A history of the cases exploring the duty of care under the Design & Building Practitioners Act 2020

On 10 June 2020, section 37 of the *Design and Building Practitioners Act 2020* (NSW*)* (**D&BPA**) commenced, imposing a duty to exercise reasonable care to avoid economic loss caused by defects on a person who carries out construction work. This duty was imposed with **retrospective operation**. The courts have since been tasked with interpreting what that duty involves.

Overview

Whilst this area of law is constantly changing, the below key decisions show that currently:

1. A plaintiff alleging a breach of a duty of care under the D&BPA "*must identify the specific risks that the builder was required to manage, and the precautions that should have been taken to manage those risks*".

2. The duty of care pierces the corporate veil to make individuals liable in some cases, but proving a developer or director had substantive control over the carrying out of work may be difficult, especially in companies with multiple directors, and will be dependent on the facts in each case.

3. When pleading a D&BPA case, the specific risks required to be managed, and the precautions that should have been taken to manage those risks are extremely important and can be difficult factually to prove. Failure to sufficiently plead a D&BPA case can result in the deficient pleadings being struck out.

4. The duty of care extends beyond class 2 buildings in NSW.

5. The Civil and Administrative Tribunal of New South Wales has jurisdiction to hear a D&BPA case.

6. The D&BPA might not impose an obligation on anyone to "ensure" anything.

7. Showing that a private certifier *actually controlled* how the building work was carried out or that it had *the ability and power to control how the work was carried out* is necessary in pleadings of *substantive control* against such persons.

8. The nominated supervisor has a duty to make decisions as to the progress and manner of the works so as to avoid defects.

9. The person who does the building work is *required to perform the construction works in accordance with the Building Code of Australia and the relevant Australian Standard.*

10. Unless the High Court decides otherwise, a defendant cannot reduce its liability under the D&BPA having regard to the responsibility of other concurrent wrongdoers.

11. As opposed to the Supreme Court, the District Court appears more willing to make findings of duties owed.

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1. First major decision – The evidence was insufficient

The Honourable Justice Stevenson set the playing field in ***Loulach Developments***, by making clear that a plaintiff alleging a breach of a duty of care under the D&BPA "*must identify the specific risks that the builder was required to manage, and the precautions that should have been taken to manage those risks"* [at 42], and that "*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*" [at 43].

2. Second major decision – Piercing the Corporate Veil

In ***Goodwin Street Developments***, Stevenson J considered [at 124], that to the extent "residential building work" under the HBA is also work relating to a "building" as defined in the *Environmental Planning and Assessment Act 1979* (NSW), it comes within the ambit of Pt 4 of the D&BPA – thus expanding the D&BPA duty of care to extend beyond the prescribed classes of buildings (class 2 at the time). The defendant in this case did not give evidence and was found to have breached their duty of care as follows:

> *[145] As it was Mr Roberts that was project managing the construction on the site, and as the construction works were undertaken under Mr Roberts's supervision, the fact that the defects were not corrected despite Mr Roberts's assurances that "I'll fix it" bespeaks his want of care in project managing and supervising the construction work.*

In ***Pafburn***, Stevenson J explained a person "otherwise having substantive control" over the carrying out of any work for the purposes of the definition of "construction work" in the D&BPA is a person who, **as a matter of fact in the circumstances of the particular case,** is able to control how the work is carried out:

> *[25] However, the words "otherwise having substantive control" point to a conclusion to be reached having regard to all relevant circumstances. The words used are not "otherwise substantively controlling the carrying out of" the work. A person could have "substantive control over the carrying out of" work notwithstanding the fact, at any particular moment in time, the person was not actually doing anything to cause that control to be exercised; provided the person had the ability and the power to control how the work was carried out.*
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> *[26] In those circumstances, in my opinion, it is sufficient to enliven the definition to establish that the person was in a position where it was able to so control how the work was carried out. That would be a question of fact in each case. The fact that, say, a developer owned all the shares in a builder, and had common directors, might lead to an inference of such an ability to control. Where, as here, the position is the other way around, namely that the builder owns all the shares in the developer, that inference may be less easily available.*

