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STEPPING UP TO THE PLATE

When does a Council Building Surveyor assume risk regarding Building Act breaches?



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In recent times local government operatives have wondered about the risk to Council and its officers in relation to private building sites where visual faults become known to the officer.

Of particular relevance is section 212(1) of the **Building Act 1993** ("the Act"). This reads:

"Except where otherwise expressly provided in this Act or the building regulations, a council is responsible for the administration and enforcement of Parts 3, 4, 5, 7 and 8 and the building regulations in its municipal district."

Note, the relevant Parts referred to are as follows:

- Part 3 Building Permits
- Part 4 Inspection of Building Work
- Part 5 Occupation of Building and Places of Public Entertainment
- Part 7 Protection of Adjoining Property
- Part 8 Enforcement of Safety and Building Standards

The words "Except where otherwise expressly provided" in the relevant section, have real poignancy. This is so when we look at the fundamental philosophy behind the Act, which is the demarcation between private building surveyors ("PBS") and Council (or municipal) building surveyors ("MBS").

This demarcation should not be lost sight of. It includes the PBS assuming the mantle of enforcer just as much as the PBS may obtain the benefit of carrying out inspections and

issuing approvals. For example, section 115 of the Act provides that the PBS must refer a matter to the Building Commission if there is a failure of someone to comply with a Building Order, and must take no further action under Part 8. Section 115 does not state that the matter must or may be referred to the MBS.

It is the intention of parliament that the Building Commission take on the role of enforcement once a referral is made under section 115. There is no specific power for the Commission (or the PBS) to then send the problem to the local Council. Under the legislation the Commission cannot compel the MBS to act upon the referral.

Notably, under section 122 of the Act, the Minister has power to compel an MBS to take appropriate action where there is immediate danger to life and property. However, this is a different section of the Act, and it relates to the Minister.

Is there a duty of care at common law?

If the Council is made aware of a breach of the Act or Regulations, or of non-compliant or unsafe building work, then the Council will be "on notice" about the problems and arguably a duty of care arises. This will apply to problems arising within the Council's local area.

If the works relate to property under the jurisdiction of a private building surveyor, it may be a shared duty of care, because the Building Commission is the entity that under the legislation is the final "back stop" for the activities of a PBS.

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Any liability for the Council that arises from a failure to abide by this duty of care, does not arise because the Council refuses to follow directions to act from the Building Commission. The Commission, under the Act, cannot compel the Council to act on a section 115 referral.

The common law liability may only “crystallise” if, having been notified by the Commission, the MBS did nothing. The MBS should either notify its refusal or opposition to the Commission’s directive, or cause remedial work to be carried out. Obviously if the second option is adopted, the MBS should be sure that it is appropriate for the Council to assume that obligation, as it could be an onerous one, and may set a precedent whereby the same would be expected of Council in the future.

Whether a negligence claim could be brought against the Council would depend on the nature of the loss and damage, the proximity of the cause of it to anything that the Council did or failed to do, and whether it was foreseeable by the Council that loss would flow from an action or failure to act.

When should a Municipal Building Surveyor act?

Where a PBS is appointed, the PBS has exclusive jurisdiction to administer the enforcement obligations under Part 8 except for Emergency Orders and section 115 referrals. The former may only be issued by an MBS, and the referrals should be made to the Commission.

Note that a PBS is insured, so if he or she abdicates their duties the insurer may provide indemnity for loss or damage.

Either a property falls within the “umbrella” of the PBS responsibility or it is under the Council’s jurisdiction. To a degree, the ability of an MBS to interfere in the PBS’ role is limited to such matters as the issuing of Emergency Orders – if the facts suggest such an order is appropriate.

Importantly, if a matter pertaining to health and safety within the Council’s local area comes to the Council’s attention, then the Council duty under section 212 may then arise, because only the Council MBS can issue an Emergency Order.

No specific section under the Act permits an MBS to request or direct a PBS to take action, or to investigate

matters. However, the MBS can request an inquiry into the PBS’ conduct under section 179(c), if the PBS is not complying with the Act. In turn, this triggers the ability to refer the problem to the Building Commission under section 198. The Commission should then direct the PBS under the latter section.

If the MBS becomes aware of a PBS neglecting to apply the Act, serious consideration should be given by the MBS to referring the matter to the Commission for action under section 198 of the Act.

Below follows a brief summary of the type of orders or notices that are available under Part 8:

Part 8 Enforcement of Safety and Building Standards

This Part confers authority upon municipal building surveyors to make an Emergency Order, (ie under Division 1) and Building Notices and Building Orders (Division 2).

Emergency Orders

These are to be issued by the MBS if he or she is *of the opinion* that the order is necessary because of a danger to life or property arising out of the condition or use or proposed use of a building, the land on which building work is being or is proposed to be carried out or a place of public entertainment. An Emergency Order can only be issued by the MBS, a private building surveyor has no power to do so.

A risk assessment needs to be done by the MBS before determining an Emergency Order is necessary.

Building Notices

These are to be issued when there has been a contravention of a building permit or the Act or the building regulations in the opinion of a private or municipal building surveyor.

Building Orders

Section 111 Building orders – general

A private or municipal building surveyor may require the owner of a building, land on which building work is being or is proposed to be carried out or place of public

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entertainment to do either or both of the following things within a specified time or times—

- (i) evacuate the building, land or place;
- (ii) carry out building work, protection work or other work required by the regulations or to carry out a program of that work as directed in the order.

Section 112 Building Orders to stop building work

A private or municipal building surveyor may issue a building order that requires an owner or other person to stop building work.

Section 113 Building orders for minor works

A private or municipal building surveyor may make a building order requiring building work, protection work or other work required by the regulations to be carried out without first serving a building notice if the building surveyor is of the opinion that the work required to be carried out is of a minor nature.

Section 107 Actions by private building surveyors

A private building surveyor may only serve a building notice or make a building order under this Division in respect of a building, land or place in relation to which the private building surveyor is appointed to carry out a function under the Act.

Justin Cotton, Partner of Lovegrove & Lord has practiced in building and construction law since 2002, acting for builders, building surveyors and other construction professionals. His areas of expertise include Building Act regulatory advice and advocacy for building surveyors and owners including adjoining owners, building and construction litigation and contract advice, dispute resolution and mediation

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