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Don't give up the fight

The benefits of tactical plays with solvent builders.

PROCEEDING IN THIS WAY... SHOULD ALWAYS BE CONSIDERED IF A SOLVENT BUILDER IS HOLDING THE COUNCIL TO RANSOM.

Councils often find themselves in the difficult position of being forced to go to trial because a solvent builder, or other construction party, refuses to settle at a level commensurate with their liability. This is particularly awkward if there is no credible defence for the council to run at trial. When forced into a corner it can be best for the council to settle at a discount with the claimant and proceed to trial against the stubborn builder to collect a worthwhile contribution.

This is exactly the result we achieved for the council in *Wellington City Council v Dallas [2014 NZCA 631]*. The council admitted liability and settled with the claimants, paying them $670,000. It collected $124,000 from some of the other construction parties then went to court to collect the remaining $546,000 from the director of a building company (the director). The council lost at trial but won on appeal.

The facts were unusual. At the final inspection the council identified a number of issues with the house. The council then wrote to the building company listing 14 items where "remedial work and documentation will be required".

The director responded to the council's letter, saying work had been completed, when in fact it had not. The council argued that the director's letter amounted to misleading and deceptive conduct in trade and was a breach of the Fair Trading Act 1986.

The court considered whether a reasonable person with the characteristics of the council would be likely to have been misled by the letter. The court found that a reasonable person would.

The court went on to consider whether the council relied upon a statement made in the letter and whether the statement in the letter was a cause of the loss.

The director had said that kick outs flashings were installed. They were not. The lack of kick outs would have been visible to the council on inspection – that is why the council admitted liability. The court was of the view that the council did not inspect for the presence of kick outs and was only left with the director's assurance that it had been done. Accordingly it was satisfied that the council had relied on the director when it issued the code compliance certificate.

The council conceded that it was at fault for not noticing the lack of kick outs. It argued that it took comfort from the director's statement that the remedial work had been done. The court found that the director had breached the Fair Trading Act 1986 and doing justice between the parties required some contribution from him.

The court of appeal has asked for further submissions on apportionment. We have argued that it should be 50/50 because if the lack of kick outs was the only defect, it would have triggered the need to reclad the house. We expect a judgment from the court of appeal shortly on the amount the director has to pay.

The director has subsequently applied for leave to take his case to the Supreme Court.

If we can maintain the status quo, whatever the director ends up being ordered to pay will be an improvement on his pre trial position. The council will also be entitled to court costs (for the trial and the appeal) from him. What we do know is that the tactical decision to proceed in this way has so far paid off for the council and should always be considered if a solvent builder is holding the council to ransom. **LG**