Further, in ***Pafburn***, it was alleged by the plaintiff that an appropriate response to a risk of harm caused by defects was for the builder to "inspect" the work in question. His Honour considered that pleading lacking, stating:

> *[32] Further, at various places in the Scott Schedule, it is alleged that an appropriate response to a risk was to "inspect" the work in question. Mr Di Francesco submitted, and I accept, that the Owners Corporation should, in due course, specify how the inspection was to take place; including whether a visual inspection was sufficient or whether some kind of testing, and if so what kind of testing, or other intrusive work, is said to be required.*

3. Beware of pleading requirements

In ***Stromer***, the builder cross-claimed against the building supervisor, alleging: "*if the building work suffered from the defects alleged by the Owners Corporation, then the Building Supervisor breached its duty of care*". Ball J considered these pleadings, stating:

[6] An allegation that the Building Supervisor failed to take adequate steps to prevent the relevant harm from occurring without identifying what those steps were is not a proper pleading of negligence. What the Builder must do is identify the particular actions that are said that a person in the position of the Building Supervisor acting reasonably would have taken to avoid the relevant risk of harm. It then needs to allege that had the Building Supervisor taken those steps the harm would not have occurred.

The defective pleadings in ***Stromer*** were accordingly struck out.

4. The D&BPA extends beyond class 2 buildings

In ***Roberts v Goodwin Street Developments Pty Ltd***, the Court of Appeal [at 230 – 232] affirmed that the building work captured by the D&BPA includes classes of building outside those prescribed by the D&BPA regulations, including a class 1b boarding house:

A boarding house falls within the definition of "building" in the Environmental Planning and Assessment Act 1979 (NSW), thereby falling within s 36 of the DBP Act. Section 37 of the Act thus applied here.

5. NCAT has jurisdiction to hear D&BPA claims

Deaves was a decision where the Tribunal on first instance dismissed the D&BPA claim on the basis of the Tribunal not having jurisdiction in respect of such a claim. In ***Deaves***, the Tribunal Appeal Panel found that the Tribunal **does** have jurisdiction to determine D&BPA claims, with jurisdiction conferred by s 48K of the HBA.

6. No duty to "ensure"

In ***Oxford*** (overturned on appeal in ***Kazzi***), Stevenson J explained that the duty of care is **not** a duty to "ensure" there are no defects, in saying:

[337] s 37 of the DBP Act does not impose an obligation on any "person" to "ensure" anything. The obligation is to exercise reasonable care.

and decided against the plaintiff:

[346] Precisely how these matters bespoke a breach of duty by Mr Kazzi personally was not clearly developed in the Owners' submissions.

However, in ***Oxford*** the plaintiffs were partially successful, as the builder accepted that it had acted in breach of its duty of care in relation to a boundary encroachments defect and a concrete strength issue.

7. Does a developer's director have the ability and power to control how the work was carried out?

In ***The University of Sydney***, the plaintiff alleged that the defendant, a private certifier, had substantive control of the carrying out of the relevant building work. Stevenson J explained in relation to substantive control at [20]:

. . .to show the defendant had "substantive control" over the relevant work, that is, the work dealing with the cladding, the University would have to show either that McKenzie Group actually controlled how the cladding was installed (and there is no such suggestion) or that it had "the ability and power to control how the work was carried out".

In circumstances where the pleadings did now suggest that the defendant actually controlled how the cladding was installed, leave to plead against the defendant was declined.

