HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	S54/2024
File Title:	Pafburn Pty Limited (ACN 003 485 505) & Anor v. The Owne
Registry:	Sydney
Document filed:	Form 27A - Amended Appellant's submissions
Filing party:	Appellants
Date filed:	05 Jun 2024

Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **PAFBURN PTY LIMITED**
(ACN 003 485 505)
First Appellant

MADARINA PTY LIMITED
(ACN 080 675 627)
Second Appellant

and

THE OWNERS – STRATA PLAN NO 84674
Respondent

AMENDED APPELLANTS' SUBMISSIONS

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Statement of Issues

2. This appeal concerns whether, and how, a damages claim under Pt 4 of the *Design and Building Practitioners Act 2020* (*NSW*) (**DBPA**) is an apportionable claim under Pt 4 of the *Civil Liability Act 2002* (*NSW*) (**CLA**). The issues in this appeal are:
3. **First,** whether s 5Q CLA is enlivened by a claim under Pt 4 DBPA?
4. **Secondly,** whether s 39 DBPA excludes by necessary implication the application of Pt 4 CLA to a claim brought under Pt 4 DBPA; or whether instead the cause of action under Pt 4 DBPA is subject to Pt 4 CLA?
5. **Finally,** if s 5Q CLA is enlivened by a claim under Pt 4 DBPA, does s 39(a) CLA prevent any apportionment taking place where there are concurrent wrongdoers; or whether instead apportionment remains available where there exists, amongst the

concurrent wrongdoers in respect of a defect, persons to whom a defendant did not delegate or otherwise entrust work or a task?

Part III: Section 78B of the *Judiciary Act 1903* (*Cth*)

6. A notice under s 78B of the *Judiciary Act 1903* (*Cth*) is not required.

Part IV: Reports of reasons for judgment

7. The Court of Appeal's decision has been selected for reporting by the NSW Law Reports. Its internet citation is *The Owners - Strata Plan No 84674 v Pafburn Pty Ltd* [2023] NSWCA 301 (**AJ**). The primary judge's decision is also unreported. Its internet citation is *The Owners - Strata Plan No 84674 v Pafburn Pty Ltd* [2023] NSWSC 116 (**PJ**).

Part V: Relevant Facts

Background

8. This appeal involves a residential strata title building located at 197 Walker Street, North Sydney, NSW (**Building**). It is an 8 level, high rise, apartment block, constructed over 2 basement carpark levels and comprises 19 residential lots.

9. The respondent (**OC**) was incorporated on 6 December 2010 upon registration of the strata plan of subdivision for the Building.[1] The second appellant (**Developer**) was the owner of the Building up to registration of the strata plan.[2]

10. In 2008, the Developer retained the first appellant (**Head Builder**),[3] to design and construct the Building.[4] That work took place between 2008 and late 2010. The Final Occupation Certificate for the Building was issued on 6 December 2020.[5]

11. On 1 December 2020, the OC commenced the first instance proceedings claiming damages against the Head Builder and the Developer under Pt 4 DBPA in respect of alleged defective construction work in the common property of the Building.

12. The OC filed an amended List Statement on 8 August 2022 (**ALS**) (ABFM 11-134).

13. On 21 September 2022, the Head Builder and the Developer filed a joint First Amended List Response (**FALR**) (ABFM 135-277). The FALR denied liability and,

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[1] ALS at C3 (ABFM 13) and FALR at C3 (ABFM 139).
[2] ALS at C5(c) (ABFM 13-14) and FALR at C5 (ABFM 139)
[3] The Developer is the wholly owned subsidiary of the Head Builder with a common director (ALS C4(d), C12A & C12B (ABFM 13 & 15-16) and FALR at C4, C12A & C12B (ABFM 139 & 141-142).
[4] ALS at C8 & C10 (ABFM 14) and FALR at C8 and C10 (ABFM 140).
[5] ALS at C15I (ABFM 20) and FALR at C15I (ABFM 146).

amongst other things, in C27 & C29A[6], sought apportionment under Pt 4 CLA with 9 alleged concurrent wrongdoers, being persons within the following categories:

(a) persons that had a connection with the Head Builder in the Building works, i.e. tradespersons who were subcontracted by the Head Builder;[7] and

(b) other persons involved with the building work: i.e. an architect retained by the Head Builder to prepare drawings and designs; the private certifying authority appointed by the Developer; the Local Council who approved certain drawings for the construction works and a manufacturer/supplier of aluminium composite panels to a subcontractor of the Head Builder.[8]

10 14. On 11 November 2022, the OC filed a notice of motion seeking to strike out paragraphs of the FALR under r 14.28 of the *Uniform Civil Procedure Rules 2005* (NSW) (**the Motion**) as not disclosing any arguable defence [ABFM 5-8].

Decision of the Primary Judge

15. On 16 February 2023, the Motion was heard by Rees J and orders made. The PJ was published on 23 February 2023. Rees J held that proportionate liability defences under Pt 4 CLA can be pleaded by ~~Appellants~~ the Head Builder and Developer[9] and that s 5Q CLA does not apply to the statutory duty of care contained within Pt 4 DBPA but instead s 5Q CLA is for non-delegable duties of care at common law: PJ [24]-[52], CAB 12-19.

20 *Decision of the Court of Appeal*

16. On 23 May 2023, the OC filed a Summons Seeking Leave to Appeal and draft Notice of Appeal. Both were heard concurrently on 1 November 2023.

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[6] C29A of FALR (ABFM 180-181), Developer and Head Builder name each other as concurrent wrongdoers if the OC's claims are upheld at trial.

[7] FALR at C27A(c), (f), (g) waterproofer entity & its director/licensee, ABFM 153-154, 163-164, 166-167, 168-169; C27A(da), (f), (h) supplier/installer of aluminium composite panels and spandrels, ABFM 154-158, 167, 173-174; C27A(f), (i) formworker, ABFM 164-165, 177; & C27A(gA), (j) tiler, ABFM 169-171, 178-179.

[8] FALR at C27A(da) manufacturer/supplier of aluminium composite panels, ABFM 158-159; C27A(da)(v), (f), (g), (gA), (h), (i), (j) private certifier, ABFM 159-162, 167-168, 169, 172, 174, 177, 179; architect C27A(gA), (i), (j), ABFM 171-172, 175-176, 179; & Local Council C27A(i), ABFM 176-177.

[9] Rees J considered that the proportionate liability defence in [C27] and [C29A] of the FALR was insufficiently pleaded and particularised but granted leave for the Head Builder and Developer to re-plead that defence. [C20]-[C24] of the FALR (relating to time limitation and contributory negligence) are agreed between the parties to be further amended with another wording proposed by the Head Builder and Developer to the OC.

