

ARE PRIVATE BUILDING SURVEYORS BECOMING THE DE FACTO GUARANTOR FOR THE SHODDY WORKS OF THE BUILDER? IS THAT WHAT THE BUILDING ACT (VIC) INTENDED?

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PBS REGULARLY JOINED TO CLAIMS FOR DEFECTIVE BUILDING WORKS BY OWNER

A recent decision of the Victorian Civil and Administrative Tribunal (VCAT) illustrates the problem for private building surveyors (PBS) and their professional indemnity insurers when owners complain of defective building works.

Defects are commonly seen as the responsibility of the builder, or another building professional associated with the project. VCAT hears most domestic building claims in Victoria.

A PBS is regularly joined to a claim for defective building works by owners. It comes as a surprise to many a PBS that they could be held liable for some defects, when they see the legislative framework establishing their role as imposing important, yet narrow duties on them. They often see their role as quite a limited one, when contrasted with the main players in a building project. However, judgments have made it clear that the PBS is seen as having an important role as a 'gatekeeper' in the building industry, to enforce minimum standards and practices.

PBS LIABLE FOR INADEQUATELY PITCHED ROOF ON RESIDENTIAL UNITS

In *Jacobi & Ors v Motalli & Anor (Domestic Building)* [2012] VCAT 659, Member Walker decided that a PBS was indeed liable to the owners of adjoining residential units in suburban Melbourne, despite the fact that the defect complained of was principally the fault of the builder.

The defect was the corrugated iron roof was constructed with a pitch of less than one degree, when a minimum of five degrees was required. An inadequately pitched roof caused to insufficient run off and water penetration to the units.

By way of background, in Victoria, before construction may commence a building permit must be issued by a council building surveyor or the private equivalent, the PBS. A PBS must review the submitted application, plans and drawings to satisfy himself that the building will be built in accordance with the *Building Act 1993*, its Regulations, the Building Code of Australia (BCA) and any other relevant building standard.

REGIME OF INSPECTIONS BY PBS DESIGNED TO ENSURE COMPLIANCE WITH BUILDING ACT AND BCA

The social intent is obvious from the framework of the legislation, which exists to ensure that buildings are constructed to a minimum standard and that they meet health, safety and amenity requirements, and in the domestic field, to offer some degree of consumer protection.

Once the permit has been issued, the PBS must conduct mandatory building inspections throughout the life of the project, generally described as a footing, frame and final, in this sequence. Other non mandatory inspections may be carried out.

Once the construction is complete, the PBS undertakes a final inspection and issues a Occupancy Permit or Certificate of Final Inspection. Both certificates generally certify that the building has been completed in compliance with the approved drawings, the Act, Regulations and the BCA and is fit for occupation.

PBS CAN BE BLAMED FOR BOTH OBVIOUS AND COMPLEX DEFECTS

A PBS was commonly joined as a defendant to a proceeding when there was a substantial defect that quite obviously should have been picked up, for example, during a mandatory inspection.

Defective foundations are a good example. Foundation movement can be caused by defective footings, the inadequate preparation of which may have been detected by the PBS by mandatory inspection. More recently much more complex and less obvious defects have been laid at the feet of the PBS.

When defects are discovered in a completed building project, the PBS is criticised for approving plans that show insufficient detail, including methods and materials for construction (areas traditionally left to the discretion of the builder and designers).

PBS CAN BE CRITICISED FOR NOT IDENTIFYING DEFECTS DURING INSPECTIONS

For the inspection phase, the PBS is criticised for failing to pick up defects in construction, many of which may be difficult to identify when undertaking inspections. On completion, the PBS may be criticised for issuing the Occupancy Permit or Certificate of Final Inspection when the building is not free of defects.

In the latter two examples, the defects are predominantly the responsibility of the builder and its subcontractors, but a PBS is sometimes seen as an easier or additional target to that of a more conventional claim against the builder.

Even more alarming is the practice of some claimants not pursuing the builder at all, only the PBS—leaving the PBS to join liable parties to the litigation. (The advent of proportionate liability in Victoria means apportionment under the legislation can only be achieved if a concurrent wrongdoer is made a party to the proceeding).

This is only encouraged by the frustratingly limited rights of recovery that a domestic building

owner has against the builder through the Home Owners Warranty insurance scheme in Victoria.

PBS MUST ENSURE THAT PROPOSED DESIGN COMPLIES WITH BCA

In *Jacobi*, Member Walker stated that a PBS does not and cannot have a duty to guarantee that a building is free of all defects, but went on to highlight the areas of exposure for a PBS. A PBS should not issue an Occupancy Permit if the proposed design does not comply with the BCA. The PBS must carry out the mandatory inspections in a competent manner.

