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EXPANDED REACH OF THE DBPA TO "PERSONS" INCLUDING DIRECTORS AND SITE SUPERVISORS

CASE NOTE - *Boulus Constructions Pty Ltd v Warrumbungle Shire Council*
[2022] NSWSC 1368

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SUMMARY

On 12 October 2022, his Honour Justice Stevenson of the NSW Supreme Court delivered an important decision (*Boulus Constructions Pty Ltd v Warrumbungle Shire Council* [2022] NSWSC 1368) which gives guidance to the scope of the duty of care under Part 4 of the *Design and Building Practitioners Act 2020* (NSW) (**DBPA**).

Although the case dealt with an interlocutory matter and is subject to final hearing, the decision has wide ranging consequences by expanding the potential ambit of the duty to exercise reasonable care to avoid economic losses under section 37 of the DBPA to “persons” such as a director and employees of a builder.

FACTS AND BACKGROUND

The matter began with the applicant, Boulus Constructions Pty Ltd (**the Builder**), bringing a claim against Warrumbungle Shire Council (**Council**) for moneys owed for works rendered.

The Council responded with a cross claim against the Builder for defective works.

The Builder then brought an additional 2 cross claims against Council alleging that Council was not entitled to remedy for defective works due to Council’s failure to obtain a valid Development Consent and Construction Certificate [4].

However, the focus of this judgment was on Council's motion to amend its cross claim which endeavoured to join the Builder's managing director and project manager to these proceedings, arguing that they, as well as the Builder, owed a duty of care to avoid economic losses under section 37 of the DBPA.

The Court considered the meaning to be given to "person" in the expression in section 37 "a person who carries out the construction work".

BUILDER'S ARGUMENTS

The Builder argued that a narrow interpretation should be given to the concept of a "person" otherwise every person on a construction site who has substantive control or supervision over some building work could potentially be a "person who carries out construction work" and would be subject to an automatic statutory duty of care to current and future owners of the property [30].

In particular the Builder argued that:

"... 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..." [30]

The Builder also argued that:

"... a broad interpretation of section 37 would also result in building cases that balloon to include huge numbers of defendants, increasing the cost and complexity of what is already a costly and complex area of litigation. This is especially so when one considers the potential for the defence of proportionate liability that can be pleaded in defence of a claim under [the Act] to raise the same issues of liability of multiple third parties even if the plaintiff does not join all potential defendants to their claim." [30]

The Builder accepted that the reference to a "person" who carries out "construction work", when read with the definition of "construction work" in section 36, is

"... obviously intended to refer to more than just a builder, and by reference to their function encompasses roles such as the architect, the project manager, the design consultants and possibly sub-contractors..." [32]

It was the Builder's position however, that "person" should be construed narrowly as "a person who carries out construction work in their own capacity" and as not including a person who acts as agent for another (at [33]).

KEY ISSUE - WHAT DOES "PERSON" MEAN?

Section 37

In dealing with the meaning of "person" for the purposes of section 37; the Court undertook a statutory interpretation exercise to determine this issue.

Section 37 of the DBPA reads as follows:

"37 Extensions of the duty of care

- (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.**
- (2) The duty of care is owed to each owner of the land in relation to which the construction work is carried out and to each subsequent owner of the land.*
- (3) A person to whom the duty of care is owed is entitled to damages for the breach of the duty as if the duty were a duty established by the common law.*
- (4) A person to whom the duty of care is owed is entitled to damages for the breach of the duty as if the duty were a duty established by the common law.*

- (a) *under a contract or other arrangement entered into with the owner or another person, or*
- (b) *otherwise, than under a contract or arrangement*

"Person" is not defined but "Practitioner" is defined

The Court observed that the term "person" is not defined in the DBPA [48].

However, the term "practitioner" is defined in section 3 to mean:

"... a design practitioner, principal design practitioner, professional engineer, specialist practitioner or building practitioner."

The Court considered the definitions of each of these categories of practitioner under the DBPA and said at [49] that "persons" who carry out particular functions are deemed to be "practitioners" of one kind or other for the purposes of the Act. For example, design practitioner is defined to mean "a person who prepares regulated designs".

However, the Court said that there are other provisions of the Act where reference is made to "persons" who, because of the context in which they are referred, could not be "practitioners" [50] meaning that sometimes the word "persons" is used in the Act to mean a person deemed to be a "practitioner" and "sometimes it is not" [52].

In the critical part of the Act, Part 4 (entitled "Duty of care"), the Court said that there are a number of references to a "person" other than the "person" having the statutory duty under section 37(1) to carry out construction work with reasonable care [53].