17. The Court of Appeal upheld the appeal and found that proportionate liability cannot apply as a defence to the OC's claims under Pt 4 DBPA[10] because either, (i) s 39 DBPA excludes by necessary implication Pt 4 CLA; and/or (ii) ss 5Q and 39(a) of the CLA are enlivened by claims under Pt 4 DBPA such that no apportionment is to occur.

18. The AJ provides for the application of solidary liability under Pt 4 DBPA rather than proportionate liability and, in consequence, persons whom owe the statutory duty of care under s 37 DBPA are required to bring cross-claims against any other concurrent wrongdoers for contribution.[11]

Part VI: Argument

Relevant Provisions of the DBPA and the CLA

The DBPA

19. Parts 1, 4 ~~–9~~ and cll 1, 4A-5 of Sch 1 of the DBPA commenced on its date of assent, i.e. 10 June 2020.[12] On 1 July 2021 Pt 2, Pt 3 (Div 1), ~~Sch 1~~ Pts 5-9 and cll 2-4 of Sch 1 of the DBPA commenced[13]. By s 2(3) DBPA, Pt 3 (Div 2) DBPA will commence if and when proclaimed.

20. The DBPA was enacted partly as a response to a report commissioned by the "Building Ministers' Forum" in the context of public concerns about building defects highlighted by publicised cases of widespread and serious defects, e.g. Mascot Towers and Opal Tower in Sydney.[14] Pt 4 DBPA specifically seeks to set aside the effect of the decision in ***Brookfield***[15] where this Court held that the head builder of strata-titled serviced apartments did not owe a tortious duty of care at common law to subsequent owners absent special cases involving vulnerability.[16]

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[10] AJ - Basten AJA at [20], [32], [43], [46], [56], [67], [68], [70], [88], & [101], CAB 43, 47, 51, 55, 58, 59, 65 & 69; Ward P at [1], CAB 38 & Adamson JA at [11]-[16], CAB 40-42.
[11] Section 5 of the *Law Reform (Miscellaneous Provisions Act) 1946* (*NSW*) and/or equitable contribution - AJ - Ward P at [1], CAB 38; Adamson JA at [14]-[15], CAB 41-42 & Basten AJA at [101], CAB 69.
[12] AJ (Basten AJA) at [27] (CAB 45). Per s 2(1) of the DBPA, Pts 1, 4 & cll 1, 4A-5 of Sch 1 of the DBPA commenced on the date of assent of the DBPA, being 10 June 2020 (see NSW Government Gazette No. 122, 12/6/2020, p.2628).
[13] Per s 2(2) DBPA.
[14] ***Roberts*** *v Goodwin Street Developments Pty Ltd* [2023] NSWCA 5; 110 NSWLR 557 at [195]-[210] (Kirk JA & Griffiths AJA; Ward P agreeing at [78]).
[15] ***Brookfield*** *Multiplex Ltd* v *Owners Corporation Strata Plan 61288* (2014) 254 CLR 185; [2014] HCA 36.
[16] Second Reading Speech Legislative Assembly Hansard 23 October 2019 for the *Design and Building Practitioners Bill 2019* (*NSW*) and Second Reading Speech Legislative Council Hansard 19 November 2019.

21. The DBPA refers to "building practitioners". But this expression does not appear in Pt 4 DBPA. By s 7 DBPA, a "building practitioner" is defined to mean a person who agrees under a contract or other arrangement to do building work or, if more than one person so agrees, then a person who is the principal contractor for the work.

22. Section 7(3) DBPA expresses that "a building practitioner is taken to do building work" if the practitioner agrees to do building work under a contract or other arrangement or is the principal contractor for the work. Various sections in Pt 2 DBPA refer to a building practitioner "who does building work": e.g. s 22(1) DBPA provides "A building practitioner who does building work must take all reasonable steps to ensure that the building work, or any part of that work, complies with the Building Code of Australia applicable to the work …"

23. Other provisions in the DBPA use the expressions "a person who carries out" (s 3 DBPA (definitions of "professional engineer" and "specialist practitioner ~~contractor~~"), "person carries out" (in s 32 DBPA) and "carry out" (in ss 19, 32, 33(1)(a), 35 (s 35 has not yet commenced), 45(3)(b), 46, 50, 88 and Sch 1 cll 3(3), 4, 4A, 4B and 4D(3) DBPA).

24. The contrast between "who carries out [construction work]" and "who does [building work]" appears to be that the former applies to a person who performs such work, whereas the latter is a broader concept and includes a person who agreed "to do" work but did not itself carry out that work, particularly a head contractor. Section 37(1) DBPA (within Pt 4 DBPA) imposes a statutory duty of care on "a person who carries out construction work" rather than upon a *building practitioner* who is *taken to do building work* or *who does building work*.

25. Part 2 DBPA prescribes various activities that building practitioners and design professionals must do. The provisions in Pt 2 DBPA expressly state that such persons "must ensure" or "must take all reasonable steps to ensure" various activities or standards are carried out, or complied with, and prescribe criminal penalties for failing to so act: e.g., for building practitioners see ss 15(1), 18, 20, 21, 22 DBPA.

26. Part 4 DBPA, entitled "Duty of Care", focuses around s 37 which imposes a duty on "a person who carries out construction work". There is no definition of the expression "carries out" but its ordinary meaning and context in the DBPA read as a whole establishes that it is concerned with the performance of activities. This is indicative of the duty in s 37(1) DBPA being limited to persons who actually carry

out construction work, not who would be taken to do building work because they agreed to do that work.

27. Section 37(1) DBPA imposes on a person who *carries out* construction work 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." Under s 37(2) DBPA, the duty of care is owed to each owner of the land in relation to which the construction work is carried out and each subsequent owner of the land.

28. Section 37(3) DBPA gives an owner a right to claim damages for a breach of s 37(1) DBPA "as if the duty were a duty established by the common law".[17]

29. The concept of "construction work" is defined in s 36 DBPA to involve four different kinds of conduct: (a) building work [which in turn is defined within s 36 DBPA to include "residential building work" under the *Home Building Act 1989* (*NSW*) (**HBA**)],[18] (b) the preparation of regulated designs for building work [defined in s 5 DBPA], (c) the manufacture or supply of a building product[19] used for building work, or (d) supervising, coordinating, project managing or otherwise having substantive control over the carrying out of any work referred to in (a), (b) or (c)[20].

