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TRENDS IN THE CIVIL LIABILITY OF BUILDING SURVEYORS

Introduction

The civil liability of Building Surveyors is an evolving field with the jurisprudence developing in VCAT. It has established a wider responsibility owed by Building Surveyors to owners and others than may previously have been envisaged upon the privatisation of the profession.

Duty of Care

Who Owes the Duty

Under the Building Act 1993 (Vic) only a natural person may apply to be a registered building practitioner.

As you may know a Building Surveyor Company is joint and severally liable for the acts or omissions of a person registered as a Building Surveyor, employed by the company, and can be brought into a proceeding as a second defendant.

However a person registered as a Building Surveyor and a Building Surveyor Company are also liable for the failure of building inspectors they sub-contract to properly conduct inspections of building work.

The seminal case in this area is the VCAT decision *Toomey v Scolaro's*

Concrete Constructions Pty Ltd (In Liquidation) and Others 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 Building Surveyor Company, Building Surveyor and the Building Inspector were all defendants in the proceedings along with the Builder, Project Manager, Architect and two of the man's friends who were skylarking with him at the time of the accident. All defendants were held liable and each was apportioned a percentage of the plaintiff's damages according to section 24 of the Wrongs Act 1958.

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.

Duty to Whom — owner and subsequent owner

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. However the law has

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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* 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."

The Nature of the Duty

In *Moorabool Shire Council & Anor v Taitapanui*, Victorian Supreme Court, Smith J applied the majority reasoning in *Bryan v Maloney*, 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*, 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]."

Young went on:

"I consider that the professional obligations required of a building surveyor are those set out in provisions of the BA and BR".

The starting point then for determining what duty a building surveyor owes is section 76 of the Building Act 1993 which determines the functions of private building surveyors to include any or all of the following -

- (a) the issuing of building permits;
- (b) the carrying out of inspections of buildings and building work under Part 4;
- (c) the issuing of occupancy permits and temporary approvals under Part 5.

From here the requirements of issuing building permits, inspecting buildings and building works, and issuing occupancy permits under the legislation set the boundaries of the Building Surveyors duty.

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.



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“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

Proportional liability is when a court or tribunal in a matter concerning more than one defendant orders the damages that a defendant must pay is that which is just and equitable having regard to the extent of that defendant's responsibility for the loss or damage caused by its breach of contract or duty. That is the damages to be paid by a defendant are in proportion to the total amount of damages owed by all defendants according to the culpability and responsibility of each defendant.

The Legislation

Section 131 of the Building Act 1993 had



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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.

On 1 January 2004 the *Wrongs Act 1958* was amended adding Part IVAA and repealing section 131 of the *Building Act 1993*.

“Section 24AF — Application of Part

This Part applies to—

- (a) a claim for economic loss or damage to property in an action for damages (whether in tort, in contract, under statute or otherwise) arising from a failure to take reasonable care; and
- (b) a claim for damages for a contravention of section 9 of the Fair Trading Act 1999.”

Section 24AI — Proportionate Liability for Apportionable Claims

(1) In any proceeding involving an apportionable claim —

- (a) the liability of a defendant who is a concurrent wrongdoer in relation to that

claim is limited to an amount reflecting that proportion of the loss or damage claimed that the court considers just having regard to the extent of the defendant's responsibility for the loss or damage; and

- (b) judgment must not be given against the defendant for more than that amount in relation to that claim.

The drafting of section 24AF (a) results in the proportionate liability regime being limited to claims for damages based on negligence and misleading and deceptive conduct.

All other damages will be determined on a joint and severable liability basis, leaving the defendant with the most money to bear the burden of the order to pay damages whatever its level of responsibility or culpability.

Application of Proportionate Liability to Building Surveyors

In *Lawley v Terrace Designs* the Tribunal applied Part IVAA. In that case the claims against the Building Surveyor and Architectural Draftsman were found to be apportionable as they arose out of a failure of each to take reasonable care.

The Tribunal first categorised the damage caused and then considered the degree of responsibility each the Builder, Architectural Draftsman and Building Surveyor had in causing the damage.

The Tribunal found the Building Surveyor had contributed 30% to the damage caused by the lack of masonry control joints and the unsatisfactory construction of the joint the Builder did install from the Building Inspector's failure to inspect such items at the mandatory final inspection stage. The Builder was found to be 50% and the Architectural Draftsman 20%

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responsible for that category of damage.

The Building Surveyor was also found 40% responsible for the lack of sub-floor ventilation, such ventilation required by the BCA and Building Regulations. The deficiency had been found to have encouraged and caused termite infestation. The remaining 60% of damages for this category of damage was assessed to the Builder.

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.

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A Building Surveyor should be looking to ensure the parameters of his or her duty are clear under the contract with the client and include only those acts that flow from the statutory duties.

In addition to prescriptive clauses which set requirements on the work to be undertaken it is common for such contracts to include terms which set the general standard of work expected of the Building Surveyor, such as to:

- conduct work in a “professional manner”; or
- “exercise reasonable skill and care and diligence”.

Such standard of work contractual clauses are likely to be interpreted in light of the standard required under the Building Act and Regulations and as such should not create a higher standard than the statutory standard.

However it would be prudent, for example, to use the wording of Regulation 15.2, “a registered building practitioner must perform his or her work as a building practitioner in a competent manner and to a professional standard”, and state the interpretation of the clause is to be the same as the Building Regulations.

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.