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Avoiding the liability web: VCAT examines the extent of a Building Surveyor's duties

These days the liability net can be cast far and wide in defective building cases, as was shown in the recent VCAT decisions of *Lawley v Terrace Designs Pty Ltd* [Domestic Building] VCAT 1363 (11 July 2006) and *Baines v Terrace Designs Pty Ltd* [Domestic Building] VCAT 1363 (11 July 2006).

These cases involved the joinder of various building practitioners in two VCAT actions for defective building work in two adjoining dwellings. The Respondents to the claim included the Builder, the Architectural Draftsman, and the Building Surveyor. Several elements concerning the obligations and extent of the duties of a Building Surveyor were examined in the course of the decisions.

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The Building Surveyor was joined to the VCAT proceedings by the Architectural Draftsman, who claimed the Building Surveyor (“the RBS”) breached his duty to the owners in several areas including:

- Failure to properly inspect the footings which allowed the footings to be excavated too shallow
- Failure to ensure there was adequate articulation of the masonry walls by the installation of sufficient and properly installed masonry control joints
- Failure to ensure there was adequate subfloor ventilation
- Reliance upon a Form 14 that was defective because it did not have sufficient notes detailing each inspection, and because the Form did not satisfy the requirements of a Form 14 as set out in the Building Regulations (“BR”)

Expert evidence was critical in aiding the Tribunal to find the RBS partially liable for the Owners’ claim. It was submitted by one expert that the RBS or the Building Inspector should have noted the lack of depth of concrete at the footing inspection, and checked that the bearing capacity of the soil was not less than 150 kpa. The expert also considered that the RBS should check that a Form 13 from the engineer is correct rather than automatically accepting the Form 13.

While Member Young of the Tribunal rejected the notion that a building surveyor was subject to the statutory warranties in s8 of the DBCA, he did consider that the RBS must carry out the duties enshrined in the Building Act (“BA”) and the BR. It is not a general or supervisory role, rather it is a checking and inspection role. The BA and the BR set out the boundaries of the RBS’ obligations, or the legislative requirements.

In regard to the footings, the Tribunal ruled that the RBS is not required to be on site to ensure that the actual construction of the footings is done correctly. However, he/she is required to inspect the footing excavation, ensure that the positioning and dimensions are correct, and that any required reinforcement is in place. This is the mandatory inspection required by the legislation, to ensure that the footings as depicted in drawing and specifications meet the legislative requirements.

Even if a court or tribunal considers that the BR should prescribe further requirements on an RBS (eg to attend at construction), Member Young stated it was not for the court or tribunal to superimpose its view for that of the legislature.

Good faith reliance

The RBS argued at Hearing that he was entitled to rely on a Form 14 provided to him by the Building Inspector, pursuant to the ‘good faith reliance’ provisions in sections 128 and 238 of the BA. There were however certain discrepancies in the Form 14 issued, as conceded by an expert witness who appeared for the RBS. The words “has been inspected by me” were missing from the Form 14, and there were no inspection notes accompanying the Form 14 that described the inspections carried out by the Building Inspector.

Member Young considered the Form 14 was not valid, primarily because it did not comply with the requirements for such a form as set out in schedule 2 of the BR, and so a “good faith reliance” defence was not available. Liability for deficient inspections was carried over from the Building Inspector, moving up the chain to the RBS.

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Further, it was held by the Tribunal, that upon completion of the works it should have been obvious from an inspection of the external walls that there were insufficient masonry control joints, and many of them had not been well constructed. The RBS “via the Building Inspector” should have recognised the deficiencies and refused to issue an Occupancy Permit following the final inspection. Further, the Tribunal found that the failure to insist upon satisfactory control joints was a significant factor contributing to the failure of the dwellings. As a result, the RBS was held to be liable in the amount of 30% for this category of defect, with 20% apportioned to the Architectural Draftsman and 50% to the Builder. The high apportionment to the RBS was due to a “serious failure of his professional duty”.

Sub floor ventilation

A further claim by the Owners was that there was insufficient sub-floor ventilation at the time the RBS issued an Occupancy Permit. As the RBS was not able to rely on the Inspector’s Form 14, the Tribunal found that an inspection of the external walls prior to issuing the Occupancy Permit should have noted that the use, number and location of perpendes was inadequate for sub-floor ventilation. The RBS was held to be liable for 40% of this defect occasioned by poor sub-floor ventilation and termite infestation.

This case provides guidance as to the extent of an RBS’ duties. The extent of the duties is governed by the Building Act and Regulations. There is a tight checking and inspection regime that is required to be followed, and the often cited case of *Toomey v Scolaro’s Concrete Constructions Pty Ltd (No.2)* [2000] VSC 279 demonstrates that such professional duty may involve “condescending to the minutiae” to ensure technical compliance. This does not however entail general supervision by a RBS to ensure that actual construction occurs correctly.

Of further note, the good faith immunity protection, for reliance on compliance certificates issued by Building Inspectors, will not arise if there are serious defects in a compliance certificate that should have put a Building Surveyor on notice.

This article contains general information and should not be acted upon without specific professional advice based on your own circumstances.

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Justin Cotton has practiced in building and construction law since 2002, acting for owners, builders, building surveyors and other construction professionals. His areas of expertise include representation of building surveyors facing misconduct charges in Victoria and NSW, and building and construction litigation and contract advice for builders and owners. Rigby Cooke Lawyers provide legal advice to Building Surveyors and offers advice on statutory and contractual requirements, as well as on complaints and contractual issues.