30. By s 38 DBPA, an owners corporation is taken to suffer economic loss if it bears the cost of rectifying defects the subject of a breach of the duty in s 37(1) DBPA.

31. Section 39 DBPA provides that the person who owes the duty, under s 37 DBPA, is not entitled to delegate that duty. Section 39 does not inform the standard or content of the duty and that is found solely within s 37 DBPA. The effect of s 39 DBPA is that a person subject to the duty under s 37 does not satisfy its obligation by selecting a competent person to undertake the work. As the duty only applies to the person carrying out the work, the selected person can only be a person whose undertaking

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[17] The Second Reading Speech Legislative Assembly Hansard 23 October 2019 for the *Design and Building Practitioners Bill 2019* (*NSW*) states about s 37(3) DBPA "This means that … any person who wants to proceed with litigation will be required to meet the other tests for negligence established under the common law and the Civil Liability Act 2002. This includes determining that a breach of the duty occurred and establishing that damage was suffered by the owner as a result of that breach."

[18] Schedule 1 cll 1 & 2 of the HBA define what amounts to "residential building work" and is extended by cll 13 and 14 of the *Home Building Regulation 2014* (*NSW*). Section 4(1) DBPA and cl 12 of the *Design and Building Practitioners Regulation 2021* (*NSW*) (**Regulation**) extend "building work" to apply to classes 2, 3 and 9C buildings under the Building Code of Australia and mixed use buildings in those classes. Cl 13 of the Regulation excludes certain works.

[19] Section 36 DBPA defines "building product" to have the same meaning as in the *Building Products (Safety) Act 2017* (*NSW*).

[20] See ***Roberts*** *v Goodwin Street Developments Pty Ltd* [2023] NSWCA 5; 110 NSWLR 557 at [186]-[210] & [219]-[232] (per Kirk JA and Griffiths AJA; Ward P agreeing at [78]).

of the work is such that the person the subject of the duty is itself carrying out the work, such as employees or contract labour.[21] As the duty is imposed upon the particular person who actually *carries out* the construction work the designation of the duty as non-delegable is not concerned with the usual circumstance at common law where characterising a duty as non-delegable is concerned with the effect of procuring an independent contractor to undertake the task. The large number of cases in this Court and elsewhere have principally been concerned with the situation where the person chosen to undertake the task has the result that the party burdened by the duty at law was not itself doing the task.

10 32. Where a non-delegable duty has been found to exist[22] at common law or under statute[23], it will be seen that in those cases the defendant itself had a duty of care upon it, which was non-delegable, i.e., personal to the defendant, and the defendant then delegated or entrusted the actual carrying out of the work or task to an independent contractor. In that situation the defendant retained a duty to see that, or procure, or ensure, that the task was carried out with due care. However, by contrast, under s 37(1) DBPA the statutory duty is imposed only on the person who *carries out the construction work*, not on the person who *contracted to do the work*, or *is taken to do construction work*, but does not carry out of the work. So for example,

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[21] ***Kondis*** *v State Transport Authority* (1984) 154 CLR 672; [1984] HCA 61 at 683 (per Mason J); *New South Wales v* ***Lepore*** [2003] HCA 4; (2003) 212 CLR 511 at [20]-[22] (per Gleeson CJ); ***Northern Sandblasting*** *Pty Ltd v Harris* [1997] HCA 39; (1997) 188 CLR 313 at 330-331 (per Brennan CJ) & 394-396 (per Kirby J) and *McDermid v Nash Dredging & Reclamation Co Ltd* [1986] UKHL 5*;* [1987] AC 906 at 919 (per Lord Brandon).

[22] For example: an employer having to provide a safe system and conditions of work to employees or contractors (***Kondis*** *v State Transport Authority* (1984) 154 CLR 672; [1984] HCA 61, *Stevens v* ***Brodribb*** *Sawmilling Company Pty Ltd* [1986] HCA 1; (1986) 160 CLR 16; ***Kirk*** *v Industrial Court of New South Wales* [2010] HCA 1; (2010) 239 CLR 531~~ and ***Dalton*** *v Angus* (1881) 6 App Cas 740~~); an owner of land who carries out dangerous activities on the land or brings hazardous materials onto the land (***Burnie Port Authority*** *v General Jones Pty Ltd* [1994] HCA 3; (1994) 179 CLR 520); a school authority having to ensure that reasonable care is taken of pupils attending a school (other than to prevent intentional or criminal activities) (*New South Wales v* ***Lepore*** [2003] HCA 4; (2003) 212 CLR 511; *Commonwealth v* ***Introvigne*** (1982) 150 CLR 258; [1982] HCA 40 and ***Woodland*** *v Essex County Council* [2013] UKSC 66; [2014] 1 AC 537); a mortgagee in possession exercising a power of sale obliged to ensure that reasonable care is taken that the property is sold at market value (*Commercial and General Acceptance Ltd v* ***Nixon*** [1981] HCA 70; (1981) 152 CLR 491); a neighbour's obligation to provide support for adjoining land when excavating or performing construction work (~~***Pickard*** *v Smith* [1861] EngR 71; (1861) 10 CB (NS) 470 [142 ER 535]~~ ***Dalton*** *v Angus* (1881) 6 App Cas 740 and ***Bower*** *v Peate* (1876) 1 QBD 321) and an owner's obligations to invitees onto the owner's premises regarding the safety of the premises (***Voli*** *v Inglewood Shire Council* [1963] HCA 5; 110 CLR 74).

[23] *Id* at footnote 22, ***Nixon*** and in ***Kirk*** were examples of where a non-delegable duty of care was found in respect of a statutory duty of care. In each of those cases the statutory provision expressly provided for the defendant to "ensure" an outcome.

where a principal contractor sub-contracts to another tradesperson part of the building works and the tradesperson actually carries out that work, then it is upon that tradesperson that s 37(1) DBPA imposes the duty. The principal contractor may attract the s 37(1) DBPA duty only for work it conducts such as to supervise the tradesperson's work.

33. Section 41 DBPA prescribes that the statutory duty in Pt 4 DBPA is in addition to, and does not limit relief under, other statutory and common law causes of action.

34. Section 41(3) DBPA states "This Part is subject to the *Civil Liability Act 2002*." This means that claims for loss under s 37 DBPA attract the apportionment provisions of Pt 4 CLA as well as the other parts of the CLA, e.g. causation etc.

