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EXPERT EVIDENCE AND THE DESIGN AND BUILDING PRACTITIONERS ACT

CASE NOTE - *Oxford (NSW) Pty Ltd v KR Properties Global Pty Ltd trading as AK Properties Group ABN 62 971 068 965 [2023] NSWSC 343*

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Need for proper evidence

1. Under the *Design and Building Practitioners Act 2020 (NSW) (DBPA)*, a person who carries construction work owes a duty of care to each owner (and to each subsequent owner) of land to which the construction work is carried out.
2. While a person's conduct constituting a breach of a statutory warranty under the *Home Building Act 1989 (NSW) (HBA)* may also relate to a breach of the duty of care owed under the DBPA, the Courts have held that there are requirements for evidence to establish a claim under DBPA.
3. These requirements were recently considered in the decision delivered by His Honour Justice Stevenson of the Supreme Court of NSW on 6 April 2023 in *Oxford (NSW) Pty Ltd v KR Properties Global Pty Ltd trading as AK Properties Group ABN 62 971 068 965 [2023] NSWSC 343*[1].

4. The case found an owner was entitled to damages against the builder for incomplete and defective works but rejected the owner's claim against the director of the builder under the DBPA.
5. This case is important as it provides the importance of proper quantification methodology being applied and documented by experts, especially on the question of percentage allocations.

Background

6. In this matter, the plaintiff, *Oxford (NSW) Pty Ltd (Builder)*, entered into a contract on 8 October 2015 (**Contract**) with the First and Second Defendants (together the **Owners**), to construct a six (6) unit apartment building (Building).
7. The Third and Fourth Defendants are the party to a deed with Oxford guaranteeing the Owners' obligations under the Contract.

8. The architect designing the Building (**Architect**) was also engaged by the Owners to supervise the works. the Architect and the director and sole shareholder of the Builder (**Director**) also owned and developed sites to the south and north of the site of the Building.
 9. The Owners identified a number of issues, including:
 - (a) incomplete works relating to Stages 2 to 8;
 - (b) incomplete works relating to Stages 9 and 10; and
 - (c) rectification works.
 10. The major defects, which were extensive and barely contested by the Builder in closing submissions included:
 - (a) failure to build a shotcrete retaining wall along a boundary of the property (see [43]);
 - (b) construction of the Building to encroach on the north of the property (see [47]);
 - (c) basement perimeter load bearing walls not constructed in accordance with the contract (see [52]);
 - (d) the Building's entry foyer to the west constructed below street level (see [55]);
 - (e) failure to construct foyer, façade and roof in accordance with Development Approval and construction certificate drawings (see [58]);
 - (f) failure to separate services passing through penetrations between separate fire compartments (see [70]);
 - (g) use of plastic pipes through penetrations between separate fire compartments (see [72]);
 - (h) defective wiring in basement (see [74]);
 - (i) failure to install fire-rated door jambs on basement and unit fire doors (see [77]);
 - (j) concrete strength of ground and first floor slabs below structural engineer's specifications (see [78]);
 - (k) part of first floor concrete slab built outside the brickwork such that the reinforcing steel within it was exposed to the elements (see [80]);
 - (l) pergolas constructed using materials not fit for purpose (see [81]);
 - (m) water and gas points installed too close to balcony balustrades, enabling children to climb and fall (see [82]);
 - (n) leaking through double brick parapet wall (see [85]);
 - (o) failure to design or construct wheelchair access to Unit C1 (see [88]);
 - (p) failure to comply with fire resistance requirements (see [91]);
 11. The Court found at [243] that:
 - (a) the Builder did not complete the works;
 - (b) the Builder performed much of the work defectively;
 - (c) the Builder purported to, but was not entitled to, suspend the works; and
 - (d) the Owners were entitled to terminate the Contract.
- Owners' claim**
12. The Owners claimed the following against the Builder:
 - (a) \$398,485.06 from the Builder for the cost of completing the work;
 - (b) rectification costs of \$420,710 under the Contract;
 - (c) (interest they have had to pay as a result of practical completion not being reached by 4 July 2017, as damages pursuant to *Hungerfords v Walker* (1989) 171 CLR 125, in the amount of \$500,000.

13. The Owners also claimed the rectification costs against the Director under the DPBA given his role as the sole director and shareholder of the Builder.

Owners' evidence on costings

14. The Owners engaged the Architect to prepare a schedule setting out all invoices received and paid by the Owners for the completion and rectification, together with an allocation of the amount of these invoices with the following three broad categories:

- (a) incomplete works relating to Stages 2 to 8;
- (b) incomplete works relating to Stages 9 and 10; and
- (c) rectification works.

