COURT OF APPEAL CONFIRMS STATUTORY DUTY OF CARE FOR ALL BUILDING WORK

Case Note: Roberts v Goodwin Street Developments [2023] NSWCA 5

Introduction

The New South Wales Court of Appeal has confirmed the earlier Supreme Court decision that building practitioners owe a statutory duty of care under the Design & Building Practitioners Act 2020 (NSW) (DBP Act) for all building work, not just residential building work or works undertaken on a Class 2 Building.

This decision is an important one for all industry players regardless of the type of construction or building work they are performing. The case confirms that the duty will be owed by individuals and corporations which means that industry participants can no longer hide behind the corporate veil.

Key Take Aways

This decision confirms that building practitioners owe a statutory duty of care under the DBP Act for <u>all building work.</u>

For all owners of residential real estate in NSW, take note that where a developer entity or building company no longer exist, there might still be a cause of project management and/or supervision of the construction work during the project.

For all project managers, superintendents, directors and shadow directors, take note that you must exercise caution and due diligence when performing supervisory or management roles on the construction site as this decision confirms, in no uncertain terms, that owners can hold you personally to account when defects arise. Of course, the burden of proving that certain personnel retained such control of works specifically linked to defects will not always be easy, especially if the owners are subsequent owners such as an owners corporation.

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Facts

The appellant is Mr Roberts, the husband of the sole director of DSD Builders Pty Ltd (DSD). DSD entered into a building contract with the respondent for the construction of boarding houses. A dispute arose between DSD and the respondent as to the alleged defective building works.

The Supreme Court held that

- Mr Roberts owed a statutory duty of care for performing project management and supervision; and
- boarding house falls within the meaning of "building work" under s 36(1).

Our case note on the previous judgement can be found here https://constructionlegal.com.au/supreme-court-hands-down-first-decision-on-statutory-duty-of-care-under-the-dbp-act

In this Appeal, Mr Roberts argued that a "boarding house did not fall within the meaning if "construction work" and "building work" as per s 36 of the DBP Act and that boarding houses were not caught by section 4 of the DBP Act

Court of Appeal (Kirk JA and Griffiths AJA)

The case focused on the interplay between definitions of 'building work' in the DBP Act, Home Building Act 1989 (HBA) and the *Environmental Planning and Assessment Act 1979 (EPA Act).*

Mr Roberts claimed that since a boarding house is not a "dwelling", it does not fall within the meaning of "residential building work" under the HBA and thus cannot be considered as a "building work" in s 36(1) of the DBP Act.

The Court undertook a detailed analysis of four possible interpretations of the definition of building work under the DBP Act, HBA and EPA and concluded that ***no one construction was straightforward.***

In the end, the Court leaned on the parliamentary speech made by the Minister and concluded that the statutory duty of care should apply to types of building work including Class 1, 2, 3 and 10 buildings:

> *"…it is envisaged that the duty of care will apply to construction work in a building that is a class 1, 2, 3 and 10 under the Building Code of Australia. Therefore, houses, multi-unit residential buildings and other buildings such as boarding houses, hostels, backpackers' accommodation, residential parts of hotels, motels or schools will all obtain the duty of care provided for under this bill—**that is, people will be protected where they live or intend to live or reside…**"*

More information

For further information on your statutory duty of care obligations, contact the team at **Construction Legal.**

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