



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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Form 27F – Outline of oral submissions

Note: see rule 44.08.2.

S54/2024

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

APPELLANTS' OUTLINE OF ORAL SUBMISSIONS

PART I: CERTIFICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

PART II: OUTLINE OF ARGUMENT

Introduction

2. The orders made by the Court of Appeal (CoA) at **Core p. 71** should be set aside and the orders made by Rees J at **Core p. 20-21** reinstated.
3. The pleading point taken at **RS[8], [19], [27]** is incorrect and irrelevant: **AR[3]**.
4. The earlier interlocutory decisions do not affect this appeal: **RS[13]-[17]; AR[4]**.
5. Various provisions of the **Design and Building Practitioners Act 2020 (NSW) (DBPA)** and the **Civil Liability Act 2002 (NSW) (CLA)** are relevant to this appeal: **DBPA** ss. 4, 7, 9, 10, 12, 15, 18, 20-22, 32, 33, 35, 36-41, cl. 5 of Schedule 1 (**JBA Pt A Vol 1 p. 123-135, 140-144, 184-185**); and **CLA** ss 3C, 5A, 5Q, 34-39 (**JBA Pt A Vol 1 p. 27, 28, 34, 79-82** and Ipp Report at **JBA Part E Vol 6 at p. 1878-1882**); **AS[19]-[53]; AR[5], [8]-[10], [15], [16]; cf RS[30], [38], [44]**.

ISSUE 1: Does the duty established by s.37 DBPA, together with s.39 DBPA, fall within the duty identified in s.5Q CLA?: (Notice of appeal [2] (CORE p.79); AS[3], [56])

6. The duty in s.37(1) **DBPA** attaches to the person who actually carries out the specific “construction work” as defined in s.36(1) **DBPA**. This is because s.37(1) **DBPA** imposes a statutory duty of care on a person who carries out “construction work” (as defined in s.36(1) **DBPA**). The duty in s.37(1) **DBPA**, in contrast with Parts 2 and 3 of the **DBPA**, is not expressed as a duty “to ensure” or as applying to a person in a specific role (e.g. a building practitioner or design practitioner), or to a person “who does”, or “is taken to do”, or contracts to do, construction work: **AS[24], [26], [31]-[32], [51]-[53], [55], [57]-[58], [66]; AR[5]-[13]; cf RS[26]-[33], [38], [40]-[42]**.
7. Therefore, for example, where a person (such as a subcontractor) carries out “building work”, the duty in s.37(1) **DBPA** is owed by that person. Another person, such as a head builder, may have a duty under s.37(1) **DBPA** if carrying out functions of supervising, co-ordinating, project managing or otherwise having substantive control over the first person carrying out the “building work” - but the head builder carries out a different type of “construction work” to that of the first person, with a separate s.37(1) **DBPA** duty, which does not change the identity of the first person

- being the one who carries out the “building work”. Contrary to **RS[30], [44]** the head builder is not taken to, or deemed to, have carried out the “building work” of the first person by the fact of having substantive control over the carrying out of that work.
8. Section 39 **DBPA** prevents delegating the specific duty in s.37(1) **DBPA** but does not alter the duty in s.37(1) **DBPA**. Section 39 **DBPA** operates where a defendant has itself carried out “construction work” through an employee, agent or other person whose activities did not change the defendant as being the identity of the person who carried out the “construction work”. No such persons are alleged to be concurrent wrongdoers in the List Response and therefore s.5Q **CLA** is not engaged: **AS[31]-[32], [40], [51]-[54]; PJ[12] (Core p. 9); AR[11]-[14]; cf RS[30], [44]**.
 9. When considering non-delegable duties of care, the first step is to identify the extent of the obligation that arises out of a particular relationship: *New South Wales v Lepore* (2003) 212 CLR 511 at [19]-[22] (per Gleeson CJ) (**JBA Part C Vol 4 Tab 28, p. 858 at p. 874-876**) and *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 (per Brennan CJ) (**JBA part C Vol 4 Tab 29 p.976 at p. 994**). The CoA did not do this: **AJ [11], [45] (Core p. 40, 51); AS[53], [59]-[63]; AR[12]**.
 10. Section 5Q **CLA** is concerned with a duty that has the characteristics of each element stated in that section. Where a defendant delegates or otherwise entrusts the carrying out of “construction work” to another person, such that the defendant is not a person carrying out that specific work, the defendant does not owe a duty under s.37(1) **DBPA** in respect of carrying out that specific work. Therefore, s.5Q **CLA** would not be engaged: **AS[31]-[32], [40], [51]-[54]; AR[15]-[16]; cf RS [30], [34], [44]**.

