

# SUPREME COURT OF NSW CLARIFIES THE NATURE AND EXTENT OF THE DUTY OF CARE OWED BY BUILDING PRACTITIONERS: WHAT YOU NEED TO KNOW

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Legal Briefings - By **Michael Lake and Katherine London**

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The *Design and Building Practitioners Act 2020* (NSW) (**DBP Act**) commenced just over two years ago. A significant feature of the DBP Act is the statutory duty of care it created, which provides that persons who carry out construction work have a duty to exercise reasonable care to avoid economic loss to owners and subsequent owners caused by defects.

Remarkably, the duty of care has retrospective effect, applying to economic losses which became apparent within 10 years immediately before the DBP Act commenced (subject to relevant limitation periods).

The Supreme Court of NSW has considered the duty of care under the DBP Act in a few recent cases, helping to clarify the nature and extent of it.

## WHAT THIS MEANS FOR YOU

Any case concerning an alleged breach of duty will turn heavily on its facts. However, the cases below clarify the duty's wide application, confirming it applies to a broad range of buildings (including both residential and commercial buildings), and to a broad range of building practitioners, including beyond the corporate entities engaged to do the work.

The key takeaways from the cases addressed below are as follows:

1. The duty of care applies to 'construction work' (which includes design work, project management and supervision) on a 'building' broadly defined by the *Environmental Planning and Assessment Act 1979* (NSW) (**EPAA**), and not just class 2 (residential multi-story) buildings. See section 1 below.
2. The duty of care extends to persons undertaking project management and supervision of the work. In order for the duty to apply it may be sufficient to show that a person was able to exert control even if such control was not exerted. See section 2 below.

## WHAT BUILDINGS DOES THE DUTY OF CARE APPLY TO?

In *Goodwin Street Development Pty Ltd atf Jesmond Unit Trust v DSD Builders Pty Ltd (in liq)* [2022] NSWSC 624 (**Goodwin**), Goodwin Street Developments Pty Ltd, the owner of the land, engaged DSD Builders Pty Ltd, the builder, to construct three boarding houses for use as student accommodation. Disputes emerged between the owner and the builder in relation to alleged defects.

The owner commenced proceedings in the Supreme Court of NSW against the builder, and later against Mr Roberts, who was alleged to have supervised and project managed the work for the builder. As a result of the builder's insolvency, the proceeding against the builder was stayed, and the Court was left to determine the claims made against Mr Roberts.

The owner alleged that Mr Roberts carried out 'construction work' and breached his duty of care to avoid economic loss caused by defects arising from that construction work.

One key question for the Court was whether the duty of care extended to 'construction work' carried out on a boarding house.

The Court observed that resolving this question involved considering the '*labyrinthine provision of s 36 of the [Act]*' which '*...appears to have been drafted so as to make comprehension of it as difficult as possible.*'

The duty of care applied in relation to 'construction work' which was, relevantly, 'building work'.

The Act includes two definitions of 'building work':

- first, in section 4 of the Act, 'building work' is defined by reference to particular classes or types of building specified in the *Design and Building Practitioners Regulation 2021* (NSW) (**Regulation**). The Regulation in turn specifies buildings that are class 2 buildings (in whole or part); and
- second, section 36 of the Act (for the purposes of Part 4 of the Act) defines it as follows: '*building work* includes residential building work within the meaning of the *Home Building Act 1989*'.

The Court found that the definition of 'building work' at section 36 applied to Part 4 of the Act, which relevantly includes the duty of care. Counsel for both parties agreed (for different reasons) that the Regulation did not affect the meaning of 'building work' here.

Importantly, section 36(2) provides that '*...a reference to building work applies only to building work relating to a building within the meaning of this Part*'. 'Building' is defined as having the meaning given in the EPAA at section 1.4 as '*[P]art of a building, and also includes any structure or part of a structure ... but does not include a manufactured home, moveable dwelling or associated structure within the meaning of the Local Government Act 1993.*'

The Court held that a boarding house was a building within the definition above, and accordingly that the Act applied to 'construction work' in relation to it.

While the definition of 'building work' was defined as including 'residential building work' to which the *Home Building Act 1989* (NSW) applied, this was not exhaustive and did not limit the buildings to which the duty of care was found to apply. This is significant because 'residential building work' does not include work to boarding houses.

## **DOES THE DUTY OF CARE APPLY TO PERSONS SUPERVISING OR MANAGING THE WORK?**

Another key issue for the Court to consider in *Goodwin* was whether Mr Roberts carried out 'construction work' as is required for the duty of care to apply. This was significant because the proceeding against the builder was stayed.

The Court held that on the evidence Mr Roberts engaged in project management of the construction, and supervision as well.

Turning to the defects, the unchallenged evidence was that the relevant defects were brought to Mr Roberts' attention who had assured the owners they would be fixed. The Court inferred they were caused by a want of care in Mr Roberts' management and supervision of the work, and he was found liable to pay damages for the cost of rectifying the defects.

In a further, recent decision the question of the degree of control required to carry out project management and supervision was considered, albeit in the context of an application for leave to amend a list statement. In the *Owners – Strata Plan No 84674 v Pafburn Pty Ltd* [2022] NSWSC 659 the owners of a residential development in North Sydney commenced proceedings against the builder and the developer.

In the context of the proposed amendments to the list statement, the Court considered whether it was necessary to show the person in question actually exercised substantial control, or whether it was sufficient to show the person had substantive control *‘in the sense of having the ability to exercise such control, whether or not such control was in fact exercised.’*

The Court’s view was that the words *‘otherwise having substantive control’* within the definition of *‘construction work’* meant it was sufficient to establish the person was able to control how the work was carried out, even if they did not. This was identified to be a question of fact in each case.

More recently, the developer applied to dismiss the proceedings against it<sup>1</sup> arising from the Owners’ proposed further amendments to their list statement. The amendments related to the need to establish the developer owed a duty of care because it carried out ‘construction work’ by supervising, coordinating, project managing or otherwise having substantive control over the building work. It was relevant factually that the developer’s sole director was also a director and shareholder of the builder (which in turn held all shares in the developer) and the builder’s nominated supervisor.

The Court found it was at least arguable that the developer’s sole director, as a result of his concurrent capacities as sole director of the developer and the builder’s nominated supervisor, may have had the ability to control how the building work was carried out in his developer capacity. Accordingly, the Court declined to order the dismissal of the proceedings against the developer. Leave was granted to the Owners to file and serve the further amended list statement.

## **WHAT THESE DECISIONS MEAN FOR YOU**

The implications of these cases for persons involved in building work in NSW are significant.

With the Court clarifying the duty of care applies beyond residential (class 2) buildings, owners of commercial buildings may increasingly look to rely on the statutory duty of care, including where potential direct contractual and other claims are not available. This will have implications in terms of insurance and risk allocation.

Further, persons who have some control, or ability to control, the work may find themselves exposed to a claim for breach of the duty of care. This is likely to be particularly relevant where there have been insolvencies in the contractual chain.

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1. *The Owners - Strata Plan No 84674 v Pafburn Pty Ltd (No 2)* [2022] NSWSC 1002.



## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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