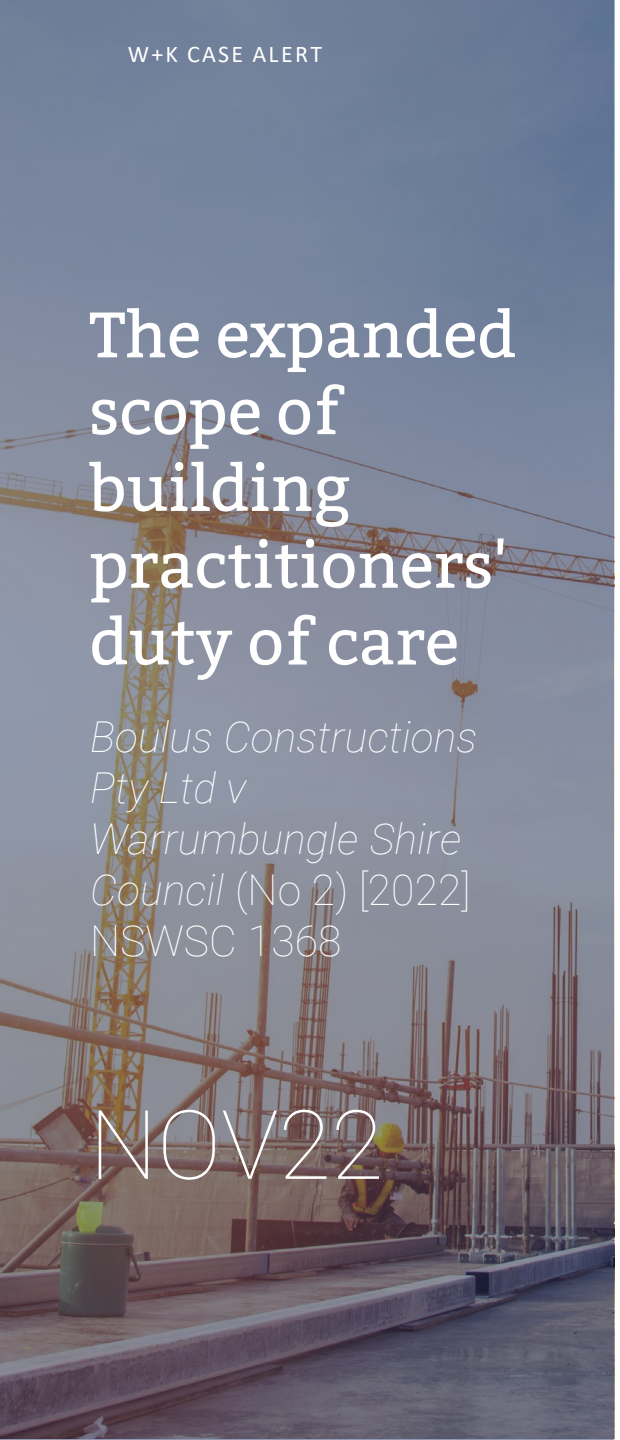

The expanded scope of building practitioners' duty of care

Boulus Constructions Pty Ltd v Warrumbungle Shire Council (No 2) [2022] NSWSC 1368

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At a glance

- When the *Design and Building Practitioners Act 2020* (NSW) (DBP Act) came into effect, section 37 imposed a new duty on building practitioners and persons who carry out construction work to exercise reasonable care to avoid economic loss to building owners, including subsequent owners.
- The scope of the new duty continues to expand in the wake of several judgments. The latest, *Boulus*, confirms that the new duty applies to directors and employees of building companies.
- This judgment raises issues for professional indemnity, management liability and D&O insurers that have policies that could, in certain circumstances, respond to section 37 claims against directors.

Background

Boulus Constructions Pty Ltd (Builder) entered into a contract with Warrumbungle Shire Council (Council) to build a retirement village (Building Contract). A dispute arose, after which the Builder commenced proceedings against the Council for payment under the Building Contract. The Council cross-claimed against the Builder, alleging defective building work.

The Council subsequently sought to join the Builder's Managing Director (Director) and its project site supervisor (Site Supervisor) to the proceedings under section 37 of the DBP Act.

The Builder opposed the joinder on the basis that, amongst other things, the Director and Site Supervisor were not 'persons' under section 37. A 'person' will owe a duty of care under section 37 if they carried out 'construction work' on a 'building'.