At [61] the Court said:

"Parliament has taken care to define "practitioner" and to define the various activities within that definition by reference to "persons" carrying out those activities, it has used the expression "person" in s 37(1). That must mean someone who is not necessarily a "practitioner" and not necessarily a person acting in their capacity as a "practitioner"; nor necessarily acting "in their own capacity". As I said in Pafburn, [31] this will be a question of fact in each case."

The Court therefore held that the term "person" as used in the DBPA is to be read widely and to include persons other than just practitioners.

What is "Construction Work"?

The Court also considered the meaning of construction work in section 36 of the DBPA which defines "construction work" as 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).***

The bolded text gives the term a wider meaning and has allowed for additional actors involved in supervising and controlling construction work, such as managing directors, to be held accountable under Part 4 of the DBPA.

Sub-clause (d) was considered in an earlier decision of Stevenson J in *Owners - Strata Plan No 84674 v Pafburn Pty Ltd* [2022] NSWSC 659 (Please see Kreisson's Case Note Insight titled "[Potential Liability of Developers Under the DBP Act](#)") where the Court held that 'having substantive control over the carrying out of any work' extends the Statutory Duty to a person able to control how the work was carried out even if they did not control how the construction work was carried out.

What did Council argue?

On this point Council argued that the Managing Director and the Project Site Supervisor were able to and in fact did exercise control over the carrying out of the building work.

In particular and with respect to the Managing Director; Council argued that:

"...the managing director of [the Builder]... 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] (including the appointment and control of [Mr McCarthy]), the supervision of the adequacy of the works performed by such project delivery staff, the selection and appointment of subcontractors to perform elements of the Works for which [the Builder] was ultimately responsible, and the overall supervision and acceptance of the works performed by [the Builder's] employees and subcontractors, for the ultimate benefit of [the Council]. Further, as the managing director of [the Builder], (the Managing Director) had the ultimate ability to control how the Works performed by [the Builder] were carried out." [27]

With reference to the Site Manager, it was alleged that: *"... the site supervisor for the Project, ...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."* [28]

WHAT DID THE COURT DECIDE?

In response to the Builders' argument that the Parliament intended that Section 37 to apply primarily to practitioners, the Court said although *"That may be so... the fact is that the word used in s37(1) is "person" not "practitioner."* [63]

The Court then proceeded to explain how Parliament ensured Part 4 of the DBPA is prevented from having an overly expansive reach.

In particular His Honour referred to section 41 which provides that the DBPA is subject to the proportionate liability regime under the *Civil Liability Act 2002* (NSW) (CLA).

This meant that persons such as the Managing Director and Site Manager could apportion liability to each wrongdoer involved, meaning that "persons" are able to share their fault with others involved [64]

After considering the arguments by the parties, the Court granted leave to Council to amend its cross claim cross summons and cross claim List Statement.

SUMMARY

To summarise, the Court held that:

1. The duty of care as provided in section 37 is owed not only by practitioners but also persons involved in “construction work”.
2. The managing director and project manager of the Builder were caught by section 37 due to their supervision and control over the construction work.

The Court allowed Council to join these persons to the proceedings.

KEY TAKEAWAYS

Although the decision was made on a preliminary procedural issue with a final and binding decision yet to be made, some of the key take ways include at least the following:

1. Consistent with the approach of earlier DBPA related decisions, the Court has given a broad interpretation to the application of the statutory duty under the DBPA.
2. Based on the decision the statutory duty of care could depending on the facts extend to directors, project managers, construction managers and site supervisors.
3. By reason of the extended application of the statutory duty under the DBPA, Building companies should:
 - (a) Make sure that their insurance is sufficient and appropriate, and covers their employees and directors, as well as the company itself for the potential liabilities under the DBPA.

- (b) Properly price potential increase to insurance premiums and other risks due to the expanded scope of “Building work” to which the DBPA applies and the increase in number of claims against persons who now need to be covered as additional insureds.
- (c) Consider any potential conflict of interest issues in the event that the company and its directors and or employees are joined in any proceedings under the DBPA.
- (d) Make sure that all persons involved in construction work are aware that they potentially owe a duty to exercise reasonable care to avoid economic loss caused by defaults and need to ensure that they have implemented appropriate risk mitigation measures.
- (e) Improve risk mitigation and other risk management strategies including training and upskilling personnel to avoid the risk of employees; directors and companies becoming liable for damages under the DBPA for breach of statutory duty of care.

CONTACT US

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