

# Australian Society of Building Consultants

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Presented by Mark Glynn and David Creais

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# The Application of the Statutory Duty of Care and Class 2 Buildings

*Goodwin Street Developments Pty Ltd atf Jesmond Unit Trust  
v DSD Builders Pty Ltd (in liq) [2022] NSWSC 624*

# The Facts

- Goodwin Street Developments Pty Ltd (**GSD**) owned land in Jesmond, New South Wales.
- On 10 July 2017, GSD enters into a building contract with DSD Builders Pty Ltd (**DSD**) to construct three residential boarding houses.
- Several disputes arose relating to late payment, defective works and general delays and works were suspended.
- During this time there was malicious damage to the works, including removed materials, fixtures and fittings.
- GSD terminated the building contract and commenced this proceeding against the DSD and Mr Roberts.

# The Act

*The duty of care is found in section 37(1) of the DBP Act, which reads:*

*"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."*

# The Decision

**Justice  
Stevenson**

- The statutory duty of care in section 37 applies to “construction work” in relation to a boarding house.
- It does not matter that a boarding house is not a “dwelling”.
- Mr Roberts did carry out “construction work” for purposes of section 36 of the Act.
- Mr Roberts engaged in project management of site and in supervision of the construction

**Must the person who owes the duty of care be  
'actually exercising substantive control' or is the  
'ability to exercise substantive control' sufficient?**

*The Owners – Strata Plan No 84674 v Pafburn Pty Ltd [2022]  
NSWSC 659*

# The Facts

The Owners Corporation sought relief from builder and developer for defect works regarding a development in North Sydney.

Developer was the owner of the land until 6 December 2010 when the strata plan was registered.

The Owners Corporation commenced the proceedings on 1 December 2020, just five days within the 10 year 'long stop' limitation period .

# The Act

*Construction Work means any of the following:*

.....

*(d) supervising, coordinating, project managing or **otherwise having substantive control over carrying out of work....***

The question is ...it is necessary to show that the person actually exercised such “substantive control”; or whether it is sufficient to show that the person had “substantive control” in the sense of having the ability to exercise such control, whether or not such control was in fact exercised.

# The Decision

## The Court

- 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.

# Can you owe yourself a duty of care?

*The Owners – Strata Plan No 84674 v Pafburn Pty Ltd [2022]  
NSWSC 659*

# The Act

*The duty of care is found in section 37 of the DBP Act and section 37(2), which reads:*

*37(1) - A person who carries out construction work has a duty to exercise reasonable care.....*

*“*

*37.2 - 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.”*

# The Decision

## The Court

- When determining if the term '*person*' extends to developers Justice Stevenson determined that 'each owner' in section 37(2) of the Act does not include *an owner that has itself carried out the construction work* in question.

# Questions

Mark Glynn

Partner

D +61 2 82817865

[mglynn@bartier.com.au](mailto:mglynn@bartier.com.au)

David Creais

Partner

D +61 2 8281 7823

[dcreais@bartier.com.au](mailto:dcreais@bartier.com.au)

To subscribe visit – [www.bartier.com.au](http://www.bartier.com.au)



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