



Statutory Duty of Care for Remedial Building Work

Case Note: The Owners – Strata Plan 80867 v Da Silva [2024] NSWDC 263

Overview

The *Design and Building Practitioners Act 2020* (NSW) ('**DBP**') is a relatively new piece of legislation, and since its introduction, the industry has been awaiting cases to interpret and apply its provisions. The recent case of *The Owners – Strata Plan 80867 v Da Silva [2024] NSWDC 263* marks one of the first major rulings under the DBP Act for **remedial building work**, setting a crucial precedent for construction professionals.

Case Background

The case involves the Owners Corp of the "Lamia" building (**Plaintiff**). The building was originally constructed by Haralambis Constructions. In July 2013, the Owners Corp engaged a building consultant to carry out an inspection of the building, and several defects were identified. The Owners Corporation commissioned a defect report and issued it to the builder, requesting that the defects be remediated.

The builder engaged Mr Da Silva, a tiler and waterproofer to undertake remedial works on common balcony terraces including removing and replacing tiles. An engineer was engaged to superintend all the works. During the work being performed, Mr Da Silva received multiple communications from the engineer highlighting concerns regarding the quality of the work. Post-completion, water ingress issues were reported

in these units which had not been present during the inspection. As a result, the Owners Corp sought to sue Mr Da Silva for breach of contract and for breach of a duty of care under section 37 of the *Design and Building Practitioners Act 2020* ('**DBP Act**').

It was claimed that the defects were due to Mr Da Silva's failure to comply with the agreed scope of works, the Australian Standards, and the Building Code of Australia. The claim against the Engineer was settled out of court leaving Mr Da Silva and his construction company to face the music.

The Decision

Mr. Da Silva was found in breach of both the contract and the statutory duty of care, resulting in total damages of \$462,707.93. After settlements with other parties, Mr. Da Silva was required to pay \$317,707 to the plaintiffs.

Under section 37 of the DBP, a duty of care is a **non-delegable duty**, which means that individuals who carry out construction work are **personally liable** to exercise reasonable care to avoid economic loss. This duty applies to individuals, regardless of whether the work was carried out under a corporate entity. In this case, the damages were awarded against Mr Da Silva personally, and not his company.

The court emphasised that Mr. Da Silva had a duty to exercise **reasonable care to avoid economic loss caused by defects**, which was breached when he failed to adhere to the Australian Standards, and the Building Code of Australia, resulting in significant economic loss for the Owners Corp.

The Court reinforced the sentiments of *Loulach*, stating that the Owners Corporation had a duty to identify the specific risks that the builder was required to manage, and the precautions that should have been taken to manage those risks. This is a burdensome task when compared to the traditional method of simply showing the existence of a defect.

What This Means for developers and builders?

For developers and builders, this case highlights the importance of:

- 1. Rigorous Compliance:** Construction professionals must ensure that all works comply with the Building Code of Australia and the relevant Australian Standards.
- 2. Effective Communication:** If instructed to perform work contrary to standards, professionals must provide written warnings to the client about potential economic loss.
- 3. Refusal to Perform Non-Compliant Work:** Professionals should refuse to carry out work if it cannot be performed in accordance with the required standards.

Failure to do so could result in significant legal and financial consequences, as demonstrated in this case.

Conclusion

The Owners – *Strata Plan 80867 v Da Silva* [2024] NSWDC 263 case sets a critical precedent for the construction industry under the DBP Act. This is the first case to hold an **individual personally liable for defects in remedial works**, emphasising that statutory duties of care have teeth and will bite.

Building practitioners are well advised to adhere strictly to contractual and statutory standards, as failure to do so can result in significant personal financial repercussions; serving as a cautionary tale for construction professionals.

More information

For further details on construction law insights and legal case notes, visit [Construction Legal Insights](#)