COMMUNIQUÉ

Newsletter of the
New Zealand Architects Co-operative Society Ltd
April 2007

NZACS Risk Management Seminars - continuing

As reported in the ***November 2006*** Communiqué the Nationwide Seminars presented by Graham Strez last year were an outstanding success. Over ***400*** members attended those Seminars which shows the importance they *(you)* attach to the risk management and practice information ***NZACS*** is providing. This support of Members by ***NZACS*** *i*s continuing.

NZACS is conscious of the need to reach Members outside of the main centres. To this end, already this year, Director Barry Dacombe has presented a Seminar on ***AAS2 2007*** and Payments under the Construction Contracts Act, to Members in both Queenstown and New Plymouth. The latter coincided with a Board Meeting in New Plymouth, which enabled the Directors to meet with some seventeen local architects.

At that Meeting the Directors approved, in principle, supporting an appropriate speaker to participate in the ***2007 NZIA CPD*** Seminar round. Further it was agreed to hold the Annual General Meeting in Nelson on ***14 June 2007*** and for Graham Strez to present his Risk Management Seminar in conjunction with that Meeting, which will complete his nationwide coverage.

Both Graham and Barry bring a huge amount of practice and professional experience to these Seminars which no other insurance provider can offer. They willingly share their knowledge with fellow architects, under the ***NZACS*** banner, for the benefit of Members to improve the manner in which they practice architecture and minimise risks.

New Producer Statements launched

One of the Risk Management doctrines ***NZACS*** has long promoted is the use of standard documentation as produced by the professional bodies, such as ***NZIA***, or by Standards New Zealand. ***NZACS*** advises strongly against the use by Members of ***"Client Generated"*** documents, and continues to do so.

Therefore the ***NZACS*** Directors welcome and support the recent launching of the new Producer Statements jointly agreed and published by ***NZIA, ACENZ*** and ***IPENZ***, which provide for professionals forms which offer consistency and reduce the possibility of error.

Support from ***NZACS*** included the involvement of Director Deb Cranko, and the ***NZACS*** Insurance Consultant Don Houchen assisting in the preparation of these new documents.

The three Producer Statements outline minimum requirements for design ***(PS1)***, design review ***(PS2)***, and construction review ***(PS3)***. Completed Producer Statements show that either part of all of a structure complies with the Building Code and that construction complies with the approved design.

The ***Building Act 2004*** does not specifically require Producer Statements as standard documents, but it does require that a suitably qualified person verify that design or construction complies with the Building Code.

These new forms have been modified to reflect the recent amendments to the New Zealand Building Code and to meet the requirements of professionals and their clients. The use of these statements assures the owner and the Building Consent Authority that architects are familiar with current codes and practices.

There are some changes to the ***PS*** forms that Members should be aware of, and the reasons behind making these changes.

Some local authorities may challenge some of these changes.

- These forms have been changed to reflect current practice;
- These forms are specifically for architects and professional engineers and this is reinforced by the professional registrations and memberships mentioned. They have the backing of the three professional associations;
- The forms are to be completed and signed ***on behalf*** *of* the firm, and this is clearly marked;
- Some ***BCAs*** have allocated firms a reference number when they ***"register***" as a pre-approved supplier. The professional bodies do not support this practice as registration as a ***Registered Architect*** or ***CPEng*** is covered by legislation, and this therefore already does the job. However, if those ***BCAs*** wish their own reference to be included, it is suggested that you put ***"Provided By: Doe & Citizen Architects Ltd, Reference 12345"*** or something similar;
- The forms contain a limitation on the liability of the architect to the ***BCA*** named. Be aware, in addition, that there is also a limitation of liability to the Client, as may be specified by the Agreement for Services with that ***Client***, except where the ***Client*** is a home owner *(i.e a domestic consumer)*;
- After considerable debate amongst the parties, it was agreed to leave the minimum at ***$200,000*** on these new forms. The reason that the lower level was retained was that it is appropriate for the many small jobs done for small ***Clients***, for which these forms apply. There is a note to the effect that the sum may be changed should the nature of the work undertaken, justify this.
- ***Note in particular:*** This is a statement that your Design or Review complies with the Building Code; or that your Construction Monitoring has shown compliance with the Building Consent – it is ***not*** a guarantee.

It is stressed that designers should advise their ***Clients*** that a level of construction monitoring is advisable. Most ***BCAs*** are insisting on this, and it should therefore be included in the Building Consent, but it is to your and your ***Client's*** advantage if you can secure such work as part of the overall project.

As with any new forms introduced constructive feed back is important. Any comments Members may have, or have received from ***Clients*** or ***BCAs*** will be appreciated and should be passed directly to Chris Mason at ***NZIA.***

Recent Case Law lifts the Corporate Veil from Company Directors

Graham Strez, ***NZACS*** Claims Director has prepared the following detailed comment on this high profile case which raises significant issues as regarding a negligent ac`ts of a director of a limited liability company.

Further Graham emphasises that the ***NZACS*** Professional Indemnity Insurance Policy does cover the negligent acts of directors and employees of an Insured Member Firm, subject of course, to the terms conditions and limitations of the Policy.

"The much publicised High Court judgement of Dicks v Hobson Swan Construction Ltd (in liquidation) CIV 2004-404-1065 is of significant interest to architects for two important reasons.

a) reinforcement of joint and several tort liability

b) lifting the corporate veil from company directors

The media publicity centred on the former.

