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## **Bulletin – Liability for Economic Loss under the new Design and Building Practitioners Act 2020**

In a unanimous decision of the Court of Appeal earlier this year, in *Roberts v Goodwin Street Developments Pty Ltd* [2023] NSWCA 5, the court unanimously upheld the Supreme Court judgment of Stevenson J (*Goodwin Street Developments Pty Ltd v DSD Builders Pty Ltd (in liq)* [2022] NSWSC 624), wherein ‘personal’ liability for economic loss was found against a shadow director engaged in construction work as defined in section 37 of the new Design and Building Practitioners Act 2020 (Design Act).

### **Supreme Court Judgment**

Respected commentator, Philip Davenport opines:

[the above Supreme Court judgment] appears to be the first case where, when a contractor became insolvent, a claim under s 37 of the Design and Building Practitioners Act 2020 (NSW) (the DBP Act) for economic loss by the owner against the individual administering the construction contract was successful. The nature of a claim under s 37 is described in ‘A new and unique claim’ 2020 #193 ACLN 29.

Goodwin made two claims against Mr Roberts. The first was a claim in trespass for \$586,000 to rectify the malicious damage. Aside from the malicious damage there were defects in the work of DSD. The estimated cost of rectifying these defects was \$300,000. Since DSD was in liquidation Goodwin included in the action against Mr Roberts an additional claim for \$300,000 under s 37 of the DBP Act. Both claims were successful. Stevenson J found that Mr Roberts caused the malicious damage and that Mr Roberts not only engaged in project management of the site but also in supervision of construction and was therefore engaging in construction work for the purposes of s 37 of the DBP Act. The judgment on the trespass claim for \$586,000 is not remarkable. The judgment for \$300,000 under s 37 of the DBP Act is remarkable.

Section 37(1) of the DBP Act provides:

- (1) A person who carries out construction work has a duty to exercise reasonable care to avoid economic loss caused by defects-
  - (a) in or related to a building for which the work is done, and
  - (b) arising from the construction work.

In s 36(1) “construction work” means any of the following:

- (a) building work,
- (b) the preparation of regulated designs and other designs for building work,
- (c) the manufacture or supply of a building product used for building work,
- (d) supervising, coordinating, project managing or otherwise having substantive control over the carrying out of any work referred to in paragraph (a), (b) or (c).

At [96] and following Stevenson J considers Goodwin’s claim under s 37 of the DBP Act that Mr Roberts carried out “construction work” within the meaning of s 37 of the DBP Act and acted in breach of his duty to exercise reasonable care to avoid economic loss to Goodwin caused by defects in the building arising from construction work. Mr Roberts contended that the DBP Act did not apply to construction work on a boarding house. At [100] Stevenson J did not agree. At [101] Stevenson J said:

Resolution of the question involves consideration of the labyrinthine provision of s 36 of the DBP Act. The section appears to have been drafted so as to make comprehension of it as difficult as possible.

Section 36(1) of the DBP Act defines “construction work”. To prove that Mr Roberts carried out “construction work” and owed Goodwin a duty of care under s 37(1), Goodwin had to prove that in the course of the building contract of DSD Mr Roberts was supervising, coordinating, project managing or otherwise having substantive control over the carrying out of “building work” (s 36(1)(d)).

“Building work” is defined in s 4 of the DBP Act to mean the construction of a building of a class prescribed by the regulations. The relevant provisions of the *Design and Building Practitioners Regulation 2021* (NSW) are set out at page 59 of [2022] #203 ACLN.

Stevenson J traces the labyrinthine provisions of the legislation and finds at [119] that a boarding house is a “building” for the purposes of the definition of “building work” and “construction work” despite the fact that construction of a boarding house is not residential building work within the meaning of the *Home Building Act 1989* (NSW).

At [139] Stevenson J lists 38 defects in the works and (at 147) found that the defects were brought about by a want of care on Mr Roberts’ part in his project management and supervision of the work. Mr Roberts was found personally liable under s 37(1) of the DBP Act to pay Goodwin \$300,000 for the cost of rectifying the defects.

## **Appeal**

On 10 February 2023, the New South Wales Court of Appeal published judgment in *Roberts v Goodwin Street Developments Pty Ltd* [2023] NSWCA 5.

The appeal concerned an important issue (as outlined above) of interpretation relating to the duty of care imposed on persons who perform construction work by s 37 of the Design and Building Practitioners Act 2020 (NSW) (“DBP Act”). The Court of Appeal found that the duty contained in s 37 of the DBP Act applies in respect of “buildings” as defined, widely, in s 36 of the Act and not the more limited meaning given to “building” in s 4.

The Court thus found that the duty applies in respect of all “buildings” within the meaning of the *Environmental Planning and Assessment Act 1979*, which encompasses all buildings except manufactured homes, moveable dwellings and associated structures, and not just class 2 buildings (multi-unit residential buildings or apartment buildings). The definition in s 4 was still relevant as it set out the types of work in respect of which the duty applies.

A majority of the Court also found (with Ward P dissenting on this issue) that the a plaintiff with a reversionary interest in land, such as a developer which has handed possession over to a builder, claiming in tort in respect of damage to real property may seek and be awarded the cost of rectification of the damage if it is reasonable to do so, and that the appropriate measure of damages is not necessarily the diminution of value of the reversionary interest.

Richard Green Construction Lawyers acted for the successful building owner in the Supreme Court and the Court of Appeal.

**This bulletin is not intended as legal advice. We must review the particular facts of any matter you may have and then provide you with specific advice.**

Yours faithfully,  
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