35. Subject to limitations of actions, Sch 1, Pt 2, cl 5 of the DBPA provides that Pt 4 DBPA extends to construction work carried out before the commencement of s 37 DBPA if the economic loss (i) first became apparent within 10 years immediately before the commencement of s 37 DBPA; or (ii) first becomes apparent on or after the commencement of s 37 DBPA. Under Sch 1, Pt 2, cl 5(5) DBPA, a loss becomes apparent when an owner entitled to the benefit of the duty of care under Pt 4 DBPA first becomes aware (or ought reasonably to have become aware) of the loss.[24]

The CLA - Section 5Q CLA

36. Section 5Q CLA has its origin in Chapter 11 of the Ipp Report,[25] that addressed a concern caused by non-delegable duties (at common law) outflanking vicarious liability. The Ipp Report recommended solidary liability be retained for personal injury or death claims but it did not consider the question whether proportionate liability should be introduced for property damage or economic loss.[26]

37. Section 5Q(1) CLA provides that:

> "The extent of liability in tort of a person (**'the defendant'**) for breach of a non-delegable duty to ensure that reasonable care is taken by a person in the carrying out of any work or task delegated or otherwise entrusted to the person by the defendant is to be determined as if the liability were the

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[24] Apart from provisions within Sch 1 of the DBPA treating pre-1 July 2021 designs as being made under the DBPA, the parts of the DBPA outside of Pt 4 DBPA are not given retrospective application.
[25] ***Review of the Law of Negligence Report Final Report*** (Commonwealth of Australia, September 2002).
[26] ***Hunt & Hunt*** *Lawyers v Mitchell Morgan Nominees Pty Ltd* [2013] HCA 10; (2013) 247 CLR 613 at footnote 14 (per French CJ, Hayne & Kiefel JJA).

vicarious liability of the defendant for the negligence of the person in connection with the performance of the work or task".

38. Section 5Q(1) CLA applies in limited circumstances. It is limited to liability in tort and only affects the "extent of" that liability in tort. It is directed to the precise duty stated in that sub-section, which is a non-delegable duty of the more stringent (common law) kind to "ensure" that reasonable care is taken by a person in the carrying out of any work or task delegated or otherwise entrusted to the person by the defendant.

39. Where that specific duty expressed in s 5Q(1) CLA exists, then the extent of liability is to be assessed "as if" the defendant's liability were its vicarious liability for the negligence of the person performing the work.

40. The duty picked up by s 5Q CLA is reflective of traditional common law non-delegable duties because it is concerned with a duty on the holder to ensure that reasonable care is taken by *another person.* Indeed, s 5Q CLA operates upon the common law duty which is described as non-delegable and deems it vicarious liability. Section 5Q CLA creates no duty but operates upon an extant duty and provides how the extent of liability in tort is to be determined. Section 37 DBPA creates a duty and one which is very different to that identified in s 5Q CLA. As the s 37 DBPA duty attaches to the person carrying out the work, s 5Q CLA simply cannot operate in relation to it. Section 5Q CLA is predicated on a position subsisting through the delegation or entrusting (i.e. others carrying out work, not the defendant) and but for which application of s 5Q CLA there would not be vicarious liability.[27]

Part 4 CLA – Apportionment regime

41. Pt 4 CLA was inserted to enact the recommendations of the *Inquiry into the Law of Joint and Several Liability: Report of Stage Two*, 1995 (**Davis Report**)[28]. This included the recommendation at p 34 that joint and several liability be abolished, and replaced by a scheme of proportionate liability, in all actions in the tort of negligence in which the plaintiff's claim is for property damage or purely economic loss. The

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[27] In *CCIG Investments Pty Ltd v* ***Schokman*** [2023] HCA 21; 410 ALR 479, Edelman & Steward JJ at [48] ff considered the various usages of the noun phrase "vicarious liability". It would appear that the reference to vicarious liability in s 5Q CLA is used in what their Honours referred to as the "true sense" at [51]. This is consistent with ss 3C and 39(a) CLA.

[28] ***Hunt & Hunt*** *Lawyers v Mitchell Morgan Nominees Pty Ltd* [2013] HCA 10; (2013) 247 CLR 613 at [13]-[15] (per French CJ, Hayne & Kiefel JJA)).

Davis Report did not consider vicarious liability nor non-delegable duties as being exempted from apportionment.

42. Part 4 (ss 34-39) of the CLA represents a departure from the regime of liability for negligence at common law of solidary liability for pure economic loss and damage to property, where liability may be joint or several but each wrongdoer can be treated as the effective cause and therefore bear the whole loss. A plaintiff can sue and recover its loss from one concurrent wrongdoer, leaving that wrongdoer to seek contribution from other concurrent wrongdoers. The risk that other wrongdoers will be unable to satisfy a judgment for contribution lies with the defendant sued. Part 4 CLA creates a regime of proportionate liability where liability is apportioned to each concurrent wrongdoer according to the extent of their responsibility.[29]

43. The transitional provisions in the Regulations to the CLA, enacted before the DBPA, expressly provided for Pt 4 CLA to apply to building actions and claims for defective building work.[30] Damages claims for breach of statutory warranties under s 18B of the *Home Building Act 1989* (*NSW*) are expressly excluded from Pt 4 CLA by s 34(3A) CLA. There is no express exclusion for claims under Pt 4 DBPA.

44. Australian legislatures have enacted statutes similar to the CLA applying to claims for purely economic loss and property damage, which prescribe proportionate liability in place of solidary liability.[31] This was for public policy reasons, including addressing fears that insurance would become unobtainable and to define the limits which should be placed on personal responsibility.[32]

45. Section 39(a) CLA provides that nothing in Pt 4 CLA " prevents a person from being held vicariously liable for a proportion of any apportionable claim for which another person is liable".

46. Where a defendant is liable to a plaintiff for its own negligent acts or omissions, in addition to those of the defendant's agent/employee, then s 39(a) CLA operates to make the defendant a concurrent wrongdoer liable for the proportion of the plaintiff's

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[29] ***Hunt & Hunt*** *Lawyers v Mitchell Morgan Nominees Pty Ltd* [2013] HCA 10; (2013) 247 CLR 613 at [10]-[23] (per French CJ, Hayne & Kiefel JJ) and [78]-[99] (per Bell & Gageler JJ).
[30] See cl 5 of the *Civil Liability Regulation 2019* (*NSW*), cl 5 of the *Civil Liability Regulation 2014* (*NSW*) (repealed) and *Owners-Strata Plan 62658 v* ***Mestrez*** *Pty Ltd* [2012] NSWSC 125 at [41] (Lindsay J).
[31] See for example Pt 4 CLA, Ch 7A of the *Civil Law (Wrongs) Act 2002* (*ACT*), Pt IVAA of the *Wrongs Act 1958* (*Vic*), Pt 2 of the *Proportionate Liability Act 2005* (*NT*), Pt 9A of the *Civil Liability Act 2002* (*TAS*) and Pt 1F of the *Civil Liability Act 2002* (*WA*).
[32] See ***Hunt & Hunt*** *Lawyers v Mitchell Morgan Nominees Pty Ltd* [2013] HCA 10 at [14]-[15]; (2013) 247 CLR 613 (per French CJ, Hayne & Kiefel JJA)).