ISSUE 2: Can Part 4 of the CLA apply to a claim for breach of the duty established by s.37 DBPA?: (Notice of appeal [3], [4] & [5] (CORE p.79); AS[3]-[4], [67])

11. Part 4 of the **DBPA** does not by necessary implication exclude the operation of Part 4 of the **CLA**: **AJ [51]-[55] (Core p. 53-55); AS [41]-[50], [55], [68]-[75]; AR[10], [14], [19]; cf RS[21]-[25], [40]-[42]**.
12. Nothing in Part 4 of the **DBPA** or in the **CLA** (particularly ss. 3C, 5Q, 34(3), 34A and 39(a)) excludes a non-delegable duty from being a duty to which Part 4 of the **CLA** can apply. There is no incoherence between Part 4 **DBPA** and sections 3C, 5Q and Part 4 of the **CLA**: **AS[42]-[50], [68]-[71], [73]-[75]; cf RS [21]-[29], [40]-[42]**.
13. Section 41(3) **DBPA** expressly states that Part 4 **DBPA** “is subject to” the **CLA**: **AS[72]-[73]; AR[19], footnote 16; PJ [24] (Core p. 12)**.

14. Where s.5Q CLA is enlivened, s.39(a) CLA still requires apportionment amongst concurrent wrongdoers. Section 3C CLA entitles a defendant whose liability is vicarious to the same apportionment amongst other concurrent wrongdoers as the person for whom the defendant is vicariously liable: AS[45]-[50], [79]; RS[30], [44].

ISSUE 3: Is Part 4 of the CLA inapplicable to every claim against any person or entity the subject of a claim under s.37 of the DBPA if s. 5Q and 39(a) of the CLA are enlivened?: (Notice of appeal [6] (CORE p.79); AS[5], [76])

15. There are concurrent wrongdoers in the List Response which do not meet the criteria in s.5Q CLA of being delegated or otherwise entrusted work or a task by one, or both, of the appellants. An appellant could not have been taken to be liable under ss 5Q and 39(a) CLA for that concurrent wrongdoer's proportion of the alleged loss and damage: AS[13], [45]-[50], [76]-[79]; AR[20]-[21]; cf RS[30], [44].
16. *Private Certifier and Local Council* - the second appellant appointed the private certifier and lodged a development application with the local council. The statutory functions of the certifier and the local council are independent of the appellants and were not functions either appellant could perform, oversee or control: ss. 6.1, 6.4-6.5 of the *Environmental Planning and Assessment Act 1979 (NSW)* and the previous ss. 109D-109E (*JBA, Vol B, pp 211-224*): AS[13], [77]-[79]; AR[21].
17. *Manufacturer and Supplier of Aluminium Composite Panels (ACP's)* - a sub-contractor of the first appellant purchased ACP's from a manufacturer/wholesaler (**Chief**). Neither appellant contracted Chief or could in any meaningful sense have the ability to supervise, project manage, co-ordinate or have substantive control over the manufacture of ACP's or other building products: AS[13], [77]-[79]; AR[21].
18. *Developer* - the second appellant hired the first appellant to construct the building. The second appellant did not hire, delegate to, or otherwise entrust work or a task to, any of the first appellant's sub-contractors, the directors of those sub-contractors or to the architect after it was hired by the first appellant: AS[13], [77]-[79]; AR[21].

Dated: 15 October 2024



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