

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



Newsletter

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In this newsletter, we provide a case note on *Roberts v Goodwin Street Developments Pty Ltd* [2023] NSWCA 5. We discuss the key findings and the implications for building and construction professionals following this decision.

Introduction

The recent NSW Court of Appeal decision, *Roberts v Goodwin Street Developments Pty Ltd* [2023] NSWCA 5 (*Roberts v Goodwin*), found that the retrospective statutory duty of care in section 37 of the *Design and Building Practitioners Act 2020* (NSW) (the 'DBPA') extends beyond class 2 residential buildings and includes commercial buildings and boarding houses.

Facts

Roberts was the builder who operated through DSD Builders Pty Ltd ('DSD'). DSD entered into a building contract with Goodwin Street Development Pty Ltd ('Goodwin') for the construction of student accommodation in Newcastle, NSW.

A dispute arose between DSD and Goodwin relating to late payment, defective works and delays in construction work, and works were suspended. The primary judge (Stevenson J) found that Roberts entered the site and caused malicious damage to the buildings during the period that works were suspended. Goodwin terminated the contract and commenced proceedings in the Supreme Court against DSD and Roberts, claiming Roberts, and amongst other things, breached his duty of care under s 37 of the DBPA.

Stevenson J found that 'building work' in Part 4 of the DBPA includes building work relating to a boarding house, and that Roberts was in breach of the statutory duty of care in s 37 of the DBPA. The definition of 'building work' in section 4(1) of the DBPA (which refers only to class 2 buildings) did not apply to Part 4 (which contains the duty of care provision); and

By reason of the operation of section 36(2) of the DBPA and the definition of 'building' in section 36(1), the statutory duty of care in section 37 applies to 'building work' and therefore 'construction work' in relation to a boarding house.

Roberts appealed and argued that the primary judge erred, amongst other things, in finding that a boarding house was a 'building' to which s 37 of the DBPA applied.

Decision

The Court dismissed the appeal and found that building work will include work carried out to a boarding house and that the retrospective duty of care introduced by the DBPA applies to **all classes** of buildings.

The key findings were:

- The central issue was whether and how the general definition of 'building work' in s 4 of the DBPA applies to the inclusive definition of building work in s36 (1). The construction of the DBPA which best supported Parliament's intention was that boarding houses were encompassed within 'building work'.

- The Court of Appeal applied an expanded duty of care that applies in relation to the meaning of 'building work' as defined in s 36(1) and in s 4 of the DBPA.
- The primary judge was right to conclude that section 37 of the DBPA applied to boarding houses, despite the Court reaching the same conclusion via different reasonings.
- The general definition of 'building work' in s 4(1) applies to the inclusive definition of 'building work' in s 36(1) of the DBPA by giving effect to the purpose of the Act and the intention of Parliament.
- Parliament's intention was that 'the duty of care applies to all classes of buildings'. At [200]:
 - ... While the regulations have not been finalised, 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...
- The duty of care under s 37 (Part 4) sought to provide a remedy for building defects and involved a broader class of buildings than for other parts of the DBPA, and this included boarding houses.

Implications of the decision

Roberts v Goodwin is a significant decision for building and construction professionals- the statutory duty of care in section 37 of the DBPA extends beyond class 2 (multi-residential buildings) and applies to a broader class of buildings to include commercial and residential buildings.

'A person who carries out construction work' is also defined broadly. This means that building practitioners, directors, site supervisors, designers owe a duty of care under section 37 of the DBPA for economic losses arising from construction defects.

The retrospective effect of the DBPA operates to create a statutory duty of care to current and subsequent owners of buildings for 10 years before and after the commencement of the DBPA. This means developers, contractors and any person who carries out construction work in all buildings in NSW owe a duty of care to avoid economic loss caused by defects for 10 years before and after the commencement of the DBPA.

For our readers, the immediate ramifications of the decision are:

- For contractors and consultants, the availability of insurance that responds to 'Goodwin' type claims;
- The certification contractors would require from consultants;

- Expanding the classes of liability of consultants, project managers and contractors.

The decision also reflects the intention of Parliament to seek to broaden remedies for building defects to cover a broader class of buildings. In this context, in 2022 various Building Bills 2022 (the 'Bills')¹ were introduced by the NSW Government for public discussion and sought to enhance consumer protection specifically within the construction industry. These Bills introduced significant changes to the current building laws and will also affect commercial and residential construction (ie beyond the operation of the *Home Building Act 1989 NSW*).

The Building Bill 2022 aims to broaden the definition of a developer, thereby encompassing a wider range of professionals who will be subject to the provisions of the Bill. This expansion includes certifiers. Furthermore, the Bill introduces applies a statutory duty of care to non-residential buildings.

The date of enactment of the Bills is not yet known and the precise nature and content of the future legislation remains to be seen.

For our readers wishing to understanding the broad reach of the Bills, one of our newsletters next month will address the topic of 'defects' and how these apply to all classes of buildings.

¹ These include: Building Bill 2022, Building Compliance and Enforcement Bill 2022 and Building and Construction Legislation Amendment Bill 2022.