loss and damage attributable to that defendant's personal acts or omissions of negligence plus also for the proportion of the loss and damage attributable to the defendant's agent/employee for which the defendant is vicariously liable.[33]

47. In a situation of vicarious liability where the principal's liability to the plaintiff arises only as vicarious liability for the negligent acts or omissions of its agent, the defendant is unable to apportion liability between itself and its agent and is liable for the same proportion of the plaintiff's loss and damage as its agent. There is judicial disagreement as to how this outcome is reached. For example, in ***Tomasetti*** *v Brailey*,[34] it was held that where the actions of an agent were also the actions of its principal company then both the agent and the principal have committed the same apportionable wrong and, as both concurrent wrongdoers, they are each liable for the same proportion of the plaintiff's loss and damage under Pt 4 CLA. Alternatively, the acts of a principal and agent are a single act, rather than joint conduct between the principal and agent, so fall outside of s 34(2) CLA and the principal and agent are not concurrent wrongdoers.[35] Or, instead, a defendant's liability, which is strictly vicarious, is not to be apportionable under analogues of ss 34(2) and s 39(a) CLA because it does not allow a vicariously liable principal to be a concurrent wrongdoer.[36]

48. Under ss 34(2) and 35(1) CLA, a defendant who is not a concurrent wrongdoer cannot apportion its liability with other persons who would be concurrent wrongdoers. This poses a difficulty due to the reasoning in the cases referred to in the previous paragraph that considered a defendant principal who is vicariously liable is not a concurrent wrongdoer. However, s 3C CLA provides a solution to this difficulty.

49. Section 3C CLA provides "Any provision of this Act that excludes or limits the civil liability of a person for a tort also operates to exclude or limit the vicarious liability of another person for that tort". Section 3C CLA enables a defendant who is

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[33] See *DSHE Holdings Ltd (Receivers and Managers)(in liq) v Potts* [2022] NSWCA 165; (2022) 371 FLR 349 at [442] (per Leeming & Kirk JJA, Basten AJA).
[34] [2012] NSWCA 399; (2012) 91 ATR 531 at 540[150]-542[157] (Macfarlan JA; McColl & Campbell JJA agreeing).
[35] See ***Robinson*** *v 470 St Kilda Road Pty Ltd* [2018] FCAFC 84; (2018) 263 FCR 572 at 586[42]-590[56] (per McKerracher & Markovic JJ; Rangiah J agreeing).
[36] *DSHE Holdings Ltd (Receivers and Managers)(in liq) v Potts* [2022] NSWCA 165; (2022) 371 FLR 349 at 439[437]-440[442] (per Leeming & Kirk JJA, Basten AJA).

vicariously liable (even if not a concurrent wrongdoer itself) to claim a limitation of liability under s 35(1) CLA.[37] In that way, a defendant who is vicariously liable can cause apportionment of its employee's wrong with other concurrent wrongdoers and be liable only for its employee's proportion of the plaintiff's loss and damage.

50. Section 39 CLA does not refer to liability for breach of a duty of care which is non-delegable in nature but s 5Q CLA operates to render s 39(a) CLA operable with respect to such a duty where s 5Q CLA is enlivened.

Section 37 DBPA and non-delegable duties

51. As addressed above, s 37 DBPA creates a new specific duty in relation to the well-defined class of persons who undertake "construction work" (s 36 DBPA). The duty is not concerned with ensuring that reasonable care is taken by others who are retained to undertake such work. It imposes a duty directly on persons who carry out building work, design work, or supervise, co-ordinate, project manage or have substantive control over that work. Where the duty in s 37(1) DBPA is engaged then s 39 DBPA makes its nature non-delegable.

52. The purpose of s 39 DBPA is to underscore that the duty imposed by s 37 DBPA is *personal* to the person who carries out construction work, not derivative.

53. A defendant may comply with its obligations under s 37(1) DBPA in differing ways depending on content of the duty. This is because a non-delegable duty does not prohibit delegating or entrusting work to others but instead focuses on *how* the duty is discharged with respect to that duty's content. This discharge may include doing the work itself, carefully checking the work performed or system of work of an employee or agent or by repairing defects itself or through directing others.[38] However, these are merely means of complying with the duty in s 37(1) DBPA and not an expression of the content of the statutory duty itself.

54. Section 37 DBPA is not a common law non-delegable duty. Parliament was not constrained in how it formulated the duty. The judicial development of the doctrine of non-delegable duties is traditionally accepted to arise from *Pickard v Smith* [1861] EngR 71; (1861) 10 CB (NS) 470 [142 ER 535] and *Dalton v Angus* (1881) 6 App

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[37] ***Tomasetti*** *v Brailey* at [2012] NSWCA 399; (2012) 91 ATR 531 at 541[155]-542[156] (Macfarlan JA; McColl & Campbell JJA agreeing).

[38] Gleeson CJ (Crennan J agreeing) in ***Leichhardt*** at [22]-[27]; ***Nixon*** at 502-503(9) (Mason J) and ***Burnie*** at 550, 553-557 (Mason CJ, Deane, Dawson, Toohey & Gaudron JJ).

Cas 740.[39] Non-delegable duties developed as an antidote to a defendant, who was engaged in an endeavour considered to be risky or involving a vulnerable class of persons, seeking to exonerate themselves by shifting liability onto a competent independent contractor. The duty imposed a personal duty on the defendant to procure, or see that, work carried out by others was undertaken with sufficient care.[40] There is no uniformity of judicial opinion as to whether common law non-delegable duties are tortious, if they impose strict liability, and the circumstances in which they arise[41]. Similarly, Gleeson CJ observed, in ***Lepore***, that "The ambit of duties that are regarded as non-delegable has never been defined and the extent of potential tort liability involved is uncertain".

55. That the s 37 DBPA duty is formulated as non-delegable does not alter the standard or content of the duty. It did not make it strict or exclude it from apportionment. It merely raises an issue of construction as to how the duty is discharged.

First Appeal Ground - Court of Appeal erred in concluding that s 5Q of the CLA is enlivened by a cause of action brought under Pt 4 of the DBPA

56. The Court of Appeal erred in finding that s 5Q CLA applied to the duty created in s 37 DBPA.[42] This Court should reject that finding for a number of reasons.

