

CASE NOTE - ROBERTS V GOODWIN STREET DEVELOPMENTS PTY LTD 2023 NSWCA 5

A recent NSW Court of Appeal decision¹ held that the retrospective statutory duty of care under the *Design and Building Practitioners Act 2020 (NSW)* (the 'DBPA') extends beyond class 2 residential buildings, to all buildings as defined in the *Environment Planning and Assessment Act 1979 (NSW)* (the 'EPAA'). This significantly broadens the application of the DBPA. Construction companies should ensure that their insurance is adequate to cover their potential exposure.

Background

Goodwin Street Developments Pty Ltd ('**Goodwin**') entered into a building contract with DSD Builders Pty Ltd (**DSD**) to construct three boarding houses for student accommodation at the University of Newcastle.

The relationship soured and, after a site meeting involving the directors of Goodwin and Mr Roberts, Goodwin issued a notice to DSD threatening termination of the building contract if the defaults were not remedied within ten working days. DSD performed no further work at the site beyond 2 March 2018, and the primary judge found that Mr Roberts had entered onto the Property to cause substantial damage to the building works in a malicious manner.

Proceedings were commenced by Goodwin against DSD (in liquidation), with Mr Roberts joined as a second defendant. Goodwin alleged that Mr Roberts had breached his statutory duty of care under s 37 of the DBPA. At first instance, Stevenson J of the NSW Supreme Court decided that the statutory duty was not restricted to the class 2 residential buildings prescribed under s 4 of the DBPA, and that the definition of "building" under the EPAA applied.²

Mr Roberts appealed on the ground, *inter alia*, that the primary judge wrongly construed the definition of "building work", such that the definition under s4(1) applied, thus excluding boarding homes from the scope of the statutory duty.

The interpreted provisions

The relevant provisions read as follows:

37 (1) A person who carries out construction work has a duty to exercise reasonable care to avoid economic loss caused by defects—

(a) in or related to a building for which the work is done, and

(b) arising from the construction work.

36(1) "construction work" means any of the following--

(a) building work

"building work" includes residential building work within the meaning of the Home Building Act 1989

"building" has the same meaning as it has in the Environmental Planning and Assessment Act 1979.

4 Building work

(1) For the purposes of this Act, building work means work involved in, or involved in coordinating or supervising work involved in, one or more of the following—

¹ *Roberts v Goodwin Street Developments Pty Ltd* [2023] NSWCA 5

² At [101].

(a) the construction of a building of a class or type prescribed by the regulations for the purposes of this definition...

Clause 12 of the regulations provides as follows:

12 Prescribed classes or types of building—building work

For the purposes of section 4(1) of the Act, definition of building work, a building is prescribed if the building, or a part of the building, is a class 2 building.

Issue

Did the more prescriptive definition of 'building work' in s4(1) apply to limit the inclusive definition of 'building work' in s36(1)?

The Court noted there were three possible constructions:

1. The s4(1) definition of 'building work' applied exhaustively to s37;
2. The s4(1) definition had no application to the statutory duty; and,
3. The definition of "building" in s 4(1) applied to the meaning of 'building work' in s36(1) in relation to identifying the type of work undertaken, but the type of 'building' was properly addressed by the definition of 'building' under s36(1).

Decision

The decision of the primary judge was upheld. The Court found that the third construction was correct, such that the narrow s 4(1) definition of 'building work' applied in relation to the s 36(1) definition insofar as it identified the type of work undertaken. However the types of buildings were properly construed by the definition of 'building' under s36(1), which refers to the meaning under the EPAA.

S1.4(1) of the EPAA provides the following broad definition of 'building':

part of a building, and also includes any structure or part of a structure (including any temporary structure or part of a temporary structure), but does not include a manufactured home, moveable dwelling or associated structure within the meaning of the Local Government Act 1993.

The appeal was dismissed because the boarding houses fell within this definition of 'building'.

Key take-aways for policyholders

Following this decision, any person who undertakes building work upon a 'building' which falls under the broad definition of the EPAA owes a duty to both current and subsequent owners of the building to take reasonable care to avoid economic loss caused by defects. The duty is retrospective in operation, such that claims can be made for economic loss where the defects were first noticed within a period of 10 years prior to the DBPA duty of care provisions (from 11 June 2020), or after.

Policyholders involved in constructing any buildings falling within this broad definition must ensure that their professional indemnity insurance covers claims for a breach of the statutory duty under the DBPA covering this retrospective period.

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