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QUEENSLAND MASTER BUILDERS

INSTITUTE OF BUILDING CONSULTANTS

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BRISBANE

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Certifier's case study

gleaned from 9 Tribunal decisions identified below

From reading all these decisions it is evident that certifiers have a very difficult task under legislation and codes including:

- The Building Act 1975
- The Integrated Planning Act 1997
- The Building Code of Australia
- The Standard Building Regulations
- Various Australian Standards
- The Code of Conduct

Please note this presentation is not to be taken as the provision of legal advice by Lenz Moreton or the presenter and the reader accepts that it is not relying upon this presentation as being given as legal advice



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Cases looked at

- *QBSA v Chandra* [2009] CCT QD035-05
- *Leung v QBSA* [2009] CCT CR009-08
- *Morley v QBSA* [2007] CCT CR002-07
- *QBSA v JH Nelson* [2007] CCT CD001-06
- *John Cleary v QBSA and Bowcock* [2006] CCT C001-05
- *Rust v QBSA* [2009] CCT CR001-08 & CR006-07
- *Ogle & Moreton Bay Regional Council v QBSA* [2009] CCT CR002-09
- *Schwede v QBSA & Kennedy* [2009] CCT CR009-07
- *Cassar v QBSA* [2009] CCT CR020-07

Unsatisfactory conduct upheld by Tribunal in one case selected, but what could you have done in that circumstance to limit:
(1) liability to contractor;
(2) liability to owner; &
(3) exposure to the Council and the BSA?



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Facts

Application to be assessed

- A shade structure contractor sought development approval for a shade structure over an existing pool (and marked on site plan a *Proposed Pool enclosure*)
- The structure was to take the place of the pool fence on three sides of the pool
- On the fourth side of the pool, the pool was adjacent to a home patio area, and one wall of the house
- No existing pool fence was shown on site plan

What certifier was to do

- Assess the application

What the certifier did

- Assessed the application without any conditions of approval, that any other development permits required [*Integrated Planning Act 1997 s3.5.15(2)(h)*]
- Issued a final Inspection Certificate stating the a DA now required for pool fencing

The problem

- Australian Standards identified how walls could meet pool fencing requirements
- The windows of the house on the fourth side of the pool needed to satisfy requirements
- There was no pool fence between the pool and the patio area
- Council wrote to certifier to address non complying pool fencing, and certifier wrote back saying it was not his responsibility
- Counsel also said that certifier should have taken enforcement action



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Certifier said that:

- The application was for an enclosure only, without any pool shown on the plans
- He could not assume when assessing the application about a pool, but could only assess the information given
- He advised owner that a separate application was to be lodged when he finally certified the enclosure work

Council complained to the BSA that:

- Certifier should have addressed the non compliance
- Certifier should have taken enforcement action

There is nothing in the case about the contractor and the owner's complaints, but let us consider how to protect against their possible actions



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Certifier's protection against Contractor

What claims would the contractor have?



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Certifier's protection against Contractor

Contract

- terms to include exclusion from liability for damages, including those for negligence? [Note however, if you are a company, s64 of the *Trade Practices Act 1974* may not allow such an exclusion against a *consumer*] Contractor is not a *consumer* because it is on selling
- terms to stipulate the precise nature of the service being provided, such that all information must be provided for service
- terms to exclude consequential losses suffered by Contractor

Insurance

- Insurance for professional negligence
- Ensure that you comply strictly with the policy and your duty of utmost good faith
- Advise immediately of a possible claim to preserve your right to claim



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Certifier's protection against Owner

What claims would the owner have?



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Certifier's protection against Owner

Contract - in this case no contract with owner, BUT IF THERE IS

- terms to include exclusion from liability for damages, including those for negligence? [Note however, if you are a company, s64 of the *Trade Practices Act 1974* may not allow such an exclusion against a *consumer*]
- terms to stipulate the precise nature of the service being provided, such that all information must be provided for service
- terms to exclude consequential losses suffered by Owner

Owner's claim for negligence – rely upon Insurance policy

- Insurance for professional negligence
- Ensure that you comply strictly with the policy and your duty of utmost good faith
- Advise immediately of a possible claim to preserve your right to claim



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Certifier's protection against the Council & QBSA

Council

- Address the non compliance
- Take steps suggested by the Council, unless very good reasons for not doing so

QBSA

- Respond in a timely fashion to correspondence from the QBSA
- If you want to challenge their decision, make sure you have satisfactory reasons for doing so, and be prepared to do the hard yards to ensure you have all the evidence you need – i.e. Use you solicitor and engage a barrister (if necessary)

In fairness in this case, the certifier was in a dilemma, because he missed the pool fencing and then was required take enforcement proceedings for his mistake!!