

MADISON HARDY

COMPANY, COMMERCIAL AND BUSINESS LAW

Recent developments in legal liability for builders

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MADISON HARDY

Company, Commercial and Business law

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Disclosure of Interest in Construction Sector

- Commercial lawyer for 37 years
- Director, Certified Builders Association
- Wrote their suite of building contracts
- Represent mostly builder clients
- Submissions & presentations on legislation
- Work with and advise MBIE officials
- Regular articles for a range of publications

The Origins of Builder Liability

- Development of the Law of Contract
- Development of the Law of Negligence
- How they differ
- Builder liability under contract
- Builder liability under negligence
- Limitations of those laws

Corporate vs. Personal Responsibility

- Emergence of limited liability companies
- The Company as a separate legal entity
- Shareholders' personal assets are protected
- Humans = normally agents of the company
- The emergence of exceptions to the rule
- Impact of the leaky home crisis
- The current state of the law

Consumer Guarantees Act 1993

- Designed to address the power imbalance
- The Act re-writes consumer contracts
- Imposes minimum accountability standards
- Applies to both consumer goods & services
- But “goods” exclude buildings fixed to land
- However “services” includes construction
- How the consumer remedies work

The Reforms of the 21st Century

- Leaky home crisis
- Hartner Construction
- Overview Group on Weathertightness 2002
- Weathertight Homes Resolution Services Acts
- Construction Contracts Act 2002
- Building Act 2004
- Amendments to the Building Act 2005-2010
- Building Act Review Discussion Document 2010

Developments since the DBH Review

- 2012 Amendment Act (Risk-based consenting)
- 2013 Amendment Act (Consumer protection)
- Both awaiting Regulations
- Improvements to the Construction Contracts Act
- Consumer Law Reform Bill (Unfair contracts)
- Complaints to the Building Practitioners Board
- Joint & several liability studies
- Housing affordability & construction productivity

2013 Act Consumer Protection Provisions

- Pre-contract disclosures & checklists
- Minimum requirements for residential building contracts
- Remedies for breaches of implied warranties
- One year defects liability warranty
- Remedies against on-sellers
- Post-project disclosures

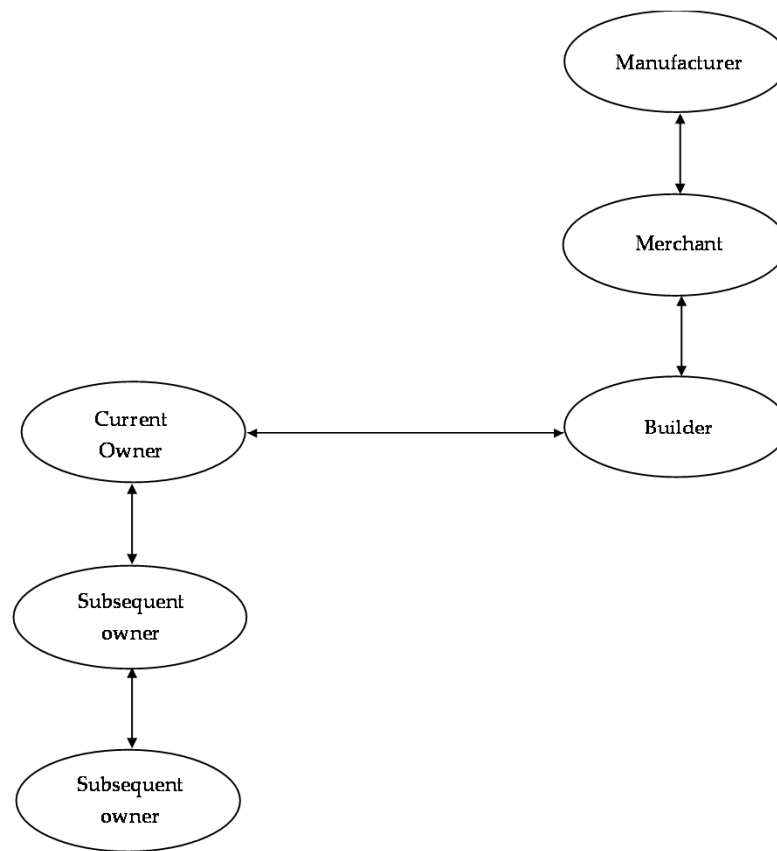
The Legacy of the Hunn Report 2002

- Improvements to Building Code, Schedule 1
- Enquiries into productivity & affordability
- Greater sophistication in residential building
- Less cowboys, but more bureaucracy
- Amateur project management continues
- Ineffective attempts to reduce BCA liability
- Superb CCA system for dispute-resolution
- Builder liability & building disputes increase

The Current State of Builder Liability

- The law of contract
- The law of negligence
- Consumer Guarantees Act 1993
- Building Act 2004 implied warranties
- Building Act 2004 defects liability warranty
- Limitation periods & length of liability exposure
- Historical unavailability of negligence insurance
- The myth of limited liability
- The myth of consumer frailty

How the different laws operate



Dispute-resolution Methods

- Negotiation
- Mediation
- Referral to expert
- Arbitration
- Litigation
- Adjudication

Dispute-Resolution Organisations

- Debt collectors & credit agencies
- Disputes Tribunals
- District & High Courts
- Mediators
- Arbitrators
- Weathertight Homes Tribunal
- CCA Adjudicators

How to Minimise Builder Exposure

- The pitfalls of doing building work on credit
- Enlightened client management
- Sophisticated documentation
- Insurance
- Quality workmanship
- Knowledge of the law, including CCA
- Limited liability companies
- Trusts