8. What is the scope of the duty of care?

In ***Mangano***, the District Court considered the question of "what is the content of the statutory duty of care". Newlinds J explained:

> *[104] It seems to me clear that the content of that statutory duty, or at least whether it has been breached or not, will vary depending upon the factual circumstances of any particular case.*
>
> *[109] This is because what constitutes "reasonable care" will vary depending on all of the circumstances a person caught by the act finds themselves in. To frame the duty by reference to the words of s 37 is only the start of the exercise. The question then becomes, to identify what a person did or did not do and then to determine in the particular factual context if that conduct satisfied the statutory duty.*

In ***Mangano***, the plaintiff contended that the defendant had a duty to ensure. The plaintiff argues the defendant "*cannot acquit himself by actually exercising reasonable care in entrusting the task to a reputable supervisor who in turn retains reputable contractors, but must actually ensure that the task is done and done carefully*". Ultimately, it was conceded by the defendant that he did in the circumstances owe a duty to ensure. The District Court was therefore not required to make a finding on "the content of the statutory duty of care".

Kazzi is a Court of Appeal decision which overturned the Supreme Court decision of Stevenson J in ***Oxford***, representing a considerable leap in the caselaw in relation to the duty of care owed under the D&BPA and how it applies to nominated supervisors. In ***Kazzi***, it was alleged that:

> *[80] Mr Kazzi breached his duty of care by "failing to carry out the Building Works, and/or ensure that the Building Works were carried out, in accordance with the construction certificate plans and specifications".*

In ***Kazzi***, the Court of Appeal made a finding on the content of the statutory duty of care in favour of the plaintiff as follows:

> *[126] I consider that Mr Kazzi breached his statutory duty of care, as the nominated supervisor of works, by making decisions as to the progress and manner of the works that gave rise to the defects on which the Owners relied.*

In ***Kazzi,*** whilst plead that the breach of duty of care was by the nominated supervisor's failure to ensure the building works were carried out [satisfactorily], that was not the finding of duty the Court of Appeal made, and so it is questionable whether the ***Kazzi*** decision overturns the ***Oxford*** decision that the D&BPA does not impose an obligation on any "person" to "ensure" anything.

However, there may be facts relevant to the finding in ***Kazzi*** which may be difficult to prove against nominated supervisors in other instances, such as the defects being a result of decisions made by the nominated supervisor:

> *[78] As the primary judge found, Mr Kazzi "supervised, and had substantive control over, the building work at the site in that he was able to control how the work was carried out": at [331]. Most of defects alleged were the product of decisions made by Mr Kazzi to depart from the approved planning and engineering documents for the Building, in circumstances where he was provided with those documents and had arranged for the two construction certificates to be issued.*

and the finding of substantive control, as in ***Oxford***:

> *[330] He said in his first affidavit that:*
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> > *"I attended the Property on a weekly basis (about two to three times a week) to **oversee** the construction of the Building." (Emphasis added.)*

[331] He was thus a person who supervised, and had substantive control over, the building work at the site in that he was able to control how the work was carried out.

Therefore, in a D&BPA claim against a nominated supervisor, a subpoena of the nominated supervisor's telephone records may be useful to demonstrate location data, which might prove the frequency of their attendance on site (to prove substantive control), or alternatively, non-attendance on site, if alleging that the supervisor should have been on site more frequent than they were.

9. What is the scope of the duty of care? Pt2

Less than one month after ***Kazzi*** came ***Da Silva***, a District Court decision which also expands upon the duty of care owed. In ***Da Silva***, the defendant was the builder who performed the defective works, and the court found that the builder, as a waterproofer, owed a duty to comply with the relevant Australian Standards as they relate to waterproofing in saying:

[253] I find that Mr Da Silva owed the Owners Corporation a duty to exercise reasonable care to avoid economic loss caused by defects in or related to the Lamia building and arising from the construction work performed by Mr Da Silva. This duty of care arises from section 37 of the DBP Act.

[254] I find that in order to meet that duty of care Mr Da Silva was required to perform the construction works in accordance with the Building Code of Australia and the relevant Australian Standard (AS 4654.2-2012)

[256.3] I find that a reasonable waterproofer in Mr Da Silva's position would have taken the precaution of complying with the Building Code of Australia and the Australian Standard.

