Since then both *NZRAB*, via their Newsletter 1/2009 and *NZIA*, in issuing Practice Note PN3.209 (*March 2009*), have highlighted the risks and consequences of such a practice. PN 3.209 is well worth reading and taking note of its message.

COMMUNIQUE

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***We welcome contributions from readers,
on how they manage risk.***



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