HIGH COURT OF AUSTRALIA

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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

APPELLANTS' REPLY

Part I: Certification

1. This reply is in a form suitable for publication on the internet.

Part II: Reply Submissions

2. These submissions reply to the respondent's submissions dated 26 June 2024 (**RS**).

3. **The Pleadings -** RS [8] and [19] raise a pleading point which is both incorrect and irrelevant to the determination of this appeal.[1] The second appellant (**Developer**) denies it carried out any construction work or owed any duty of care under s 37 of the *Design and Building Practitioners Act 2020* (*NSW*) (**DBPA**).[2] The appellants admit that the first appellant (**Head Builder**) itself carried out some actual physical building work and supervised other works (but have not particularised which works and have denied each item in the Scott Schedule Pleadings).[3] The Head Builder

[1] Amended List Statement (**ALS**) at C8 to C15 (ABFM 14 to 17) and First Amended List Response (**FALR**) at C8 to C15 (ABFM 140 to144).
[2] *Ibid*.
[3] ALS C10A (ABFM 14) and FALR C10A and List Response Scott Schedule (ABFM 140, 183 to 276).

admits that it owed a duty of care in the terms set out in s 37(1) of the DBPA for the construction work it carried out.[4]

4. **The Resurrection of Argument Issue** – contrary to RS [13]-[17], other previous interlocutory decisions[5] did not determine the issues the subject of this appeal. In those decisions,[6] Stevenson J held that s 37(1) DBPA applies to a person who actually carries out construction work and the concepts of "supervising, coordinating and project managing" (s 36 DBPA) require that a person actually performed those tasks. Whether "otherwise having substantive control" applies is a question of fact to be determined at trial as to whether a person was able to exercise substantive control and did in fact control building work, designs, etc. Those decisions, even if correct, are not inconsistent with the appellants' appeal.

5. **The Purposive Interpretation -** RS [20]-[27], [30] & [41]-[42] incorrectly submit that the appellants' contentions constrain s 37(1) DBPA contrary to the purpose of enacting Pt 4 DBPA and exonerate head builders from responsibility.

6. ***First***, the RS does not engage with the text of the DBPA as a whole or with [19]-[35] & [51]-[55] of the appellants' amended appeal submissions (**AS**).

7. ***Secondly***, ***Brookfield***[7] was not a case dealing with non-delegable duties of care.

8. ***Thirdly***, in contrast to the language of s 7 DBPA, Parliament has chosen to refrain from drafting s 37 DBPA as applying to persons who contract to do building work but do not carry out that work.

9. ***Fourthly***, Parliament has chosen to draft s 37(1) DBPA to impose a statutory duty of care only on the persons who actually carry out particular "construction work". That choice is understandable as the duty under Pt 4 DBPA has retrospective effect potentially going back 10 years (Pt 2, cl 5 of Schedule 1 of the DBPA). Further, the legislature has chosen not to make persons who have limited construction roles potentially liable for every casual act of negligence on building projects, particularly as building projects can be vast in scale.

10. ***Finally***, the appellants' interpretation of Pt 4 DBPA is consistent with, and not repugnant to, the terms, structure and purpose of the DBPA and does not result in absurdity. Under s 33 of the *Interpretation Act 1987* (*NSW*) a purposive approach

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[4] *Id* at footnote 1.
[5] *The Owners - Strata Plan No 84674 v Pafburn Pty Ltd* [2022] NSWSC 659 at [21]-[27] & [52] and *The Owners - Strata Plan No 84674 v Pafburn Pty Ltd (No. 2)* [2022] NSWSC 1002 at [13]-[17] & [40]-[47].
[6] *Ibid*.
[7] ***Brookfield*** *Multiplex Ltd* v *Owners Corporation Strata Plan 61288* (2014) 254 CLR 185; [2014] HCA 36.

does not assist the OC as the interpretation contended for by the appellants also promotes the purpose of the legislation.[8]

11. **No Work For s 39 DBPA to do** - RS [21]-[29] misunderstand AS [19]-[75]. The OC and the Court of Appeal infer a duty "to ensure" merely from s 39 DBPA.

