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The extended statutory duty of care for construction work in NSW

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SNAPSHOT

- The *Design and Building Practitioners Act* provides that a person who carries out 'construction work' has a duty to exercise reasonable care to avoid economic loss caused by defects in, or related to, a building for which the work was done.
- In *Roberts v Goodwin Street Developments Pty Ltd*, the NSWCA confirmed that this retrospective and extended statutory duty of care applies to all classes of buildings, not just residential building work.
- It is likely that this decision will lead to an increase in the number of claims.

With the enactment of the *Design and Building Practitioners Act 2020* (NSW) ('**Act**'), a retrospective statutory duty of care was created in favour of owners of land. The Act provides that a person who carries out 'construction work' has a duty to exercise reasonable care to avoid economic loss caused by defects in, or related to, a building for which the work was done. However, it was unclear from the Act whether the duty of care applied to all classes of building or simply residential building work as defined in the *Home Building Act 1989* (NSW) ('***Home Building Act***').

The scope of the duty of care was considered in *Goodwin Street Developments Pty Ltd atf Jesmond Unit Trust v DSD Builders Pty Ltd (in liq)* [2022] NSWSC 624 ('***Goodwin 2022***') and the decision has been confirmed by the Court of Appeal in [2023] NSWCA 5 ('***Goodwin appeal***'). It is now incontrovertible that the extended statutory duty of care applies to all classes of buildings.

Background

In *Brookfield Multiplex v OC SP 61288* (2014) 254 CLR 185 ('***Brookfield***'), the High Court stated that a builder does not owe a subsequent owner a duty of care to avoid pure economic loss. The Owners Corporation, therefore, had no redress against the builder for defects in the serviced apartment building. The Act has overcome this principle in New South Wales. The other states and territories have been watching the operation of the Act with a view to similarly overcoming the effects of the *Brookfield* case.

Goodwin – the issues

The plaintiff in *Goodwin 2022* had entered a contract with DSD Builders Pty Ltd for the construction of boarding houses in the Newcastle area. The plaintiff was unhappy with the performance of DSD Builders and terminated the contract. In 2018, the plaintiff commenced proceedings against DSD Builders which subsequently went into liquidation. In 2020, Part 4 of the Act was passed with immediate and retrospective effect of ten years. The plaintiff amended its claim against the second defendant to invoke the extended statutory duty of care.

One of the issues in *Goodwin* was whether the second defendant, ostensibly the quantity surveyor who was charged with preparing the progress claims for the building works, had also carried out 'construction work' within the meaning of the Act. This was the first barrier to fixing the second defendant with the extended statutory duty of care. The second barrier was whether the ambit of the extended statutory duty of care in Part 4 included work carried out on boarding houses.

Goodwin – the decision

The key issue was what constituted 'construction work'. 'Construction work' is broadly defined in section 36(1) in a mildly circular manner. It means 'building work', the preparation of designs for 'building work', the manufacture or supply of building products for building work, as well as those supervising, coordinating, project managing or otherwise having substantive control over the carrying out of that work.

This means that everyone who undertakes construction work may be subject to the extended statutory duty of care. The primary judge said the second defendant had supervised the construction work (*Goodwin 2022* at [132]). However, it was not clear whether the extended statutory duty of care extended to all classes of buildings under the *Environmental Planning and Assessment Act 1979* (NSW) (‘***EPA Act***’). The primary judge found that it did.

While the Court of Appeal did not accept the reasoning of the primary judge, the Court of Appeal agreed the extended statutory duty of care applied to all classes of buildings, in particular, to all buildings as defined in the *EPA Act*. Section 1.4 of the *EPA Act* defines building to include:

‘[P]art of a building, and also includes any structure or part of a structure (including any temporary structure or part of a temporary structure), but does not include a manufactured home, moveable dwelling or associated structure within the meaning of the *Local Government Act 1993*.’

A difficulty with the reasoning of the primary judge was that not all provisions in the Act were given work to do. In particular, sections 4 and 36(1) of the Act were otiose. The Court of Appeal remedied this. In order to determine what constitutes ‘building work’ and thereby ‘construction work’, one looks to:

1. the definition of ‘building work’ in s 4 of the Act to determine the type of work the extended statutory duty of care applies to; and

2. the inclusive definition of ‘building work’ in s 36(1) of the Act to determine the type of building the extended statutory duty of care applies to.