The failure to detect that the roof was constructed with inadequate fall was found to be a careless inspection. The PBS was liable, along with the builder. The inadequate fall of the roof was not a concealed defect. As such, it should have been detected by the PBS when carrying out his inspections.

Finally, in issuing the Occupancy Certificate, the PBS was representing that the inspections had been undertaken in a competent manner and that the building complied with the BCA. Owners, including subsequent owners, were entitled to rely on those representations when purchasing the dwelling.

ROLE OF PBS IN SETTING AND MAINTAINING BUILDING STANDARDS

In *Jacobi*, following a brief review of the legislative framework and earlier decisions, Member Walker observed that the power and obligation to inspect meant a PBS played an important role in setting and maintaining building standards.

Private building surveyors (PBS) seen as easier target for claims than the builder ... In recent times increasingly complex and less obvious building defects have been the subject of claims against private building surveyors. Some claimants are not pursuing the builder at all, only the PBS, leaving the PBS to join liable parties to the litigation.

However, we observe the BCA is a detailed Code and that building projects, with their alternative methods of construction, are complex. The extent to which a PBS must descend into the minutia of the construction remains unclear. The BCA may be silent on some issue, or the builder may seek to comply with it by an alternative method, a process the BCA recognises. Australian Standards are also relevant.

MINIMUM STANDARDS SET OUT IN BUILDING ACT AND BUILDING CODE OF AUSTRALIA

Perhaps some answers to this issue might be found in earlier tribunal decisions, including *Lewis v Threadwell* [2004] VCAT 547. In that decision, Member Davis said it would be wrong to burden a PBS with issues in respect to design, supervision or workmanship, (the preserve of builders, architects and draftspersons) except insofar as they relate to the *Building Act* and the BCA. The duty of the PBS is to set minimum standards.

So, we suggest the 'minimum' standards which the PBS must maintain are likely to be those essentially codified by the Act and the BCA. Matters which are outside the scope of the *Building Act* and the BCA, for example, methods of construction or materials to be used, should perhaps not be the concern of the PBS.

WHEN IS A DEFECT CONCEALED AND WHEN IS IT OBVIOUS?

Lewis also considered the liability of a PBS as it related to multiple defects, some said to be obvious and others hidden, principally at the frame inspection stage. The problem of defects which are obvious on inspection and those that are not remains an issue for a PBS. What is a concealed defect that will not be the responsibility of the PBS?

Depending on the time of an inspection, some defects may be apparent on close scrutiny, but subsequently concealed by further work. For example, a failure to fix external cladding with appropriate fasteners may be a defect readily apparent to a PBS on inspection, if he attends the site when the cladding is exposed, but a concealed defect if he attends later, when the cladding is rendered and the fixing method hidden.

PRIVATE BUILDING SURVEYORS MUST KEEP DETAILED RECORDS OF INSPECTIONS

Are not the owners and the PBS at the mercy of the builder for recovery and liability purposes, because their liability may depend on whether the PBS was called out to inspect at a particular stage of construction?

In some scenarios, the owner is unlikely to have a claim against a PBS if they could not be said to have reasonably been on site when the offending defect was exposed and readily apparent. (As an aside, a problem for a PBS is they may not record sufficient detail of their inspections as to the state of construction on any given day, so giving an account years later of what they inspected is difficult. We encourage private building surveyors to improve their recording).

PBS CAN BE LIABLE FOR CONSTRUCTION WORK WHICH DOES NOT MEET MINIMUM STANDARDS

We think it likely that where a defect that related to a minimum standard set by the BCA was not detected on a mandatory inspection, the PBS will have an exposure, because such mandatory inspections are fundamental to the basic stages of construction contemplated by the Act, and the PBS should have

satisfied himself that that stage of construction met the standard, notwithstanding that the defect may have been concealed at the time of his inspection.

This perhaps would only relate to core requirements of construction, not peripheral, non-structural issues. However, the converse is likely to be that for a hidden defect on a non-mandatory inspection, the PBS should not be liable.

TREND TO FIND PRIVATE BUILDING INSPECTORS LIABLE IS DISTURBING FOR INSURERS

In conclusion, *Jacobi* simply highlights one of the areas of exposure a PBS faces in the modern construction environment. The extent to which a PBS will be liable for the minutia of defects sometimes encountered on a project will require further determination, but the judicial guidance so far is unsettling news for private building surveyors and their insurers.

So as to the question posed in the title—the answer is yes. The PBS is becoming a de facto guarantor of shoddy builders. This might not have been what the *Building Act* intended but it is the practical result.

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