



LITIGATION

STRICT LIABILITY FOR DIRECTORS AND EMPLOYEES UNDER FAIR TRADING ACT CONFIRMED

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Individuals can expect to be held personally and strictly liable for breaches of consumer legislation after a Court of Appeal decision confirming a broad approach to liability in a leaky building case.

The judges said consumer protection was best served by a broad approach and confirmed that directors and employees can be liable as principal parties under the Fair Trading Act (FTA). They can face strict liability even though they may have been acting within the scope of their employment or in their capacity as director.

The recent case of *Body Corporate 202254 v Taylor* (2008) 12 TCLR 245 is a classic example of leaky home litigation. The owners of affected houses were from a single development. As all of the companies involved in the development's construction had been struck off, they sought to claim against the director of the main development company.

The claim was based on a marketing brochure which the owners alleged contained misrepresentations breaching section 9 of the FTA, which provides: "No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."

It was assumed for the appeal that the director had personally made the

representations in the brochure.

The question for the Court was whether the section could apply to the defendant given that he was acting as the director of a limited company at the time that he allegedly made the representations.

Is a director "in trade"?

This question divided the Court. The majority favoured a broad approach in interpreting the section while a strong minority dissent supported a more narrow interpretation.

Previous cases in which the courts have held that an employee or director could be principally liable under the FTA have typically involved directors who were seen as the alter ego of a company and were personally responsible for the acts complained of (*Gloken Holdings Ltd v The CDE Ltd* (1997) 6 NZBLC 102,272 and *Kinsman v Conrfields Ltd* (2001) 10 TCLR 342).

Some commentators, however, have criticised this approach and argued that the section should be read narrowly to ensure that employees did not find themselves unexpectedly liable for representations made in the course of their employment.

In an earlier decision, the Court of Appeal had shown sympathy with these criticisms and suggested that the matter needed to be looked at again (*Newport v Coburn* (2006) 8 NZBLC 101,717).

Majority approach

Trade is defined in section 2 of the FTA as “any trade, business, industry, profession, occupation, activity of commerce, or undertaking relating to the supply or acquisition of goods or services or to the disposition or acquisition of any interest in land”.

In the view of the majority this definition was consistent with a broad approach. In particular the judges noted that the terms “profession” and “occupation” could include a person not trading on their own account. It was therefore sufficient that the defendant’s conduct took place within the context of his occupation.

The majority recognised that the existence of accessory liability provisions (s 43) could show a legislative intention to specify the circumstances under which employees and directors were liable. However, their view was that accessory liability provisions applied where the impugned conduct could not be attributed directly to a defendant but did not apply where a director had personally and directly infringed s 9 (as the director would have committed the breach, not aided or abetted it as the section requires). The judges pointed to section 45(2) which deems that any conduct of a director or employee is also engaged in by their company; the use of the word “also” suggesting dual liability.

Finally, the majority considered that the risk of unexpected and unacceptable liabilities being imposed was overstated. Claims were likely only to be brought against senior employees who could obtain insurance to cover any risk and not all misleading or

deceptive conduct which a director participated in would necessarily be conduct on the part of that director so as to fall within s 9, they said.

In the majority’s view, consumer protection was best served by a broad approach to liability. They saw no reason to depart from the broad approach consistent with that of New Zealand and Australian authority on the issue.

The dissenting view

For the judges in the minority, the broad approach conflated the concept of a person engaged in trade (such as a sole trader) with acting in the course of trade. If the section was interpreted in light of the rest of the Act, a narrow interpretation was appropriate. The range of terms used in the definition was designed to ensure that there was no room to argue that particular types of undertaking, such as a profession, were excluded. However, the omission of the term “employment” from the definition of trade showed that employees were not intended to be caught by the definition.

Other grounds on which the minority dissented included:

- It was compelling that the FTA already made provision for secondary liability (s 43). Therefore, there was no need to read s 9 broadly as the provisions of s 43 ensured that directors could still be sued personally if they were appropriately involved. The difference is that under s 43 it would be necessary to show intention for a director to be found liable as an accessory.
- On policy grounds, the broad approach cut across accepted concepts of limited liability and should not be adopted.
- It would also expose employees to unexpected, and strict, liability for representations they make on behalf of their employers. Direct liability for

employees in such circumstances was not justified by consumer protection considerations.

What the decision means

The decision firmly establishes the principle of primary liability for directors and employees who face claims under the FTA. This means that if a director or an employee is found to have made a misrepresentation, even if it is in the course of their employment, they can be personally liable. The liability that they will face will be strict, with no exception for an unintended breach.

It is important to note that the decision does not allow for a director to be found vicariously liable for the actions of his or her company. Instead, directors and employees will only face claims if their own actions are at fault. An employee who is merely a conduit for a representation made by their employer will not face liability.

The decision can be criticised for potentially giving rise to the unexpected consequences that the minority feared. It does not necessarily follow, as the majority believed, that only senior employees will face claims under the provision. On the broad approach there is nothing to prevent claims being brought against more junior employees. Nor is it realistic to expect that senior employees will simply be able to obtain insurance as a precaution. It has to be hoped that reference by the majority to the discretionary nature of the remedy is an indication that the courts will be prepared to ameliorate these potentially harsh consequences.

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