12. ***First***, s 39 DBPA indicates that the nature of the duty in s 37(1) DBPA is non-delegable, but that expresses the duty's nature rather than its content. The content of the duty is a matter of statutory construction.[9] This Court has found a non-delegable duty created by statute, giving rise to a *duty to ensure,* in cases where the statute creating the duty expressly used the expression "ensure".[10] Nowhere in Pt 4 DBPA does the word "ensure" appear. However, other provisions in the DBPA, when intending to create a duty *to ensure*, expressly say so.[11] Section 37(1) DBPA only requires a "duty to exercise reasonable care" not one "to ensure" an outcome.

13. ***Secondly***, where a non-delegable duty exists at common law it is imposed on a particular relationship, such as a school authority with pupils, a hospital with patients or an employer with a workplace. Under s 37(1) DBPA, Parliament has not imposed the non-delegable duty on the relationship of a developer with a head builder or any person who agrees to do construction work, but, instead on a person when actually engaged in doing work or engaged in supervising, coordinating, project managing or otherwise having substantive control over such work.

14. ***Finally***, no case holds that a defendant under a non-delegable duty of care must be liable for the whole of a plaintiff's loss without apportionment. Contending that a non-delegable duty gives rise to strict liability incorrectly conflates non-delegable duties with vicarious liability.

15. **Section 5Q CLA** - RS [31]-[38] advances an erroneous construction of ss 37 and 39 DBPA and s 5Q of the *Civil Liability Act 2002* (*NSW*) (**CLA**).

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[8] See for example *Chugg v Pacific Dunlop Ltd* [1990] HCA 41 at [21]; (1990) 170 CLR 249 at 408 (per Dawson, Toohey & Gaudron JJ; Brennan and Deane JJ agreeing).
[9] *New South Wales v* ***Lepore*** [2003] HCA 4; (2003) 212 CLR 511 at [23] (per Gleeson CJ) and ***Leichhardt*** *Municipal Council v Montgomery* (2007) 230 CLR 22; [2007] HCA 6 at [9]-[10], [22]-[27] (Gleeson CJ).
[10] ***Kirk*** *v Industrial Court of New South Wales* [2010] HCA 1; (2010) 239 CLR 531: ss 15 and 16 of the *Occupational Health and Safety Act 1983* (*NSW*) included "Every employer shall ensure the health, safety and welfare at work of all the employer's employees" and "Every employer shall ensure that persons not in the employer's employment are not exposed to risks to their health or safety arising from the conduct of the employer's undertaking while they are at the employer's place of work." *Commercial and General Acceptance Ltd v* ***Nixon*** [1981] HCA 70; (1981) 152 CLR 491: s 85(1) of the *Property Law Act 1974-1976* (*Qld*) stated "It is the duty of a mortgagee, in the exercise after the commencement of this Act of a power of sale conferred by the instrument of mortgage or by this or any other Act, to take reasonable care to ensure that the property is sold at the market value".
[11] For example, ss 15(1), 18, 20, 21 and 22 of the DBPA.

16. The OC and Court of Appeal in the Appeal Judgment (**AJ**) interpret s 5Q CLA too broadly as applying to any duty of care expressed to be non-delegable, no matter its content.[12] But that interpretation is inconsistent with the text of s 5Q CLA itself. Section 5Q CLA does not express itself as applying to all non-delegable duties. Instead, s 5Q CLA expressly restricts itself to the extent of liability in tort and only for a non-delegable duty of the kind and circumstances expressed in s 5Q CLA.

17. **Part 1B CLA** - The references to Pt 1B CLA in RS [35]-[36] are misconceived. Rather than creating a non-delegable duty, Pt 1B, Div 3 CLA legislated for vicarious liability with the intent of codifying the "relevant approach" to vicarious liability set out in *Prince Alfred College Inc v* ***ADC***[13] but expanded to cover non-employees who carry out roles akin to employees.[14] Section 5Q CLA does not apply to vicarious liability or statutory claims. Pt 4 CLA would not apply to child abuse cases as they arise out of personal injury (see s 34(1)(a) CLA). Section 6B CLA is a clarifying (rather than operative) provision.

18. **Statutory Torts** - Statutes can create new torts[15] but RS [39] omits to answer AS [65]'s submissions as to why Pt 4 DBPA does not create a tort. Nowhere has Parliament actually "labelled" the cause of action under Pt 4 DBPA a "tort". But in any event, as submitted in AS [36], [40]-[41] and [63], s 5Q CLA should not be interpreted to extend to statutory claims even if categorised as a statutory tort.