All provisions of the Act are therefore given some work to do in determining what constitutes ‘building work’ and thereby ‘construction work’. However, this construction seemed to create an artificial distinction between the definitions of ‘building work’ in sections 4 and 36(1). The definition of ‘building work’ in s 36(1) is an inclusive definition and imports the definition of ‘residential building work’ in the *Home Building Act*. A review of the definition of ‘residential building work’ in Schedule 1, clause 2 of the *Home Building Act* reveals that the definition refers to the type of work that falls within the definition. Nevertheless, the time for a special leave application has lapsed and there will be no challenge in the *Goodwin appeal*. All practitioners must proceed upon the basis that the extended statutory duty of care extends to building work carried out on commercial buildings and infrastructure like bridges, lamp posts and pipelines.

Where to next?

The outcome in *Goodwin* has been unexpected for many. It has also been greeted with some trepidation and has led to some contractors no longer carrying out residential apartment building work in New South Wales. This does not address the fact that the extended duty of care applies to *all* classes of buildings and not just residential apartment building work. Consultant engineers and architects are equally concerned by the outcome in the *Goodwin* case, as they may be exposed to personal liability for breach of the extended statutory duty of care. This concern may be unwarranted as professional indemnity policies typically cover the employees or principals of the insured firms.

While the policy behind the Act, in part, envisages that building practitioners and building consultants are insured, even prior to *Goodwin* some insurers had stopped writing risk for residential apartment buildings. This was because of the retrospective nature of the duty of care, as well as the extended duty owed to the current owner and all subsequent owners of the land. Schedule 1, clause 5 of the Act relevantly provides:

1. ‘Part 4 of this Act extends to construction work carried out before the commencement of section 37 as if the duty of care under that Part was owed by the person who carried out the construction work to the owner of the land and to subsequent owners when the construction work was carried out.

2. Subclause (1) only applies to economic loss caused by a breach of the duty of care extended under that subclause if—
   a) the loss first became apparent within the 10 years immediately before the commencement of section 37, or
   b) the loss first becomes apparent on or after the commencement of that section.’

The rationale behind the Act is to raise the standard of construction however, in the short term, it leads to unacceptable risk for some insurers. It is now possible for developers and builders to purchase Decennial Liability Insurance at a cost of 1.5 per cent to 2 per cent of the construction cost to cover waterproofing and structural defects for a period of 10 years. At the time of writing, it seems that five developers or builders have purchased decennial liability insurance for their development. This should provide the purchasers of those developments with a high level of comfort as the insurers vet the design documentation prior to construction and send experts to inspect the works in progress so that any defects are addressed during construction.

It is difficult to say whether the decision in *Goodwin* will lead to a plethora of claims. The view of the author is that it will inevitably lead to an increase in the number of claims commenced. This will be naturally constrained by

the fact that the primary objective of a plaintiff is to follow the money. While plaintiff owners now have the benefit of an additional cause of action in negligence against entities or persons that they do not enjoy a contractual relationship with, this does not mean that all defendants will have deep pockets.

Further, the extended statutory duty of care is non delegable (see section 39 of the Act). This may mean that a person carrying out 'construction work' is vicariously liable for the negligence of its independent contractors (Cf the interlocutory decision of Rees J in *The Owners – Strata Plan No 84674 v Pafburn* [2023] NSWSC 116). Given the operation of other legislation is expressly preserved by s 41 of the Act, claims under the Act are apportionable (See *The Owners – Strata Plan No 84674 v Pafburn* [2023] NSWSC 116). The upshot of this is that:

- until the applicability of s 5Q of the *Civil Liability Act 2002* (NSW) is determined at final hearing, cross-claims ought to be brought against independent contractors for contribution under s 5 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW); and
- concurrent wrongdoers must be named in the defence of those who have been sued pursuant to the extended statutory duty of care.

Finally, while the extended statutory duty of care has retrospective effect, clause 6.20 of the *EPA Act* still operates to act as a long stop. Building actions cannot be brought more than 10 years after the issue of the occupancy certificate (see Laina Chan 'The enforceability of extended contractual warranties – can the hurdle of applicable limitation periods be overcome?' (2016) 32(3) BCL 170).

[#]The author appeared for Mr Roberts at trial and on appeal.

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