



## Three recent Supreme Court decisions providing clarification on key DBP definitions

### The statutory duty of care and the proper approach to pleading defective works

#### Introduction

Section 37 of the *Design and Building Practitioners Act 2020 (NSW)* (**DBP Act**) provides that a person who undertakes construction work has a duty of care to exercise reasonable care to avoid economic loss caused by defective work. In three recent Supreme Court decisions, the definitions of ‘a person’ for the purposes of undertaking ‘construction work’ and exercising ‘substantive control over the carrying out of building work’ was analysed.

#### What constitutes ‘construction work’?

In *Goodwin Street Developments Pty Ltd atf Jesmond Unit Trust v DSD Builders Pty Ltd (in liq)* [2022] NSWSC 624, DSD Builders Pty Ltd (**DSD**) were contracted to construct three boarding houses on a property owned by Goodwin Street Developments Pty Ltd (**Goodwin**). Goodwin terminated the contract due to disputes relating to defects and delays, and when DSD went into liquidation, Goodwin commenced proceedings against DSD’s representative for breach of s 37 of the DBP Act among other things.

Whether DSD had breached the statutory duty of care depended upon:

- whether the boarding house was a building to which s 37 applied; and
- whether the work carried out was ‘construction work’ within the meaning of s 36.

In relation to the first issue, Stevenson J found that a boarding house (a non-class 2 building) was a ‘building’ to which the duty of care in s 37 applied. As such, the duty was not confined to residential apartment-type buildings.

In relation to the second issue, it was held that ‘construction work’ within the meaning of s 36 relevantly included ‘building work’ which was performed on the boarding houses. Subsequently, DSD was found to be in breach of s 37.

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## What is meant by ‘substantive control over the carrying out of building work’?

In *The Owners – Strata Plan No 84674 v Pafburn Pty Ltd [2022] NSWSC 659*, Pafburn Pty Ltd (**Pafburn**), the builder, constructed a strata development for Madarina Pty Ltd (**Madarina**), the developer. On the facts, Mr Obeid held 80% stake in, and was a director of Pafburn. Mr Obeid was also the sole director of Madarina in which Pafburn held 100% stake in.

In 2020, the Owners Corporation commenced proceedings for defective work performed by Pafburn and Madarina and in doing so acted in breach of the statutory duty of care prescribed by s 37 of the DBP.

Section 36(1)(d) of the DBP Act defines ‘construction work’ as supervising, coordinating, project managing or otherwise having substantive control over the carrying out of building work. It was for the Court to decide whether for the purpose of that definition, it had to be established whether substantive control meant whether:

- the person actually exercising such substantive control; or
- the person had the ability to exercise such control notwithstanding whether such control was in fact exercised.

Stevenson J held that the latter view should be adopted given a person could have substantive control over the carrying out of work notwithstanding that at any time the person was not actually doing anything to exercise that control. In this case however the builder owned all the shares in the developer and the inference of substantive control would be less visible.

It was also for the Court to confirm the proper construction of ‘a person’ who carries out construction work.

It was held that a person who has the prescribed duty under s 37 extends not only to a builder who engaged in the construction work but to any other person who carries out construction work. Subsequently, any person who supervised, coordinated, project managed or had ‘substantive control’ over the performance of work would be subject to the statutory duty of care, including the owner of the land.

In *The Owners – Strata Plan No 84674 v Pafburn Pty Ltd (No 2) [2022] NSWSC 1002*, it was for the Court to decide whether allegations which the Owners Corporation sought to make in a proposed Amended Technology and Construction List Statement could establish that Madarina carried out construction work for the purpose of s 37(1).

To determine this, the Owners Corporation must have proven that the Developer supervised, coordinated, project managed, or otherwise had substantive control to carry out the building work. On this basis, Stevenson J found it difficult to rebut the conclusion that Mr Obeid had concurrent capacities as a director of both Pafburn and Madarina, and upon acting in his capacity as a director of Madarina, may have had the ability to control how building work was carried out.

## How do parties allege a breach of the duty of care?

In *The Owners – Strata Plan No 87060 v Loulach Developments Pty Ltd (No 2) [2021] NSWSC 1068*, the Owners Corporation commenced proceedings against Loulach Developments Pty Ltd, the developer, and Loulach Steel Pty Ltd, the builder (together, **Loulach**) for defective work.

The Owners Corporation asserted that Loulach was in breach of their statutory duty of care by virtue of the mere existence of defects. It was held that this was not the case as a claimant must specify how a builder or developer breached such a duty of care.

Stevenson J affirmed that a plaintiff alleging a breach duty of care must identify:

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- the specific risks that a builder was required to manage; and
- the precautions that should have been taken to manage those risks.

## Key Takeaways

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- A duty of care is owed in respect of both residential and non-residential buildings.
- Any person who has supervised, coordinated, project managed or had substantive control over building work has a statutory duty of care.
- The correct procedure to plead allegations of defective work require specificity as to the risks a builder is required to manage and the precautions that should have been taken to manage such risks.

For further assistance in claiming for defective work, contact the team at Construction Legal.

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