This includes someone who was involved in:

- building work
- regulated designs (and other designs)
- manufacture or supply of a building product
- supervision, coordination, project management, or otherwise "having substantive control" over the carrying out of building or design work, or manufacture or supply of a building product.

Stevenson J had previously held[1] that a person "having substantive control" over the carrying out of 'construction work' included a person with the ability and power to control how the work was carried out.

[1] *The Owners Strata Plan No 84674 v Pafburn Pty Ltd* [2022] BSWSC 659

The Council's argument

The Council argued that the Director and Site Supervisor were able to, and in fact did, exercise substantive control over the carrying out of the construction work. The Council said that:

- the Director had "*… the power and ability to and did substantively control all of the building works comprising the entire project, such control including the appointment and control of the project delivery staff working for the Builder … the selection and appointment of subcontractors … the overall supervision and acceptance of the works performed by the Builder's employees and subcontractors …*", and

- the Site Supervisor "*… actively supervised, coordinated and project managed all of the primary elements of the building works comprising the project, and coordinated and directed how the Works performed by the Builder were carried out, including by directing and engaging with the Builder's subcontractors in the performance of their works*".

In short, the Council argued that the Director and Site Supervisor fell squarely within the scope of section 37.

The Builder's argument

The Builder argued that a consequence of construing 'persons' in section 37 to include directors and employees would be that personal liability would be expanded to include almost everyone who is involved in construction work, leading to proliferation of multiparty litigation (which is already a common feature of construction litigation). The Builder said:

> *"Every person on a construction site has substantive control or supervision over some building work performed at that site, often the work that they themselves directly perform, and accordingly, taking section 37 at its broadest interpretation, every such person could potentially come within the ambit of a '**person who carries out construction work**', and be the subject of an automatic statutory duty of care to the current and future owners of a project where no such duty previously existed. Such a broad interpretation could make hundreds, or on a very large job even thousands, of people personally liable in respect of the construction work over which they have control or supervision, which would have far reaching and negative impacts on the construction industry."*
> [Emphasis was in the original.]

The Builder submitted that 'persons' should be construed narrowly as "a person who carried out construction work in their own capacity" and not a person who acts as agent for another – in other words, not employees.

Judgement

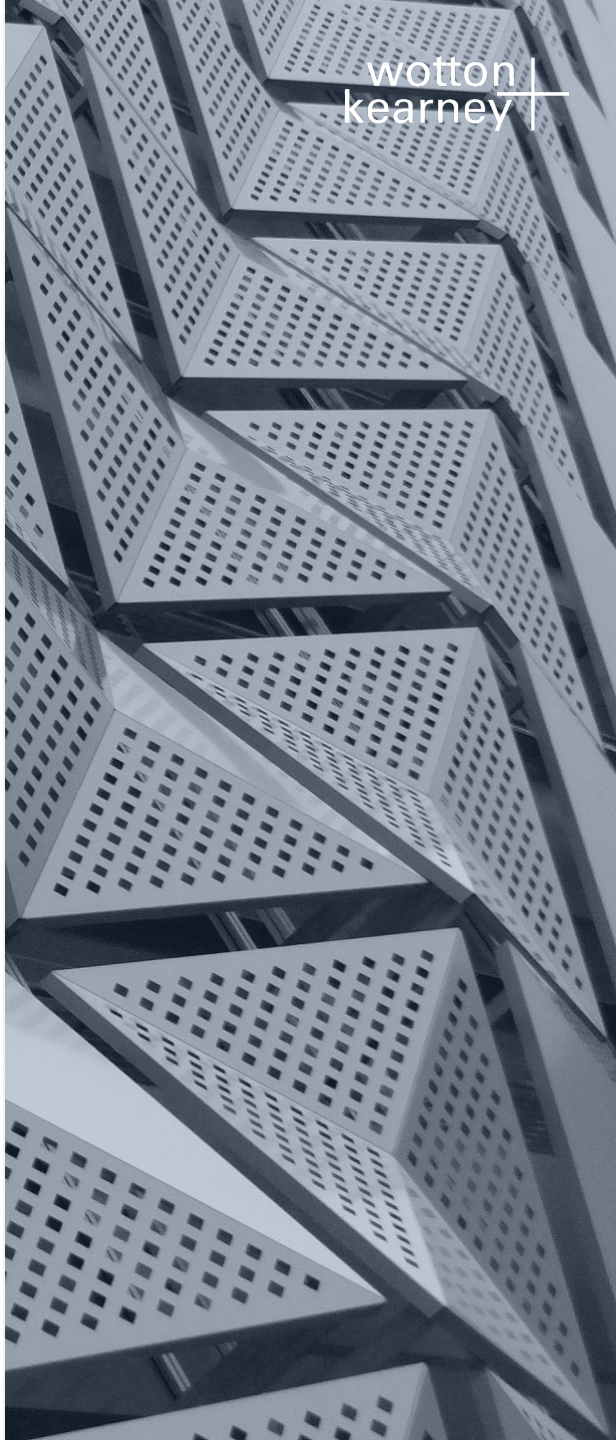
Stevenson J made, amongst other things, the following observations:

