LOVEGROVE solicitors

Seminar

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BEST PRACTICE TO AVOID THE BUILDING PRACTITIONERS BOARD

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This is a sequel to our last AIBS seminar that looked at how to defend misconduct complaints against building surveyors.

You will save on stress, time and legal fees if you introduce best practice at your office on a daily basis, rather than having to brief lawyers to defend complaints. This is very much *"the ambulance at the bottom of the cliff"*.

Some of the Inquiries against building surveyors can involve many allegations or charges. It is not uncommon to have over 20 allegations.

This can take up a lot of preparation time, drafting submissions and witness questions, and several days of hearing time.

Also, if at least some of the allegations are not contested or are found to be proven, you will need to pay some if not all of the prosecutor's legal costs.

Therefore it is definitely better to head a potential problem "off at the pass", rather than finding yourself at The Goods Shed before the Board.

Office Procedures

Many allegations can relate to administrative, office slip ups. However such slip ups can lead to more serious consequences, and the allegations can add up to a larger problem

Some potential cures:

- Introduce a Quality Assurance or Systems Manual, familiar to all staff;
- Employ a general manager who attends regular meetings with both technical and administrative staff;
- Have technical staff such as junior building surveyors checking Building Permit and other technical forms – otherwise the danger is if forms are computer generated then important details could be missed;
- Bring in a system, e.g. a MYOB system that records what documents have been sent from the office – on a Council by Council basis;
- Logging of all incoming mail, e.g. from Councils, owners, adjoining owners and date stamping this mail;
- Ensuring that date stamped mail is immediately forwarded to the correct department or person in the business;
- Having a dedicated day of the week when documents such as Building Permits, Building Notices are sent to Councils;

The BPB is extremely interested, at Inquiry Hearings, at what a Building Surveyor has done or is doing to improve their personal procedures to avoid administrative oversights.

In past cases, the Board members have asked detailed questions about QA/Systems manuals, though they are more impressed if it is demonstrated that the manual already exists, and its procedures are being followed.

Do you need to bite off more than you can chew?

In past cases we have argued that some of the allegations before the Board involve allegations of "omissions" that are not really the Building Surveyor's "look out".

For instance, responding to adjoining owner complaints. The extent of any duty to reply to such concerns is unclear.

Sometimes adjoining owners will even try to blame the Building Surveyor for building errors, even workers urinating in laneways. The Building Surveyor is not a "clerk of works" on-site constantly to police workmanship. And sanitary issues are more clearly a Council responsibility.

Lewis v Threadwell [2004] VCAT 547:

"*With respect to carrying out mandatory inspections and the issue of the Occupancy Permit, it is appropriate for an RBS to rely on the design practitioners and the builder or owner/builder to ensure that the building is constructed in accordance with the BCA."*

"It is also reasonable and common practice to rely on Certificates of Compliance in order to issue an Occupancy Permit."

It can be argued that there is no statutory duty owed by the RBS to the adjoining owner where Part 7 (Protection Works) of the *Building Act* is not involved.

Keller and Anor v City of Sandringham and Ors [1996] 1 VCR 356 (Supreme Court of Victoria)

This case involved a challenge to a Council building surveyor's decision to issue a Building Permit. It was held:

1. Examination of the *Building Act 1993* shows that the only right of participation or appeal an adjoining owner has is relation to protection works (Part 7);
2. For permits and dispensations, it is only the owner of the subject land in respect of which a permit or dispensation is sought, who may appeal.

While this can be argued at an Inquiry Hearing, we are finding that on "line ball" allegations (50/50 prospects of defending), the Board is quite willing to find the allegation proven.

This is largely due to the rather vague usage of *"unprofessional conduct"* as referred to in the legislation. A concise definition of the ingredients of "unprofessional conduct" is not to be found in the Act.

However, many of the allegations are pitched as a breach of the Regulation involving "unprofessional conduct" (section 179(1)(a)). This can include where it is alleged the RBS has failed to reply to adjoining owner concerns.

Contrast this with the detailed definition of what constitutes "unsatisfactory professional conduct" or "professional misconduct", as found in the *Building Professionals Act 2005* (in NSW).

Also, the definition of *"competent manner"* and *"to a professional standard"* (Regulation 1502 of the Regulations) is not given clear definition.

The upshot is that safe practice suggests that the RBS at least record incoming messages and letters from adjoining owners, and reply to them directly. It may not be enough to just pass on their concerns to the builder.

Best practice need not be draconian

It is stated in the Act that the RBS should not demand more of an applicant than is required by the legislation.

Often best practice simply means, if the direction given or the action taken is correct, that the RBS record it in writing. (section 37(4))

For example, if the RBS issues directions to the site owner or their builder to carry out certain works, if verbal it should be confirmed in writing as a written direction.

If a direction is not followed, issue a Building Notice or if needs be a Building Order. If the owner refuses to comply with a Building Order the matter can be referred to the Building Commission and it is no longer the RBS' responsibility. (section 115)

Often the RBS can become the "meat in the sandwich" in a poisonous relationship between owners/adjoining owners and a builder. As the regulatory 'gate keeper' (in effect), the RBS has to be careful in their role.

Sometimes an RBS can overburden themselves with too many Permits issued in a given year, creating a millstone of paperwork. A heavy workload in circumstances where they could charge more for their services.

Everyone else is doing it so why can't I?

A building surveyor company needs to be careful not to use unregistered building inspectors to carry out inspections. Though it may be happening, it is contrary to the legislation.

It will be no excuse to say it is happening elsewhere in the industry, if you are called before the BPB.

We are aware of a situation where a building surveyor and building inspector had been joined to a building defect dispute where foundation movement was alleged.

It appeared that the building inspector had not actually carried out the footing inspection himself, so while the building surveyor may have had an immunity based on the compliance certificate, there could have been a complication for the building inspector if the matter had not settled.

In another BPB case in Bendigo I appeared at in 2004, the RBS had assisted in designing an internal staircase he later approved.

When asked to comment the practitioner told the Board he considered it was unworkable that this be considered a "conflict of interest" as he was just trying to assist with a problem on site.

If in doubt as to the extent of your duties, don't be afraid to seek some brief legal advice (or more detailed if needed). This will be far less costly in the long run if later problems are avoided.

By Justin Cotton, Partner, Lovegrove Solicitors

For more advice on your rights and responsibilities, the conduct of responding to or defending misconduct inquiries, or regulatory advice, contact Lovegrove Solicitors (Kim Lovegrove or Justin Cotton) for prompt, expert assistance.

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