57. **First**, as stated above, the duty in s 37(1) DBPA applies to a limited group of persons. Pt 4 DBPA does not use the expression *a building practitioner who does building work* or *is taken to do building work*. Instead, s 37(1) DBPA applies to each person who "carries out" construction work. The person who actually *carries out the*

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[39] ***Northern Sandblasting*** *Pty Ltd v Harris* [1997] HCA 39; (1997) 188 CLR 313 at 345-346 (per Dawson J), 394-396 (per Kirby J); ***Woodland*** *v Essex County Council* [2013] UKSC 66; [2014] 1 AC 537 at [6].

[40] ***Woodland*** *v Essex County Council* [2013] UKSC 66; [2014] 1 AC 537 at [1]-[23]. ***Voli*** at 95-96([24]) (Windeyer J); ***Nixon*** at 502-503([9]-[12] (Mason J)); ***Kondis*** at 687-688 (Mason J) & 689-690 (Kirby J); ***Burnie*** at 550, 553-557 (Mason CJ, Deane, Dawson, Toohey & Gaudron JJ); ***Northern Sandblasting*** at 329-331 (Brennan CJ), 345-346 (Dawson J) & 394-396 (Kirby J); ***Lepore*** at 527-535 (Gleeson CJ), 551-552 (Gaudron J), 566 (McHugh J), 599-601 (Gummow & Hayne J) & 608-609 (Kirby J); ***Leichhardt*** *Municipal Council v Montgomery* (2007) 230 CLR 22; [2007] HCA 6 at [22]-[27] (Gleeson CJ); and *CCIG Investments Pty Ltd v* ***Schokman*** [2023] HCA 21; 410 ALR 479 at [70]-[81] (Edelman & Steward JJ).

[41] These tensions are identified in cases such as ***Leichhardt*** and numerous academic commentary over many decades (e.g): see Glanville Williams, *Liability for Independent Contractors*, (1956) 14 Cambridge Law Journal 180; John Murphy *The Juridical Foundations of Common Law Non-Delegable Duties*, in Jason Neyers et al (eds), Emerging Issues in Tort Law (2007), Christian Witting, *Breach of the Non-Delegable Duty: Defending Limited Strict Liability in Tort* (2006) 29(3) UNSW Law Journal 33; *The Liability Bases of Common Law Non-Delegable Duties – A Reply to Christian Witting* (2007) 30(1) UNSW Law Journal 86.

[42] AJ - Basten AJA at [67], [68], [70], [88], & [101] (CAB 58, 59, 65 & 69); Ward P at [1] (CAB 38) & Adamson JA at [12] & [16] (CAB 40-41 & 42).

construction work is the person upon whom ss 37 and 39 DBPA impose a statutory, non-delegable/personal, duty to take reasonable care to avoid economic loss.

58. The duty created by Parliament in s 37 DBPA does not enliven s 5Q CLA. The content of the duty imposed by s 37 DBPA is different to that the subject of s 5Q CLA. The duty set out in s 37(1) DBPA does not require that the holder "ensure" reasonable care is taken to avoid economic loss (in contradistinction to the phraseology of s 5Q CLA). This is not a matter of semantics. Accordingly, even if this Court, contrary to the Appellants' submissions, were to find that the duty in s 37(1) DBPA extends to persons who contract to do construction work but do not actually carry out that work, s 5Q CLA is not enlivened because the content of the duty in s 37(1) DBPA is different to that described in s 5Q CLA.

59. The content of a non-delegable duty at common law is expressed as the duty to *see that*, or *procure*, or *ensure* that reasonable care is taken by others but with a statute it is not automatically of the same content and instead must be considered as a matter of statutory interpretation.[43] This was borne out in Gleeson CJ's observations in ***Lepore*** at [23]: "It is significant that the duty of care is personal or non-delegable; but it is always necessary to ascertain its content". Pt 4 DBPA is also a statutory (albeit non-delegable) duty concerning construction work and is not expressed to give rise to the more stringent form of non-delegable duty to *ensure* that reasonable care is taken by others. Unlike Pt 2 DBPA, Pt 4 DBPA is not expressed with the standard of having to "ensure".

60. The duty in s 37 DBPA is consistent with the text, context and purpose of the DBPA. The diffuse congregants undertaking "construction work", who in many instances do not share contractual relationships with the principal builder, or do not have knowledge of each other, could hardly "ensure" reasonable care was taken by others within the collective of construction work participants. This would be impossible for the reasons identified by Gleeson CJ at [23] in ***Leichardt***. Such impossibility is, *a*

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[43] *Cf New South Wales v* ***Lepore*** [2003] HCA 4; (2003) 212 CLR 511 at [24]-[26], where Gleeson CJ considered that Mason J (Gibbs CJ agreeing) in *Commonwealth v* ***Introvigne*** (1982) 150 CLR 258; [1982] HCA 40 intended to make no distinction between a duty to ensure that reasonable care is taken and a duty to see that reasonable care is taken. However, the appellants submit that should be seen in the context of the nature of the common law duties there considered by Mason J regarding a non-delegable duty of care for the safety of students/persons from physical injury.

fortiori, present in a construction project in involving (e.g.) designers, contractors, suppliers and private certifiers.

61. The Court of Appeal erred by interpreting the duty in s 37 DBPA, read together with s 39, is picked up by s 5Q CLA and thereby attracts vicarious liability which, the Court reasoned, precludes apportionment. Section 39 DBPA does nothing to make the duty in s 37 DBPA amenable to s 5Q CLA. Section 37 DBPA's duty cannot be transformed into the altogether different duty identified in s 5Q CLA.

62. The Court of Appeal fell into error by focusing on the non-delegable nature of the duties expressed in ss 37(1) DBPA and 5Q CLA as a unifying feature whilst not analysing the content of each duty and finding that s 37 DBPA does not engage with the duty in s 5Q CLA.

63. **Secondly,** as Rees J reasoned (PJ at [49) (CAB 18-19)], s 5Q CLA expresses a common law tortious formulation of non-delegable duty and indicates s 5Q CLA is directed at claims for non-delegable duties of care in tort at common law and not to a duty created by statute (whether tortious or otherwise). This interpretation is also consistent with Rees J's observations that the Ipp Report was dealing only with common law claims not statutory duties of care: (PJ at [50], CAB 19).

