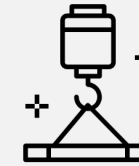


NSW Supreme Court clarifies scope of statutory duty of care for construction industry

Goodwin Street Developments Pty Ltd atf Jesmond Unit Trust v DSD Builders Pty Ltd (in liq) [2022] NSWSC 624

MAY 2022



AT A GLANCE

- On 19 May 2022, the Supreme Court of NSW handed down the first substantive decision on the application of the statutory duty of care introduced by Part 4 of the *Design and Building Practitioners Act 2020* (NSW) (DBP Act) in June 2020.
- The effect of this judgment is that, arguably, the statutory duty of care extends to 'building work' on any building or structure, including any part of a building or structure.
- Insurers should be aware that the statutory duty of care applies to a wider variety of buildings than first thought.

KEY FACTS

In 2017, the plaintiff developer, Goodwin Street Developments Pty Ltd (developer) contracted builder DSD Builders Pty Ltd (builder) to construct three residential boarding houses intended for university student accommodation.

The second defendant, Daniel Roberts, project managed and supervised the works.

The buildings contained a number of defects and were maliciously damaged (by Mr Roberts).

DECISION

Mr Roberts was held liable to the developer for the defects and damage at the buildings because he was found to have:

- carried out 'construction work' within the meaning of section 36 of the DBP Act, and
- breached his duty of care under section 37 of the DBP Act.

THE IMPORTANCE OF THE DECISION

This decision clarifies that the statutory duty of care is not restricted to class 2 buildings, but applies to additional classes of buildings, which in this case involved residential boarding houses.

Before this decision, it was unclear whether the duty of care was confined to work performed on class 2 buildings or whether it applied to 'building work' on a wider variety of buildings.

The statutory duty of care under section 37 relates to 'construction work'. For work to be 'construction work', it must be 'building work'. The ambiguity is caused by the two different definitions of 'building work' in the DBP Act:

- Section 4(1) defines 'building work' to mean "...the construction of a building of a class prescribed by the regulations" (i.e. class 2 buildings as prescribed by the regulations), and
- Part 4 of the DBP, which includes the statutory duty of care under section 37, contains its own definition of 'building work' applicable to Part 4 only, which:
 - incorporates 'residential building work' as defined by the *Home Building Act 1989* (NSW), and
 - applies only to 'building work' relating to a 'building' as defined by s1.4 of the *Environmental Planning and Assessment Act 1979* (NSW) (EPAA), which includes part of a building and any structure or part of a structure (including any temporary structure or part of a temporary structure).



This decision clarifies that the statutory duty of care is not restricted to class 2 buildings

Stevenson J held:

- section 4(1) of the DBP Act has no application to Part 4 (including the statutory duty of care under section 37)
- the statutory duty of care applies to ‘building work’ done on a boarding house, and
- the inclusion of the definition of ‘residential building work’ in the definition of ‘building work’ for the purpose of Part 4 of the DBP Act is of no consequence.

On a lighter note, Justice Stevenson took the opportunity to take a swipe at the legislature for the unsatisfactory way Part 4 was drafted, describing the definitions in section 36 as a “labyrinth provision” that appeared to have been drafted “so as to make comprehension of it as difficult as possible”.

THE ISSUE FOR INSURERS

The effect of this judgment is that the statutory duty of care extends to ‘building work’ on any ‘building’, as defined by section 1.4 of the EPAA, and is not confined by section 4(1) of the DBP Act or to residential building work within the meaning of the HBA.

Insurers should be aware that the statutory duty of care applies to a wider variety of buildings than first thought. The limits on the type of building the statutory duty of care applies to are yet to be judicially considered.

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