

The Personal liability of Building Surveyors

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Building Surveyors have been found to be liable to owners not only under their contract of engagement with the client but also by owing a duty of care to the owner. The seminal case in this area is the VCAT decision **Toomey v Scolaro's Concrete Constructions Pty Ltd (In Liquidation) and Others**¹ subsequently upheld by the Court of Appeal of the Supreme Court of Victoria. The case concerned the liability for the personal injury to a man who whilst drunk fell off a balustrade that was constructed lower than the BCA required height. The Court determined the duty owed by the Building Surveyor was a non-delegable one and as such the duty under the Building Act and Regulations could not be delegated to a building inspector.

However the law has moved further, in 2003 a VCAT case **Taitapanui v HIA Insurances Services Pty Ltd** decided a Building Surveyor could be found liable to a subsequent owner for breach of duty. The decision was later upheld by the Supreme Court of Victoria. In this later case **Moorabool Shire Council & Anor v Taitapanui**² Smith J held "apart from his contractual obligation to exercise reasonable care in performing his contract, he owed a duty of care to the original owners. He would or should have known that a subsequent owner was likely to assume that the house had been competently built and the foundations adequate unless the inadequacy of the footings had become manifest."

His honour went on to say: "Finally, the economic loss was of the same kind and the house provided the connecting link to the original relationship with the owner - if that is required." In **Moorabool Shire Council & Anor v Taitapanui**, Victorian Supreme Court, Smith J applied the majority reasoning in **Bryan v Maloney**³, in finding a private building surveyor "should have foreseen that a failure to exercise reasonable care could cause serious economic loss to the owners of the house".

The courts have limited the culpability of Building Surveyor's for foreseeable damage to the damage that results from a failure to adequately conduct his duties under the Building Act and Regulations. A Building Surveyor's liability will be interpreted to be circumscribed by their responsibilities under the legislation.

This has been made clear by the 2006 VCAT case **Lawley v Terrace Designs Pty Ltd**,⁴ where Senior Member Young stated: "the position the private building surveyor has is a statutory position created by the building regime enacted in the Building Act and Regulations...His is essentially a checking and inspection role: but to reiterate what I said above, it is not a general or supervisory role but to carry out acts specified in the BA and BR in the manner required by the legislation [emphasis added]."

Building Surveyor Immunity

If the Building Surveyor relies on a certificate issued by another Building Professional in relation to domestic building work it is possible to invoke immunity under section 128 of the Building Act.

¹ [2002] 12 ANZ Insurance Cases 61-519 Supreme Court of Victoria.

² [2006] VSCA 30.

³ [1995]128 ALR 163.

⁴ [2006] VCAT 1363 (11 July 2006).

“Section 128 — Immunity for building surveyor relying on certificate

(1) A municipal building surveyor or a private building surveyor, in carrying out a function under this Act or the regulations, may rely on a certificate by a registered building practitioner in a prescribed category or class of practitioners—

(a) that proposed building work of a prescribed class complies with any provision of this Act or the regulations; or

(b) that building work of a prescribed class complies with any provision of this Act or the regulations.

(2) A registered building practitioner must not give a certificate under subsection (1) in respect of building work unless the certificate states that the registered building practitioner has inspected that building work.”

Sections 128 and 238 operate so that a Building Surveyor is not liable for anything done or omitted to be done as required by the Building Act or Regulations if he relies in good faith on a certificate issued by a registered building practitioner (in the relevant prescribed category or class of practitioners).

Good Faith Test

Unfortunately there is no comprehensive test for statutory good faith under section 128. Further judicial consideration of this section is required for clarity. However, from the case law, a key consideration in determining whether the good faith test has been met is the compliance of the certificate, relied upon, with the legislation. Both **Toomey** and **Lawley** concerned a certificate of compliance under Form 14 and issued under Regulation 15.7(2) that must comply with Schedule 2 of the Building Regulations. The Tribunal held in both cases that the Form 14 certificate was not completed with sufficient detail in accordance with Schedule 2 for it to be a valid form.

In **Toomey** the Form 14 failed to describe the building work inspected and the Act, Regulations or Code complied with, and in **Lawley** the Form 14 did not state that the building work had been inspected. The Building Surveyor in both cases failed to prove their reliance upon such an invalid certificate was in good faith. It is clear if a Building Surveyor is relying on a certificate issued by another Registered Building Professional, in relation to a requirement under the legislation that a Building Surveyor is responsible for, he or she should closely check the certificate issued.

Proportional Liability Legislation

Section 131 of the Building Act 1993 had provided for the proportional allocation of damages if there was no personal injury or death whether the liability was due to a contractual relationship or from a duty of care owed to the plaintiff. In **Taitapanui** the Supreme Court found the Tribunal in applying section 131 was right to consider the obligations each defendant undertook, and to assess them against the major shortcomings in the design and construction of the building.

Many errors in construction occurred as well as errors in design and not all of the errors of construction came within the responsibility of the Private Building Surveyor.

The court upheld the Tribunal’s decision that the Builder and Building Surveyor had equal responsibility for the damages.

Contractual Obligations to the Client

Aside from statutory obligations, as discussed above, the duties of Building Surveyors to their

clients is also regulated by the contractual terms of engagement. Many of the terms within these contracts mirror the statutory obligations of Building Surveyors to all parties. It is recommended that Building Surveyors consider carefully whether any prescribed conduct within the terms of engagement required of the Building Surveyor fall outside those duties required under the Building Act and Regulations.

For example, inspections are required at mandatory notification stages and not at the end of progress payment periods or other periodic events, so a contractual clause requiring a Building Surveyor to conduct inspections for the purpose of issuing an occupancy permit would be in addition to the duties under the Building Act and Regulations.

If an inspection before issuing an occupancy permit is not conducted and a court later determines that a defect in the building would have been found at such a time if the Building Surveyor had conducted such an inspection, the Building Surveyor could be liable for breach of contract despite the inspection not being a statutory duty.

Conclusion

The civil liability of a Building Surveyor now clearly extends to subsequent owners. Any expectation of reliance on the indemnity in section 128 is heavily dependent upon the procedural rigour taken with the completion of the certificate being relied upon. In addition, contracts of engagement need to clearly reflect the legislation in defining the scope of the Building Surveyor's duty.

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