15. The invoices and amounts scheduled by the Owners were not disputed by the Builder, and His Honour noted that the distinction between payments in respect of completion of works and payment in respect of rectification of works may not be significant for the claim against the Builder given that "*the Builder was obliged to complete the works and to rectify the defects*" [254].

16. However, the Owners' claim against the Director under the DBPA related only to defective work and must therefore exclude any costs of completing the works. The Court held that the Architect's evidence was only capable of establishing "*the fact that made the allocations in question*" [272].

Requirements for an allocation of costs

17. The Owners referred to *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd (No 3)* [2012] VSC 99 where a builder was unsuccessful in challenging the cost allocations of the owners' expert as arbitrary.

18. His Honour noted that the builder in that case provided expert evidence that did not challenge the owners' allocation and the Supreme Court of Victoria was satisfied that the owners' expert "*applied a methodology in determining percentage allocations*" [281].

19. In that case, the owners' expert explained that the report was prepared on "*an elemental basis*" as there was no complete scope of works to simply list costs by trade.

20. The Supreme Court of NSW distinguished that case as the allocations provided by the Architect were not as detailed. For example, the Architect allocated the single largest item in his allocation (\$216,000) in fees "40% to completion works and 60% to rectification works" without providing a basis for the percentages.

21. His Honour acknowledged the Builder's content that "[the Architect] has not stated any of the implicit assumptions or material facts relied upon which informed his opinions and the allocations that he made" [271]

22. This means that any allocation to be relied upon needs to set out the assumptions and/or methodology, or the Court will not find that costs of rectification have been clearly identified (and distinguished from any costs of completing) and a claim under the DBPA may fail.

Requirements to identify breach of duty to exercise of reasonable care

23. The Owners sought to recover \$420,719 in rectification costs from the Builder under the Contract, and also from the Director under the DBPA.

24. Section 37(1) of the DBPA provides that a person who carries out construction work has a duty to exercise reasonable care to avoid economic loss caused by defects.

25. The Court found the Director to be a person under section 37(1) on account that the Director was the sole director and shareholder of the Builder, and his affidavit evidence confirmed that he was a person who supervised and had substantial control over the building work [331].

26. The pleadings of the Owners referred to various failures by the Director to "ensure" certain things, however His Honour noted that the DPBA "*does not impose an obligation on any "person" to "ensure" anything. The obligation is to exercise reasonable care*". [337]

27. The Court nonetheless read the pleadings as referring to a breach of duty to exercise reasonable care, and considered the defects provided as particular in light of this.

28. His Honour repeated [42] – [43] from his decision in *The Owners – Strata Plan No 87060 v Loulach Developments Pty Ltd (No 2)* [2021] NSWSC 1068:

“These authorities establish that a plaintiff alleging a breach of duty of care by a builder, and this must include a breach of the Statutory Duty of Care, must identify the specific risks that the builder was required to manage, and the precautions that should have been taken to manage those risks.

It is not sufficient simply to assert a defect and allege that the builder was required to take whatever precautions were needed to ensure that the defect not be present.”

29. His Honour did not allow the column titled “Scope of Completing Works and Actions” set out work that the Architect contended was needed to rectify the defects as evidence that such work was necessary. Considering this missing nexus, His Honour found that the evidence failed to clearly develop the breach of duty by the Director personally.

Lessons and tips from the case

30. In summary, the Owners’ DPBA claim against the director of the Builder was rejected because:

- (a) the Owners failed to provide clear quantum for the costs of rectification, and
- (b) the evidence required a clearer link between the action that was required and person who allegedly owes the duty to exercise reasonable care to avoid economic loss caused by defects under s.37 of the DBPA

31. For claimants preparing pleadings or experts preparing evidence in respect of the DBPA, the following should be carefully considered:

- a) confirm the person with alleged liability under the DBPA was conducting, or had substantive control over the carrying of, construction work;
- b) avoid using terms such as “ensure” to simply convert a liability (such as a statutory warranty under the HBA) to a breach under the DBPA;
- c) identify the necessity in the risk and associated precaution that the allegedly liable person had;
- d) provide a clearly allocated costing for rectification, that can be substantiated by a methodology if allocated from a pool of costs.

CONTACT US

If you would like more information on the or need any assistance, please contact **Andrew Li** on **(02) 8239 6500**.

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