How duty of care works in favour of property and strata owners

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This article includes an example of the new statutory duty of care protection that property and strata owners now enjoy. By the reasons of this decision, there is a real and potential argument that “building work” to which the statutory duty of care applies (under section 36 and 37 of the DBPA) is not strictly restricted to class 2 or part 2 buildings but can also apply to the broader meaning of “building” under the EPAA.

An example of how the new duty of care protection works in favour of property and strata owners in the Courts

What are some examples of the new statutory duty of care protection that property and strata owners now enjoy, I hear you ask? Well, you are in luck. Below is one example that we have come across recently:

Roberts v Goodwin Street Developments Pty Ltd [2023] NSWCA 5

The facts, in brief:

- 1) Daniel Roberts, the appellant, is a builder who operated through a company, DSD Builders Pty Ltd (DSD) which is now in liquidation;
- 2) DSD was engaged by Goodwin Street Developments Pty Ltd (the respondent) under a building contract entered into on 10 July 2017 for the construction of student accommodation in Jesmond NSW on land owned by the respondent;
- 3) At the time that the works commenced on site in July 2017, DSD had employed a licensed supervisor at the site (Mr Johnstone) but he left DSD about a month after the works commenced and was not replaced;
- 4) Work was well advanced when the parties fell out with work stopped after 2 March 2018;
- 5) Appellant entered onto the property and damaged the buildings and removed fixtures including doors, windows and stairs;
- 6) In the first instance in the Supreme Court, his Honour found the appellant, Daniel Roberts, is liable to the respondent for damages on what is known as an action on the case (or trespass) for damage to the reversionary interest of the respondent in property at the site. And also, the primary judge separately found that the appellant is liable for damages for its breach of the statutory duty of care in relation to construction work carried out on the property.

We note the case mentions, amongst other things:

- 7) Trespass against the reversioner - A reversioner, including a lessor who has leased

its property to a lessee, or an owner of land who has temporarily given another (such as a builder) exclusive possession of its property, is entitled to bring “an action on the case for trespass” if during that other person’s possession of the property, a trespass occurs resulting in “permanent injury to the reversion” or that will “necessarily affect the reversioner’s interest when the property falls into possession”;

- 8) As in a contract claim, the prima facie approach to assessing damages for tortious damage to property when the owner has possession of the property, or soon will resume possession of the property is by reference to the costs of repairing the damage to the property or the diminution in value to the property;
- 9) If the wrongdoer seeks to challenge the reasonableness of the aggrieved party’s election in that regard, it bears the evidentiary burden of establishing unreasonableness … In this case the evidentiary burden lay with the appellant, as the party challenging the assessment of damages on the basis of rectification costs;
- 10) Extended definition of “building work” under the DBPA - the Court of Appeal has expressed the view that due to the inherent difficulties of the DBPA wording in that regard (with three reasonable but different interpretations), the best construction with respect to the general definition under section 4(1) of the DBPA applies to the further definition of “building work” in section 36(1) of the DBPA but only in identifying the type of work undertaken but not the type of building involved. In this case, the boarding houses fell under Class 1B of the BCA. However, because it is a building under the EPAA and it was not disputed that the type of work undertaken did not also fall under the general definition of “building work” under section 4(1), the statutory duty of care under the DBPA was held to apply.
- 11) The appeal by Daniel Roberts was dismissed with costs.

Takeaway

By the reasons of this decision, there is a real and potential argument that “building work” to which the statutory duty of care applies (under section 36 and 37 of the DBPA) is not strictly restricted to class 2 or part 2 buildings but can also apply to the broader meaning of “building” under the EPAA.

More Information

Please contact our Property/Strata law team at Matthews Folbigg Lawyers on 9635 7966 if you would like advice or assistance or email Eadz Tang at Eadzt@matthewsfolbigg.com.au. Or simply use the conact form below.

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