- 'person' is not defined in the DBP Act, and

- supervision, coordination, project management and having "substantive control" over building work could be affected by a wide range of actors. Parliament has used the word 'person' to determine those actors.

Stevenson J declined to read down the definition of 'person' as someone acting "in their own capacity". His Honour said, Parliament has taken care to define the various building activities by reference to 'persons' carrying them out. That must mean someone who is not necessarily a 'practitioner', or necessarily acting "in their own capacity".

In short, His Honour held that directors and employees fall within the scope of section 37.



Implications

This decision means that plaintiffs will have more potential defendants to choose from when bringing claims. Importantly, claims against employees and directors are claims against individuals – and it is the individual's personal assets that are at risk here. That is a significant development. As Stevenson J pointed out, those individuals may rely on proportionate liability to dilute their liability, however, that will probably not resolve the issue for them.

Employee indemnity

In many instances, employees who are joined to a proceeding will be entitled to be indemnified:

- by their employer under:
  - section 3 of the *Employees Liability Act 1991* (NSW), or
  - at common law[2] for liabilities incurred while the employee was acting within the scope of their employment, or
- under a policy of insurance that the employer may have taken out.

However, there is an exposure for employees if that indemnity does not exist. For example, if the employee has acted in a way that disentitles them to indemnity, or the relevant company no longer exists, or there is no insurance cover.

In those cases, there is some risk that employees may be left "holding the can", particularly given the retrospective application of section 37, the spate of recent insolvencies in the construction sector, and the 'long tail' nature of building and construction claims.

Director indemnity

Directors who are joined to a proceeding may also be entitled to be indemnified:

- by their company under a directors' indemnity, where the company undertakes to protect its directors against liabilities that they may incur during the performance of their directors' duties, or
- under a policy of insurance that the company may have taken out.

Most large and medium companies obtain insurance to protect their directors.

D&O insurance is primarily focussed on covering liability for breach of director duties. Similarly, smaller companies obtain management liability insurance to cover acts of management, including director duties. While breach of section 37 is a new source of liability for directors, it arguably arises from the provision of professional services. The issue will likely turn on whether the ability to control how the building works are carried out is a professional service or an exercise of director or managerial functions. Even if control over buildings works is found to be a director or managerial function (which is far from certain), it will still need to be shown that the director breached the duty, and that the breach caused loss.

The evolving landscape

His Honour's decision in *Boulus* is the latest in a series of judgments clarifying the operation of the new statutory duty of care. When the DBP Act was passed, there were questions asked about the scope of the duty of care, including the classes of building covered and the classes of persons who owe, and are owed, the duty.

The decisions in *Loulach*,[3] *Goodwin Street Developments*,[4] *Pafburn* and now *Boulus* have provided further clarity on how the new duty operates.

Going forward, it will be interesting to see if this decision results in increased claims against directors, or whether such claims will be relatively small in volume. However, if this decision results in a significant volume of claims against directors, this may bring the interplay of cover between D&O, management liability and professional indemnity policies into sharper focus. If that happens, it may be necessary for insurers to revisit policy wording or pricing to take this new duty into account.

[2] *Re Famatina Development Corporation Limited* [1914] 2 CH 271
[3] *The Owners – Strata Plan No 87060 v Loulach Developments Pty Ltd* (No 2) (2021) 250 LGERA 114; [2021] NSWSC 1068
[4] *Goodwin Street Developments Pty Ltd atf Jesmond Unit Trust v DSD Builders Pty Ltd (in liq)* [2022] NSWSC 624

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