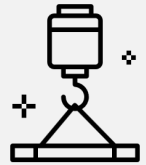
Risk profile for construction professionals rises with new Supreme Court decision

***The Owners – Strata Plan No 84674 v Pafburn Pty Ltd* [2022] NSWSC 659**

MAY 2022



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AT A GLANCE

- Following the recent decision in *Goodwin v DSD*,[1] the Supreme Court of NSW has handed down another decision that considers the scope of the duty arising under the DBPA and to whom it is owed.
- In *Pafburn*, the court established the duty is prima facie owed by those who are able to control how the construction work is carried out, even if they were not involved in the carrying out of the construction work itself. This may include developers who are owners, depending on the facts of the case.
- This decision effectively increases the risk profile of construction professionals for insurers.

KEY FACTS

The owners corporation of a strata development in Walker Street, North Sydney brought proceedings against Pafburn Pty Limited (the builder) and Madarina Pty Limited (the developer). The proceedings alleged breaches of the statutory duty of care introduced by the *Design and Building Practitioners Act 2020* (NSW) (DBPA). The owners corporation was out of time to bring a claim for breach of the statutory warranties under the *Home Building Act 1989* (NSW).

In addition to allegations against the builder for defective building works, the owners corporation alleged that the developer had engaged in construction work because it "*… supervised, coordinated, project managed and substantively controlled … the building work carried out by …*" the builder within the meaning of sub-paragraph (d) of the definition of "*construction work*" in the DBPA.

It was submitted, on behalf of the developer, that the duty could not be owed by a person who was the owner of the land at the time the construction work was carried out.

DECISION

The issues the Supreme Court considered included:

- the proper construction of the definition of "*construction work*" in s 36(1) of the DBPA – in particular, what is meant by "*otherwise having substantive control over*" the carrying out of construction work, and
- the proper construction of a "*person*" in s 37 – in other words, who owes the duty.

The court found that the duty:

- is owed by persons who carry out construction work extending to those who are in a position to control how the construction work is carried out, and
- is unlikely to be owed to an owner who is a developer if, on the facts of the case, they carried out construction work (within the broad meaning of the term).

Meaning of substantive control

The definition of construction work in the DBPA includes:

> "*(a) building work*
>
> …
>
> *(d) supervising, coordinating, project managing or otherwise having substantive control over the carrying out of any work referred to in paragraph (a) …*"

The court concluded that while "*supervising, coordinating, project managing*" require a form of positive action, a person could have "*substantive control over the carrying out of*" work even if they were not actually doing anything if they had the ability and the power to control how the work was carried out. That is a question of fact in each case.

Does the duty extend to developers?

The defendants sought to rely on an argument that a person who carries out construction work does not include a person who was the owner of the land at the time the construction work was carried out. In other words, as owner of the land at the time the construction work was carried out, the developer could not owe and be owed a duty.

The Supreme Court's attention was drawn to the following passage from Parliament's Second Reading Speech:

> "*The duty* [now contained in s 37] *deliberately does not extend to owners who are developers or large commercial entities, as the Government considers these entities to be sufficiently sophisticated and able to contractually and financially protect their commercial interests.*"

While the exclusion of developers and large commercial entities from the definition of owners did not make its way into the DBPA, the Supreme Court held that it is obvious that Parliament could not have intended to create a duty owed by an owner to itself. The court considered that this could be avoided by reading "*each owner*" as not including an owner that has itself carried out the construction work in question.

WHAT THE DECISION MEANS FOR DEVELOPERS

The intent of the legislation was to eradicate any uncertainty that existed in the common law surrounding the duty owed to the end user for defective building work and to put precision around the circumstances in which a duty to exercise reasonable care to avoid economic loss caused by defects is owed.

Not confining the definition of "*each owner*" to the end user (as Parliament had intended), combined by the late amendment to the definition of "*construction work*" to include "*(d) supervising, coordinating, project managing or otherwise having substantive control over*", reintroduced a layer of complexity in pinpointing the circumstances in which a duty is held to arise and where liability should lie.

The Supreme Court has now clarified that the benefit of the duty is unlikely to extend to an owner who is a developer if, on the facts of the case, they carried out construction work (within the broad meaning of the term).

However, it remains unclear whether developers and large commercial entities are completely excluded from bringing a claim for breach of statutory duty under the DBPA.

In the recent decision of *Goodwin v DSD* (see our earlier article), the project manager was held to owe a duty under the DBPA to the developer as owner of the land. However, the proper construction of section 37 and the meaning of "*each owner*" was not an issue under consideration in that decision.

IMPLICATIONS FOR INSURERS

This decision, combined with the earlier decision in *Goodwin v DSD* which clarified that the class of building to which the new duty may apply is not limited to residential, further increases the risk profile of construction professionals.

The decision makes it harder for developers to successfully resist a claim under the DBPA. Under the current state of the law, it will be a factual inquiry.

Pending legislative clarification, consideration should be given to the potential wide-reaching application of the duty for insurers writing risk for construction professionals, particularly developers and head contractors.

References

[1] *Goodwin Street Developments Pty Ltd atf Jesmond Unit Trust v DSD Builders Pty Ltd (in liq)* [2022] NSWSC624 (19 May 2022)

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