In this case the building contractor was sued jointly and severally with the local authority, Waitakere City. Since both tortfeasors were found liable, and because the builder was in liquidation and of no worth, the remaining tortfeasor, Waitakere City Council, became severally liable for the damages award, which amounted to ***$235,000***:- the entire loss in this leaky homes claim.

No building designer was brought into the proceedings. Had there been, and an architect was found to have been negligent in a material aspect, then the architect as an additional joint and severally-liable tortfeasor, would have contributed to the liquidated builder's liability shortfall along with the council.

The major source of architect's Professional Iindemnity insurance payouts in New Zeland is in cases where the insolvency of a major joint-tortfeasor is effectively underwritten by the architect's insurance assets.

The media however ignored an important finding in this judgment – the liability of directors for breaches of legal duty.

It is established law that developers ***(****Mt Albert Borough Council v Johnson [1979] 2 NZLR* ***234),*** builders *(Bowen v Paramount Builders (Hamilton) Ltd [1977] NZLR 394 (CA****)* and territorial authorities *(Invercargill City Council v Hamlin. [1996] 1 NZLR 513****)*** owe a duty to home owners to exercise reasonable skill and care to achieve a sound building.

In this case the builder, Hobson Swan Construction Ltd, was found to have been negligent, and judgment was made in favour of Mrs Dicks, for its failure to maintain proper standards of workmanship.

Mr McDonald, a director of Hobson Swan Construction Ltd, was also found to have been personally liable for the loss suffered by Mrs Dicks. Baragwanath J. traversed the history of significant case-law examples relating to the apparent immunity of company directors to legal proceedings.

Starting with *Salomon v Salomon. [1895-9] All ER Rep 33 [1893] AC22*, it was established that shareholders and directors owed no liability to plaintiffs beyond their shareholder's capital contribution to the company.

In the NZ case of *Trevor Ivory v Anderson [1992] 2 NZLR 517 (CA)*, the Court held that a sole director/shareholder was not liable for the negligent advice given by the directors. The Court accepted that the negligent advice was given by the company and not the director, the director being an agent of the company. It was subsequently commented, that had Anderson reasonably thought that he was dealing with an individual, the result might have been different.

Legally, it is argued that there are four competing interests in cases involving director's liability:-

(1) The public interest of separate legal identity of companies.

(2) The public interest in providing incentives against wrongful conduct and compensating those injured by it.

(3) The hierarchy of wrongs, from wilful conduct to strict liability.

(4) The law's greater protection of persons than property.

In respect of *(1)* there appears to be no reason why servants should be personally liable for conduct rendering their employer liable in tort, and directors of companies should be exempt on the same basis. It was found in *Callaghan v Robert Ronayne Ltd [1979] 1 NZCPR 989*, that there was no proof of individual acts of negligence on the part of directors; the defective work was in all cases done by workmen or subcontractors.

In *Morton v Douglas Homes Ltd [1984] 2 NZLR 584*, it was found that the directors of a building company were liable because of the control they exercised over the building work. "It is not the fact that he is a director that creates the control, but rather that the fact of control, however derived, may create a duty.

There is therefore no essential difference in this respect between a director and a general manager, or indeed a more humble employee of the company. Each is under a duty of care.

In Dicks' case, the Court confirmed that:

(1) In NZ Law, the protected interest is classified as more than merely economic.

(2) The imposition of personal liability on the director would tend to add incentives to performance.

(3) Since there is no contract with later purchasers, they would be able to sue unencumbered by the present point.

(4) In this case Mr McDonald did not merely direct, but actually performed the construction of the house and was personally responsible for the omission of the window seals. His carelessness was a breach of a duty of care. He therefore is personally a tortfeasor and accordingly personally liable to Mrs Dicks.

By legal analysis, it is now clear that architects, who are sole directors of their limited liability company, will be personally liable for their own acts of negligence, and will be unable to shelter under the corporate veil previously identified in Trevor Ivory v Anderson.

In multi-director companies, directors who were not involved in negligent conduct, will be protected by the corporate veil, but the particular director who caused a plaintiffs loss by his/her own negligence, will be personally liable.

Limits of Indemnity

Alan Purdie writes:

Recently I met a senior Wellington practitioner in the local super market and we got around to discussing limits of indemnity and the cost of increasing the level of cover. Recently he had been asked by a Client to take out a higher limit of indemnity and was pleasantly surprised that doubling his cover did not double his subscription.

So yes, doubling your cover does not mean a doubling of subscription.

This is well worth remembering when you next consider an increase in your level of indemnity.The following table shows the numbers of Insured Members and their various limits of indemnity as at ***April 2007.***

This table provides Members with information that can assist when assessing an appropriate level of indemnity for their firm. The impression is that there is a wider spread and a noticeable increase in the proportion of members moving up to the ***$500,000*** and ***$1,000,000*** levels.

Limits of Indemnity	*Number of Insured Member Firms*
$250,000	***320***
$300,000	***55***
$400,000	***36***
$500,000	***117***
$750,000	***14***
$1,000,000	***118***
$1,500,000	***3***
$2,000,000	***37***
$5,000,000	***3***
$10,000,000	***2***
Total	***705***

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