

## **LEAKY BUILDINGS**

### The Buck Stops Here

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New Zealand's residential construction industry is facing a crisis with leaking new buildings. The New Zealand Herald recently reported that for thousands of New Zealanders, the dream of a new home is turning into a "sodden nightmare".

In Vancouver, the "leaky condo" disputes have cost the industry more than \$1 billion.

This article examines some of the causes for leaking and rotting in new houses, who is responsible and most importantly, how architects can protect themselves from liability.

Nobody quite knows what is causing the rotting of new buildings, but it is generally accepted that rotting can be attributed to two causes.

The first cause is the use since 1996 of untreated kiln dried timber for framing in houses. Such timber is apparently more susceptible to rot than treated timber. The use of untreated kiln dried timber has only become prevalent since 1996, when the relevant standard was amended permitting its use.

The second arises from trends in design and construction, favouring modern cladding systems, the absence of eaves, internal balconies and other modern design features which have contributed to the problem of rotting buildings. Such design features render houses more susceptible to leaks and modern cladding systems do not allow drainage, which contributes to the rotting problems.

At the moment the problem is mainly one of negative publicity. However, it will not be long before home owners and developers take to the Courts. It is inevitable that they will point the finger at architects and builders.

Whether or not architects and builders can be found liable will depend on a number of factors, including:

- (1) the contractual relationships in place;
- (2) whether, outside the contractual relationships, a duty of care is owed by any party to the ultimate homeowner;
- (3) the actual cause of the rotting timber; and
- (4) whether there has in fact been a breach of any contract or duty of care.

In many cases, liability will be attributed between the architect, the builder and if applicable the developer.

Architects face liability in two common scenarios.

First is where the architect is responsible for the design of the building and specification of the materials to be used. The architect could be liable in either contract or tort to the person commissioning the house and in tort to subsequent purchasers of the house for failing to design the house to ensure that it does not leak and for failing to use untreated kiln dried timber, rather than treated timber. Architects must be particularly careful in the choice of material because BRANZ has recently issued a recommendation (Update 1: 28 August 2001) that in high risk areas, particularly where non-ventilated cladding has been used, treated timbers should be used.

Architects are also at risk in situations where a developer commissions the architect to design an apartment block. The ultimate purchaser of the apartment will look first to the developer for redress. The developer will almost certainly point the finger straight at the architect, who once again can be liable for any design faults resulting in leaking, or the choice of materials.

If the developer is a “fly by nighter”, then the ultimate occupier of the apartment is also likely to see the architect (or more particularly its insurers) as a “deep pocket” and pursue the architect direct.

Whatever the legal rights and wrongs, architects should try and avoid litigation, which can end up being expensive and time consuming.

How can architects protect themselves?

The first and most obvious step is to do a good job. This may involve:

- ensuring you specify timber which has been boron treated. This is less likely to rot and is also protected from boron;
- using materials that are appropriate for the conditions. Modern designs are not appropriate for all conditions, particularly if a site is exposed;
- following any recommendations made by BRANZ regarding cladding applications; and
- if you are also engaged to manage the project, ensuring that the builder follows your designs and complies with your specifications regarding building materials.

Second, review your contract carefully. If you take on the role of overseeing the entire project, then you can be liable for work undertaken by the builder, or the builder's subcontractors.