

# You've Got the Wrong Guy! How Far Does a Builder's Liability Extend?

## To what extent will a builder be 'in the gun' for following a defective design, or for design errors?

In the VCAT case of *Thurston v Campbell* [2007] VCAT 340, Senior Member Lothian had to decide:

- Were the building works defective, and if so
- What was the primary cause of any defect and who was liable?

The owners' claim concerned a leaking roof affecting two residential units. Member Lothian accepted evidence that the roof tiles had leaked causing internal damage to the units. Was, however, the Respondent builder liable for the cost of replacement of the roof tiles?

Expert opinion was that a plain tile roof should not normally be pitched at less than 35 degrees. The roof as constructed was pitched at 30 degrees. Member Lothian concluded there was a design failure.

*Bryan v Maloney* is a decision of the High Court of Australia that confirms a duty to take reasonable care extends from the original builder to the current

owner of a house. Does, however, a builder bear responsibility for someone else's defective design?

Member Lothian said if it were simply a case of the builder constructing the dwelling to plans provided by the owners, there would be "no hesitation in finding" the builder was not liable for the design failure. However, in this case it was uncertain what degree of responsibility the builder had.

The original contract drawings and specifications were prepared by an architect. Member Lothian considered the architect was "probably engaged either by the Respondent [i.e. the builder] or by a group including him."

The Tribunal held that the owners had failed to show the builder was responsible for the design of the roof, even though at times the builder had attempted rectification.

Despite the Tribunal accepting the owners' evidence that a defect existed at the units, it was

held that responsibility did not lie at the feet of the builder. As the owners had not joined the Architect to the proceeding, they could not recover compensation for the rectification costs.

Builders should ensure that if there are defective works attributable to a faulty design, the relevant parties are joined to any VCAT proceedings in which the builder is involved to ensure apportionment of responsibility and liability.

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