

The Year in Review: Construction Litigation – balconies not holding water, Owners Corp disputes up and change afoot with the regulators

By Justin Cotton, partner and head of practitioner advocacy

The 2012 year has been one of variety and contrasts once again. Misconduct defence work was strong for us in the first half of the year, commencing for the writer with an appearance on behalf of a building surveyor in regard to swimming pool fencing – and examining the level of detail required with the plans accompanying a building permit. This has been a vexed problem for the industry, with some building surveyors saying the practice notes from the Building Commission have been inadequate and in some cases internally contradictory. However, and rightly so, it is a problem that remains front and centre in the minds of those at the Commission. It was the first industry problem mentioned by the Commissioner at the HIA breakfast around August; the number of building permits concerning swimming pool construction where the pool contractor has not been responsible for the fencing, and the multitude of recalcitrant owners reluctant to do the right thing.

Construction disputation has been up in the domestic building sphere, even while ‘new starts’ in the domestic market have fallen from the highs prior to 2008. As a result it has been a busy year at VCAT and that has included many appearances for us at Lovegrove Solicitors in the domestic building list. We have appeared for Builders and Owners alike in this jurisdiction in 2012, with a number of matters continuing into 2013. The draught is well and truly over, and the common defects that once were shrinkage cracks and footings movement, are now more heavily focussed on water leaks and in particular leaking balconies.

The writer has been engaged in more than one “high end” residential building dispute on behalf of private owners. These have been architect administered ABIC contracts where there have been issues with architectural design (in two of the instances) and another matter where the Builder became insolvent and a claim was required to a warranty insurer, in circumstances where the works were more properly described as incomplete rather than defective. This is perhaps reflective that, unfortunately, there have been a number of insolvencies in the building industry in 2012.

Also indicative of that is a couple of matters we have encountered, where subcontractors are owed monies from a Builder who has gone into insolvency, and although they have been paid some or even most of the debt, at a later time the liquidator of an insolvent Builder comes to ‘have a crack’ at the subbie, wanting repayment of monies that have allegedly been demanded when the Builder was insolvent. Of course the subcontractor has iterated that they had no knowledge of such insolvency, they just wanted to be paid, and we have helped draft letters back to the liquidators pointing out (in a diplomatic and more legalistic way) that this is a bit like “robbing Paul to pay Paul”.

Commercial construction is faring better in Victoria in 2012 but is still not fantastic, and construction litigation has also been busy for us. There have been disputes under the security of payment legislation and seemingly a greater awareness in the fraternity of one’s rights and obligations under the *Building and Construction Industry Security of Payment Act 2002*. Perhaps in 2013 it will not be as easy as it once was to utilise the guillotine date where a party has failed to supply a payment schedule within the 10 business days following a payment claim under the Act. We consider it likely that commercial construction litigation will remain strong in 2013, and that there could be a growing use of adjudication and court action under the security of payment laws.

There have been a multitude of adjoining owner disputes, particularly in the second half of the year, involving such matters as disputes over protection works (though in fairness this has been a regular point of litigation over the last

few years), adverse possession claims and negotiations over common fencing. Such matters can be drawn out and angst ridden affairs, best settled by common sense negotiation and the quick agreement over a deed of settlement.

This year we have also had more involvement with disputes involving building defects at Owners Corporation developments. This has related to small scale disputes between owners within a development (and often involving balcony leaks), but also a large matter we have become involved with in the ACT where we have been engaged by an Executive Committee on behalf of the Owners Corporation. It is noted that the Territory regulator (ie the government) is responsible for approving a Certificate of Occupancy in the ACT, and in doing so the laws state that the regulator only 'may have regard to' certificates of inspection from certifiers. Marvin Gaye heard it through the grapevine, and the ACT grapevine is telling us that building defect claims could be up in 2013 in the ACT. As more and more people are living in Owners Corporation residential apartments, we expect these types of claims to be up also.

Finally, as we all know there has been some less than favourable press coverage of the Victorian industry in 2012, and there are big changes afoot at the Building Commission. In summary, the regulator will soon no longer be the Building Commission and it will be replaced by the Victorian Building Authority (VBA). This body will take over regulatory appeals and practitioner misconduct investigation and hearings. One point of controversy in this has been that Architects for the first time will be subject to the same misconduct investigation regime as other construction practitioners.

So in summary 2012 has been an interesting and never dull year in construction litigation, as we all now rest up and take stock. We wish you all the very best for yourselves and families over Christmas and a safe and prosperous new year.

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