64. **Thirdly**, s 5Q DBPA is expressed to apply only to "the extent of liability in tort of a person". The cause of action under Pt 4 DBPA is not expressed in the DBPA or the second reading speeches to be a common law tort. If the liability is not in tort then it does not enliven the express limitation at the beginning of s 5Q CLA. This limiting to liability in tort stands in distinction to s 5A(1) CLA which states "This Part applies to any claim for damages for harm resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise".[44]

65. The cause of action under Pt 4 DBPA is a statutory cause of action and not a statutory tort. Pt 4 DBPA was enacted following the decision in ***Brookfield***. The cause of action under Pt 4 DBPA is in essence a *sui generis* one to enforce a statutory right, against an extensive group of persons, by a statutory cause of action, where no common law action would otherwise exist. The AJ gives too much emphasis to the heading of s 37 DBPA and reasoning that the statutory duty creates an extension of

[44] ***Paul*** *v Cooke* [2013] NSWCA 311; (2013) 85 NSWLR 167 at [39]-[41] per Leeming JA (Basten & Ward JJA agreeing).

an existing common law duty.[45] Section 37(3) DBPA[46] was incorrectly interpreted by the Court of Appeal to mean that the cause of action under s 37(1) DBPA is to be treated within s 5Q CLA as if it were a tort[47] – but s 37(3) DBPA is dealing with an entitlement to, and assessment of, damages rather than the content of the statutory duty in s 37(1) DBPA. If Pt 4 DBPA were intended to create a statutory tort then there would be no need for the deeming provision in s 37(3) DBPA as damages would be assessed in the tortious measure anyway for breach of a duty of care.

66. **Finally**, returning to the classes of persons raised by the Appellants as concurrent wrongdoers in the Court below (see para 13 above), each of them fell within one of the categories of persons defined in s 36 DBPA carrying out construction work. None of them attracted the duty identified in s 5Q CLA because each of them has a non-delegable duty imposed under s 37 DBPA; a direct duty on each of them rather than a duty to ensure some other person uses reasonable care. Section 5Q CLA was not enlivened. The Court of Appeal erred in finding otherwise.

Second and Third Appeal Grounds - Court of Appeal erred in concluding that s 39 of the DBPA excluded, by necessary implication, the application of Pt 4 of the CLA to claims under Pt 4 of the DBPA; and instead ought to have held that the cause of action under Pt 4 of the DBPA was subject to Pt 4 of the CLA

67. The Court of Appeal erred in concluding[48] that Pt 4 DBPA excludes by necessary implication Pt 4 CLA in respect of a claim under Pt 4 DBPA.

68. **Firstly,** the Court of Appeal engaged in a stepping-stone error by reasoning that a non-delegable duty of care cannot be apportionable as, otherwise, the essence of a non-delegable duty is rendered incoherent.[49] Liability for non-delegable duties at common law arose when such liability was solidary (i.e. before parliament enacted

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[45] AJ - Adamson JA at [11]-[12] (CAB 40-41), Basten AJA at [18] & [76] (CAB 42 & 61) & Ward P at [1] (CAB 38).
[46] "A person to whom the duty of care is owed is entitled to damages for the breach of the duty as if the duty were a duty established by the common law",
[47] AJ - Adamson JA at [10]-[12] (CAB 40-41), Basten AJA at [70]-[73] (CAB 59-60) & Ward P at [1] (CAB 38).
[48] AJ - Basten AJA at [43], [56] & [101] (CAB 51, 55 & 69); Ward P at [1] (CAB 38) & Adamson JA at [11], [13] & [16] (CAB 40-42).
[49] AJ - Basten AJA at [37], [53]-[54] & [101] (CAB 48-49, 54-55 & 69); Ward P at [1] (CAB 38) & Adamson JA at [13]-[14] (CAB 41-42).

proportionate liability regimes). There is no basis to find that Parliament cannot legislate for apportionment of non-delegable duties.

69. An apportionment of damage does not dilute the content of the duty upon the holder nor does anything within Pt 4 CLA require as much. If every non-delegable duty (of which s 5Q CLA expresses but one) demanded solidary liability, no solicitor (or other professional) providing personal service (one category of non-delegable duty the subject of ***Hunt & Hunt***) could apportion loss. Part 4 CLA imposes no such restraint.

70. Under Pt 4 DBPA, Parliament has imposed duties on a range of participants involved in undertaking "construction work"[50] not merely a head builder: e.g. subcontractors, sub-subcontractors, suppliers and manufacturers of building materials. The duty is stated in the specific, limited, form of s 37(1) of the DBPA. The DBPA does not expressly exclude apportionment. Nor does a duty which cannot be delegated inherently necessitate that each defendant must be liable for the whole loss. It is neither unjust nor contrary to principle for a concurrent wrongdoer, with a duty that cannot be delegated, to be able to apportion the loss under Pt 4 CLA. This is particularly so where under Pt 4 DBPA there are multiple participants in the building process with potentially concurrent duties owed to owners of land and subsequent owners whose negligence could contribute to a defect.

71. **Secondly,** there is no authority for the conclusion that it is implicit that a statutory non-delegable duty, or delegable duties otherwise, attracted solidary liability and the defendant should be liable for the whole of the loss.[51] That conclusion was based upon an underlying presumption that a non-delegable duty imposed strict liability akin to vicarious liability and that vicarious liability *ipso facto* could not be apportionable. First, if non-delegable duties attracted strict liability for the wrongdoing of another s 5Q CLA would have been otiose. Secondly, it does not follow that vicarious liability is implicitly not apportionable.

72. **Thirdly,** s 41(3) of the DBPA states that "this Part" is "subject to the Civil Liability Act 2002". In the absence of express words in a statute there must be strong grounds to support an implication that a provision in an earlier statute is altered or derogated by a provision in a later statute, particularly where the policy enacted by Pt 4 CLA

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[50] As defined in s 36 DBPA.

[51] AJ - Basten AJA at [53]-[54], CAB 54-55, Adamson JA at [13]-[14], CAB 41-42 and Ward P at [1], CAB 38.

was to replace solidary liability with proportionate liability. It is *a fortiori* where the very part of the DBPA (the later Act that imposes liability) states it is subject to the CLA (the earlier Act which creates the apportionment regime). There is a general presumption that the legislature intended both provisions to operate and that to the extent they would otherwise overlap the DBPA should be read subject to the CLA.[52]

73. **Fourthly,** a parliamentary intention for a provision of a later statute to alter or derogate from a provision of an earlier statute will not be implied if the later provision is otherwise capable of sensible operation.[53] Pt 4 DBPA gives owners of buildings a new cause of action, not previously existing. Allowing proportionate liability under the new cause of action still provides a sensible operation with value to an owner who had no such right before enactment of the DBPA.