19. **Ouster by necessary implication** - in RS [40]-[42], apart from referring to purposive interpretation submissions [dealt with at [5]-[10] above of this reply], the OC has not engaged with AS [67]-[75]. Further, it is erroneous to find s 39 DBPA excludes by necessary implication Pt 4 CLA as (i) the proportionate liability provisions in Pt 4 CLA apply to a claim for economic loss in an action for damages arising from a failure to take reasonable care (s 34(1)(a) CLA), which is the

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[12] This might be suggested to arise from the Second Reading Speech Legislative Council Hansard 19 November 2002 for the *Civil Liability Amendment (Personal Responsibility Bill) 2002* (*NSW*), which inserted s 5Q into the CLA. The speech included "The proposed changes to section 5Q clarify that the bill is not intended to abolish non-delegable duties altogether. Instead, this provision will reflect the approach of the Ipp report more closely by requiring the courts to treat a breach of such a duty as if it were vicarious liability. This approach will still ensure that plaintiffs cannot circumvent the reforms under the bill by framing an action as a breach of a non-delegable duty. …".

[13] [2016] HCA 37; (2016) 258 CLR 134 at [80]-[85] (French CJ, Kiefel, Bell, Keane & Nettle JJ) and at [130]-[131] (Gageler and Gordon JJ).

[14] See second reading speech to the *Civil Liability Amendment (Organisational Child Abuse Liability) Bill 2018* (*NSW*), Legislative Assembly Hansard 26 September 2018.

[15] See *Philip Morris Limited v Ainley & Incorporated Nominal Defendant* [1975] VR 345 at 348-349 (Menhennitt J); *Commissioner of Police v Estate of Edward John Russell & Ors* [2002] NSWCA 272; (2002) 55 NSWLR 232 at [70]-[78] (per Spigelman CJ in obiter; Davies AJA agreeing; Stein JA not deciding).

language used in s 37(1) DBPA; and (ii) s 41(3) DBPA expressly prescribes that Pt 4 DBPA is "subject to" the CLA and so leaves no room for the asserted implication. An effect of the phrase "subject to" is that the CLA prevails if Pt 4 DBPA conflicts with, or is inconsistent or incompatible with, the CLA.[16]

20. **Appeal grounds 4 & 5** - At RS [43] the OC misunderstands AS [67]-[75]. Appeal grounds 4 and 5 do not depend on the appellants' interpretation of s 37 DBPA, but instead arise if both (i) liability under Pt 4 DBPA enlivens s 5Q CLA; and (ii) if Pt 4 CLA is not excluded by necessary implication from applying to Pt 4 DBPA.

21. RS [44] merely asserts the Developer and Head Builder had substantive control over all of the construction work and, presumably, submits every concurrent wrongdoer was delegated or entrusted to do work or a task by them. ***First***, 'carrying out', by *having substantive control* over *building work*, is not the same as carrying out *building work*. The OC does not explain how "substantive control" over building work is supposed to have been delegated or entrusted to each concurrent wrongdoer by each appellant. ***Secondly***, neither the Developer nor the Head Contractor could have substantive control over all "construction work" (as defined in s 36 DBPA). For example, neither could have substantive control over (i) the manufacturing of building products by a third party manufacturer, in this case aluminium composite cladding; (ii) the drafting of architectural designs by the architect; and (iii) carrying out of statutory functions by the private certifier or the Council. ***Finally***, the OC has not submitted any interpretation of s 39(a) CLA.

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[16] See PJ at [24]; *Newcrest Mining (WA) Ltd v BHP Minerals Ltd & Commonwealth* [1997] HCA 38; (1997) 190 CLR 513 at 580-581 (per Gaudron J); *Wass v Director of Public Prosecutions (NSW); Wass v Constable Wilcock* [2023] NSWCA 71; (2023) 111 NSWLR 210 at [52] (per Leeming JA; Bell CJ Kirk JA agreeing).

ANNEXURE TO THE APPELLANTS' REPLY 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' reply 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 5Q and Pts 1B & 4.	as at 16/6/2022
Design and Building Practitioners Act 2020 (NSW), whole Act	current
Interpretation Act 1987 (*NSW*), s 33	Current
Occupational Health and Safety Act 1983 (*NSW*), ss 15 & 16	Repealed, as at 1 September 2001
Property Law Act 1974-1976 (*Qld*), s 85	As at 11 June 1977