

# First Supreme Court judgment on application of new duty of care in DBP Act

1 DECEMBER 2021

## *The Owners – Strata Plan No 87060 v Loulach Developments Pty Ltd (No 2)* [2021] NSWSC 1068

### AT A GLANCE

- In this case, the Owners' Corporation commenced proceedings against a builder regarding alleged defects in a residential development in Parramatta.
- The Owners' Corporation claimed the alleged defects constituted breaches of the statutory warranties under the *Home Building Act 1989* (NSW). It then filed a motion seeking leave to amend its List Statement to include a claim for breach of the statutory duty of care under the *Design and Building Practitioners Act 2020* (NSW).
- Stevenson J refused leave for the plaintiff to amend its List Statement because it did not adequately articulate the nature of any breach.
- The decision is a timely reminder that the presence of a defect does not prove negligence. It is also a useful summary of what the common law requires plaintiffs to do to satisfy the general principles at s. 5B of the *Civil Liability Act 2002* (NSW).

### FACTS

The Owners – Strata Plan No 87060 (Owners' Corporation) commenced proceeding against Loulach Developments Pty Ltd and others (Loulach) regarding alleged defects in a residential development in Parramatta, which were mainly related to water ingress and cladding.

In the List Statement, the Owners' Corporation claimed that the alleged defects constituted breaches of the statutory warranties under the *Home Building Act 1989* (NSW). The Owners' Corporation later filed a motion seeking leave to amend its List Statement to include a claim for breach of the statutory duty of care created by s. 37 of the *Design and Building Practitioners Act 2020* (NSW) (DBP Act).

Loulach opposed leave on the basis that, while the existence of statutory duty of care was not disputed, the pleading merely alleged that the defects existed and failed to otherwise articulate the Owners' Corporation's claim for breach.



**While a duty of care will be automatic, a plaintiff must still meet the other test for negligence under the common law.**

### ISSUES AND DECISION

The question for determination was whether it was sufficient for the Owners' Corporation to identify the defects and contend that their existence represented a breach of the statutory duty of care.

Stevenson J held that it was not sufficient for the Owners' Corporation to simply assert a defect and allege that Loulach was required to take whatever precautions were needed to ensure the defect not be present.

His Honour said that the DBP Act was engaged to avoid the need for an owners' corporation to prove that a builder owed it a duty of care, not to provide a shortcut to establish a breach. His Honour referred to the Second Reading Speech for the DBP Act, which stated that, while a duty of care will be automatic, a plaintiff must still meet the other tests for negligence under the common law and the *Civil Liability Act 2002* (NSW), including breach of the duty and establishing damage was suffered due to that breach.

His Honour also said that a plaintiff alleging a breach of the statutory duty of care by a builder must identify the specific risks the builder was required to manage, and the precautions it should have taken. His Honour referred to s. 41 of the DBP Act, which provides that it is subject to the *Civil Liability Act 2002* (NSW) (including s. 5B), and the following decisions:

- *Garzo v Liverpool/Campbelltown Christian School* [2012] NSWCA 151, which states that s. 5B requires a plaintiff to formulate its claim to account for the precautions that should have been taken, and the risks that those precautions should have been directed to, and
- *Sergienko v AXL Financial Pty Ltd* [2019] NSWSC 1610, which states that a proper pleading requires a plaintiff to articulate the “risk of harm” against which the defendant should have taken precautions. A proper pleading also requires the plaintiff to say if its case is that the defendant had actual knowledge of the risk, or ought to have known about it. Unless the risk is clearly identified, it is not possible to know what steps ought reasonably have been taken.

## THE INSURANCE IMPLICATIONS

Builders and others who fall within the ambit of the DBP Act, as well as their insurers, may take comfort from this decision as it has reinforced the fact that the statutory duty of care created under the DBP Act is assessed by the usual principles of negligence, and does not require a higher standard be met.

Defendants in proceedings where a breach of the statutory duty of care is alleged should carefully review the claim and form a view about whether breach has been properly pleaded. If it hasn't, further and better particulars of the claim should be requested. It is also likely to be worth considering whether a Notice of Motion striking out the claim is warranted.

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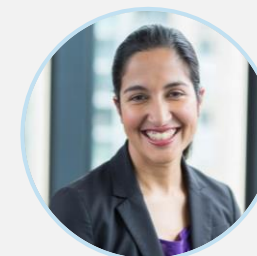


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