74. **Fifthly,** Pt 4 CLA gives defendants a right to apportion loss in accordance with its terms. Displacement of a right conferred by a statute requires that intention to be expressed in clear and unambiguous statutory language.[54] It is neither clear nor unambiguous that the CLA, which replaced solidary liability with proportionate liability, was intended by Parliament to be ousted by an implication arising from s 39 DBPA, or by expressing any statutory duty to be unable to be delegated.

75. **Finally**, Basten AJA in the AJ at [51]-[52] (CAB 53-54) interpreted ss 34(2) and 35(1) of the CLA in reasoning that a person with a "non-delegable duty" who "delegates" work to another person to carry out neither undertook an act nor an omission that caused the damage or loss such that it is 'awkward' to apportion loss to a person who has neither conducted an act nor an omission. This is wrong. If a person omits to carry out work or omits to cause it to be carried out properly that is either an act (to the extent of conduct) or an omission (to the extent of refraining from acting).

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[52] ***Saraswati*** *v R* (1991) HCA 21; (1991) 172 CLR 1 at 17 (per Gaudron J) and ***Butler*** *v Attorney-General (Vict.)* [1961] HCA 32; (1961) 106 CLR 268 at 276 (per Fullagar J) and at 290 (per Windeyer J).
[53] ***Saraswati*** at 17, per Gaudron J; *Seward v* ***The "Vera Cruz"*** (1884) 10 App Cas 59 at 68 and *Minister for Immigration and Multicultural and Indigenous Affairs v* ***Nystrom*** [2006] HCA 50; (2006) 228 CLR 566 at [48], (per Gummow & Hayne JJ discussing the doctrine of implied repeal).
[54] *Australian Postal Commission v* ***Sinnaiah*** [2013] FCAFC 98; (2013) FCR 449 at [33]-[34], per the Court.

Fourth and Fifth Appeal Grounds - if s 5Q of the CLA is enlivened by a cause of action under Pt 4 of the DBPA, the Court of Appeal erred in concluding that no apportionment is to occur even where there exists, amongst the concurrent wrongdoers in respect of a defect, persons to whom the defendant did not delegate or otherwise entrust work or a task

76. This ground only arises in the alternative to the preceding grounds. The Court of Appeal erred in concluding that if s 5Q CLA is enlivened then no apportionment of liability at all is to occur.[55]

77. The range of persons who may be considered delegates or entrusted persons to which s 5Q CLA applies is narrow. Not all of these people are delegates of (eg) the builder. The Court of Appeal treated all concurrent wrongdoers as delegates or entrusted persons. This places an impermissibly broad interpretation on s 5Q CLA and, in so doing, overlooks persons who are neither delegates nor entrusted to do work by a defendant in the construction process. Not even the Respondent in the Court below advocated for such an extreme position.

78. It is a question of fact, or mixed fact and law, whether any named concurrent wrongdoer was a delegate or person entrusted to do work by another defendant or concurrent wrongdoer. As the Motion was an interlocutory strike out application, such questions should have been left to the trial judge to determine.[56] For example, it is unlikely that the private certifier would be a delegate or person entrusted to do work by the Head Builder, and perhaps the Developer, as the private certifier was appointed by the Developer and exercised statutory functions as a public official and independent regulator.[57] It is unlikely the Council or the manufacturer/supplier of aluminium panels would be a delegate or entrusted person of either Appellant.

79. On the express terms of ss 5Q and 39(a) of the CLA, even if s 5Q CLA applies to claims under s 37 DBPA this does not necessarily exclude apportionment. If s 5Q CLA is enlivened then under ss 3C and 39(a) CLA a defendant will be liable for the proportion of loss and damage attributable to that defendant plus also for the proportion attributable to a person to whom that defendant delegated/entrusted any

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[55] AJ - Basten AJA at [20], [32] & [101] (CAB 43, 47 & 69); Ward P at [1] (CAB 38) & Adamson JA at [14]-[16] (CAB 41-42).

[56] ***General Steel*** *Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 128-130 (Barwick CJ); ***Webster*** *v Lampard* (1993) 177 CLR 598 at 602-603 (Mason CJ, Deane & Dawson JJ), 611-612 (Toohey J), 619 (McHugh J).

[57] See ss 6.4-6.5 of the *Environmental Planning and Assessment Act 1979* (*NSW*) as at 30 May 2024 or ss 109D-109E as at 1 October 2008.

work or task. To decide the *proportions*, an apportionment exercise is required to be undertaken. If the concurrent wrongdoers are all persons to whom a defendant delegated or entrusted any work or task then there may be no practical utility in a defendant raising an apportionment defence, but if the concurrent wrongdoers include other persons there will be utility for a defendant.

Part VII: Orders sought

80. The appellants' appeal be allowed.

81. Orders 2, 3 and 4 of the New South Wales Court of Appeal made on 13 December 2023 be set aside, and in lieu thereof the respondent's appeal to the New South Wales Court of Appeal be dismissed with costs.

82. The respondent pay the costs of the application for special leave to appeal and the appeal.

83. Such further or other orders as this Honourable Court considers appropriate.

Part VIII: Time required for presentation of oral argument

84. The appellants estimates that approximately three hours (including reply) will be required for the presentation of its oral argument.

Dated ~~30 May~~ 4 June 2024

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ANNEXURE TO THE APPELLANTS' SUBMISSIONS

Pursuant to Practice Direction 1 of 2019, the following is a list of the particular statutes and statutory instruments referred to in the Appellants' submissions, identifying the correct version of the legislation as at the date or dates relevant to the case.

Description	Version
Civil Liability Act 2002 (NSW), ss 3C, 5, 5A, 5Q, Pt 4.	as at 16/6/2022
Civil Liability Act (TAS), Pt 9A, s 43(G)(1)(a).	as at 1/5/2020
Civil Liability Regulation 2014 (*NSW*), cl 5 (repealed) *Civil Liability Regulation 2019* (*NSW*), cl 5	as at 1 September 2014
Design and Building Practitioners Act 2020 (NSW), whole Act	current
Design and Building Practitioners Regulation 2021 (NSW), whole Regulation	current
Environmental Planning and Assessment Act 1979 (NSW), ss 6.4-6.5	current
Environmental Planning and Assessment Act 1979 (NSW), ss 109D-109E	as at 1 October 2008
Home Building Act 1989 (NSW), s 18B & Sch 1	current
Home Building Regulation 2014 (*NSW*), cll 13-14	current
Uniform Civil Procedure Rules 2005 (NSW), r 14.28.	as at 11/11/2022