KREISSON
CONSTRUCTION AND ENGINEERING LAWYERS

Level 37, 25 Martin Place
Sydney NSW 2000
(02) 8239 6500
excellence@kreisson.com.au

April 2023

A "Goodwin" for Owners confirmed by the Court of Appeal

CASE NOTE - *Roberts v Goodwin Street Developments Pty Ltd* [2023] NSWCA 5

Written by **Garren Pezikian**

In a previous Insight, we wrote about the Supreme Court decision of *Goodwin Street Developments Pty Ltd atf Jesmond Unit Trust v DSD Builders Pty Ltd (in liq)* [2022] NSWSC 624.

In that case, the Supreme Court of NSW determined that "construction work" defined in section 36(1) of the Design and Building Practitioners Act 2020 (NSW) (DBPA) included building work with respect to any class of building on the following basis:

1. The definition of *"building work"* in section 4(1) of the DBPA did not relate to the definition of *"building work"* in section 36(1) of the DBPA;
2. The relevant definition of *"building work"* in relation to *"construction work"* was the definition contained in section 36(1) of the DBPA; and
3. As *"building work"* in section 36(1) of the DBPA is simply defined to include "*residential building work within the meaning of the Home Building Act 1989*" which is an open definition, it was said that *"building work"* related to any work in relation to the construction of any class of building.

This decision meant that the project manager owed a duty of care which he was found to have breached.

The project manager appealed to the NSW

Court of Appeal on three grounds, and on 10 February 2023 the appeal decision of *Roberts v Goodwin Street Developments Pty Ltd* [2023] NSWCA 5 was handed down.

DID "BUILDING WORK" EXTEND TO BOARDING HOUSES?

One of the grounds of appeal made out by the project manager was that the trial judge erred in construing *"construction work"* and *"building work"* in section 36 of the DBPA to include the construction of boarding houses.

The Court of Appeal considered section 36 of the DBPA, which it noted was:

1. described by the primary judge as a "*labyrinthine provision*"; and
2. drafted in a way that made its comprehension as difficult as possible [180].

The Court of Appeal said that the conclusion of the primary judge that "construction work" as defined in section 36 of the DBPA related to the construction of any class of building (including boarding houses) was correct but for different reasons.

COURT OF APPEAL'S DECISION

After considering the history of the commencement of the DBPA [184], the Court of Appeal considered the operation of Part 4 and in particular section 37 which imposes the statutory duty of care.

The Court of Appeal observed that:

1. the statutory duty of care in section 37 applies with respect to a person who carries out *"construction work"*, which is a term only defined in section 36(1) and includes "*building work*", which in turn is a term that is confusingly defined in part 4, section 36(1) as well as in part 1, section 4(1) of the DBPA;
2. it was not in dispute that the three buildings the subject of the proceeding were boarding houses; and
3. the core issue relates to whether and how the definition of *"building work"* in section 4(1) applies to the definition of "*building work*" in section 36(1).

In order to resolve this core issue, the Court of Appeal formulated four constructions in respect of the definition of "*building work*" in section 36(1) of the DBPA, with the third of those constructions being the construction that was adopted by the Supreme Court of NSW.

The Court of Appeal held that:

1. the Supreme Court was correct in determining that *"building work"* for the purposes of *"construction work"* related to the work involved in the construction of any class of building;
2. the basis upon which the Supreme Court came to its decision was not correct as the third construction was not the correct construction to be applied; and
3. the correct construction of the definition of "*building work*" in section 36(1) of the DBPA was the fourth construction set out by the Court.

The fourth construction set out by the Court was that the definition of "*building work*" in section 4(1) did apply to the definition of "*building work*" in section 36(1), but only as regards to the first topic addressed in section 4(1) (identifying the type of work undertaken), with the second topic (identifying what type of buildings that work is undertaken on) instead being addressed by the definition of "*building*" in section 36(1).

Accordingly, as the definition of "building" in section 36(1) has the same broad and

encompassing definition of "*building*" found in the Environmental Planning and Assessment Act 1979 (NSW) (EPA Act), "*building work*" as defined in section 36(1) was held to be in respect of the construction of any class of building.

The Court noted that this decision reflected the intention of parliament, noting that:

1. in the second reading speech of the Minister on 23 October 2019 it was stated that it was envisaged that the duty of care would *"apply to construction work in a building that is a class 1, 2, 3 and 10 under the Building Code of Australia"*; and

2. that parliament's stated intent when introducing the duty of care contained in section 37 of the DBPA was that it should have *"broad coverage"* and apply to *"all buildings"* whether residential or not, so long as they fall within the ambit of the EPA Act.

KEY TAKEAWAYS

The decision means that any building professional who has undertaken or undertakes building work in the construction of any building which meets the definition of "building" under the EPA Act is now exposed to a claim for breach of the duty of care owed under section 37 of the DBPA.

The duty is owed to current and subsequent owners of these buildings and requires building professionals to exercise reasonable care to avoid economic loss caused by defects. It operates retrospectively, provided the economic loss in question first became apparent within the 10 years before the commencement of the DBPA. If the economic loss has occurred since the commencement of the DBPA, a claim for a breach of the duty of care needs to be made within 6 years since that economic loss first became apparent.

Furthermore, the Court of Appeal's decision, in no uncertain terms, confirmed that employees such as project managers, superintendents, directors and shadow directors can be found to owe the statutory duty of care. Accordingly, those working in the construction industry should take note that they must exercise caution and due diligence when performing supervisory or management roles in relation to a project or on a construction site.

CONTACT US

Please contact **Garren Pezikian** on **(02) 8239 6500** if you have any questions regarding anything above or if you need any assistance.

This communication is sent by Kreisson Legal Pty Limited (ACN 113 986 824). This article contains general information only and is not a substitute for considered legal, accounting or business advice. It does not take into account your particular circumstances, objectives, appetite for risk or financial situation. We are not tax or BAS agents or specialist tax advisers. You should not rely on this article without seeking detailed advice from discipline experts. The contents are copyright and should not be reproduced, re-published, adapted or used without the author's permission