However, in ***Da Silva***, the requirement to perform the works in accordance with the relevant Australian Standards was found to be owed in circumstances where repeated warnings were given to the defendant – circumstances which might not be easily provable in other cases:

[143] To the contrary, the evidence establishes that Mr Moisidis repeatedly warned Mr Da Silva (and Mr Haralambis) against proceeding with the work in the way Mr Da Silva was proposing because (amongst other things) it would raise the height of the screed under the tiles and thereby raise the height of the finished tiled balcony relative to the height of the internal floor, reducing the step down from inside to outside. The repeated warnings were contained in the 4 warning emails, which themselves referred to or were confirmatory of other meetings.

10. Is a defendant liable for all the damage or only a part to reflect their proportion of responsibility

In the ***Pafburn High Court Appeal***, the question of whether a defendant can rely upon a proportionate liability defence will be determined. This decision will be significant, as it will dictate whether or not damages against a defendant for breach of duty of care under the D&BPA can be adjusted to reflect the defendant's responsibility for the damage suffered, having regard to the responsibility of concurrent wrongdoers for that damage.

11. Key Cases

This article considered the following 11 of the 62 published decisions on NSW Caselaw referencing the D&BPA, and one anticipated High Court decision:

No.	Case	Court	Decision Date	Judgment of
1.	*The Owners - Strata Plan No 87060 v Loulach Developments Pty Ltd (No 2)* [2021] NSWSC 1068 (**Loulach Developments**)	Supreme Court	15 Nov 2021	Stevenson J

2.	*Goodwin Street Developments Pty Ltd atf Jesmond Unit Trust v DSD Builders Pty Ltd (in liq)* [2022] NSWSC 624 (**Goodwin Street Developments**)	Supreme Court	19 May 2022	Stevenson J
3.	*The Owners – Strata Plan No 84674 v Pafburn Pty Ltd* [2022] NSWSC 659 (**Pafburn**)	Supreme Court	24 May 2022	Stevenson J
4.	*The Owners – Strata Plan No 89005 v Stromer (No 3)* [2022] NSWSC 1707 (**Stromer**)	Supreme Court	15 Dec 2022	Ball J
5.	*Roberts v Goodwin Street Developments Pty Ltd* [2023] NSWCA 5 (***Roberts v Goodwin Street Developments Pty Ltd***)	Court of Appeal	10 Feb 2023	Ward P Kirk JA Griffiths AJA
6.	*Deaves v Sigma Group NSW Pty Limited* [2023] NSWCATAP 94 (**Deaves**)	Tribunal Appeal Panel	31 Mar 2023	P Durack SC M Gracie
7.	*Oxford (NSW) Pty Ltd v KR Properties Global Pty Ltd trading as AK Properties Group ABN 62 971 068 965* [2023] NSWSC 343 (**Oxford**)	Supreme Court	06 Apr 2023	Stevenson J
8.	*The University of Sydney v Multiplex Constructions Pty Ltd* [2023] NSWSC 383 (**The University of Sydney**)	Supreme Court	18 Apr 2023	Stevenson J
9.	*Mangano v Amescorp Pty Ltd* [2024] NSWDC 195 (**Mangano**)	District Court	31 May 2024	Newlinds SC DCJ
10.	*Kazzi v KR Properties Global Pty Ltd t/as AK Properties Group* [2024] NSWCA 143 (**Kazzi**)	Court of Appeal	07 Jun 2024	Gleeson JA Mitchelmore JA Basten AJA
11.	*The Owners – Strata Plan 80867 v Da Silva* [2024] NSWDC 263 (**Da Silva**)	District Court	05 Jul 2024	Waugh SC DCJ
12.	*Pafburn Pty Limited & Anor v. The Owners - Strata Plan No 84674* [2024] HCASL 96 (**Pafburn High Court Appeal**)	High Court		

This area of law is constantly changing. This article is not legal advice.

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