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 27F - Outline of oral submissions (R)
Filing party:	Respondent
Date filed:	15 Oct 2024

Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **PAFBURN PTY LIMITED**
First Appellant

MADARINA PTY LIMITED
Second Appellant

and

THE OWNERS - STRATA PLAN NO 84674
Respondent

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

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

Part II: Propositions to be addressed

1. The *Design and Building Practitioners Act 2020* (NSW) (**DBP Act**) imposes a statutory duty of care upon those who carry out "*construction work*" in favour of owners and subsequent owners of land. As with all negligence actions, the provisions of Part 1A of the *Civil Liability Act 2002* (NSW) (the **CLA**) apply.
2. Section 5Q of the CLA deems the liability for a breach of a non-delegable duty to be determined as if the liability were the vicarious liability of the defendant for the negligence of the person in connection with the performance of the work. One of the purposes of s 5Q is to "prevent judicial sidelining of principles relating to vicarious liability, by imposing a non-delegable duty": AJ [68]. The primary judge's and the appellants' construction of s 5Q of the CLA sidelines the principles of vicarious liability.
3. Section 39(a) of the CLA states that a concurrent wrongdoer who is otherwise vicariously liable for the harm done by another remains vicariously liable for any portion of the claim for which the other person is found liable. As the Court of

Appeal stated at AJ [54]: "*In short, s 39(a) reflects a statutory intention that Pt 4 will not affect the imposition of vicarious liability. Accordingly, it will not prevent a person from recovering from an employer the economic loss caused by an employee for whom the employer was vicariously liable. On the basis that the general law concept of a non-delegable duty, as reflected in s 39 of the [DBP Act] merely places the principal's position with respect to independent contractors in the same position as that of an employer and employee, it follows that Pt 4 will not prevent recoveryin full from the principal who is subject to a non-delegable duty.*"

4. The assumption underlying the appellants' appeal is that the duty of care under s 37(1) of the *Design and Building Practitioners Act 2020* (NSW) (**DBP Act**) is imposed only on the person who "*actually 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 the work ("*particularly a head contractor*": AS [24]): AS [26], [31], [32], [51], [52].

5. *First*, contrary to AS [24], the asserted "*contrast*" between a person who "*carries out*" construction work (the words used in s 37(1)) and a person who "*does*" construction work is not "*apparent*" from the words of the DBP Act as a whole.

6. The definition of "*principal contractor*" in s 7(2) of the DBP Act makes plain that work that is carried out by a subcontractor is taken to be "*work carried out [by the principal contractor] under the head contract*". Further, s 37(1) refers to both work that is "*carried out*" (in the chapeau) and work that is "*done*" (s 37(1)(a)) with no apparent distinction between the two.

7. *Second*, it would be absurd to interpret the words "carries out construction work" in s 37(1) to mean "actually performs the construction work" in circumstances where "*construction work*" is defined to include "*having substantive control*" over thework. "Having substantive control" is not something that a person "actually performs". A person "has substantive control" for the purposes of the definition of "construction work" if the person has the ability to control how the work is carried out: *Kazzi v KR Properties Global Pty Ltd t/as AK Properties Group* [2024] NSWCA143 at [78]. This is in contrast to a person who actually directs how the work is

carried out. This is plain from the wording of paragraph (d) of the definition of "*construction work*" – "*supervising, coordinating, project managing or otherwise having substantive control over the carrying out of any work…*"

8. *Third*, as the appellants accept at AS [26] there is no definition of the expression "*carries out*" in the DBP Act. The ordinary meaning of "carries out" work is undoubtedly wider than the ordinary meaning of "does" work. The verb "doing" connotes action. The Collins dictionary defines "carry out" to mean "to perform or cause to be implemented". A head builder can cause work to be implemented without actually "doing" the work.

9. *Fourth*, the appellants' reliance on the definition of the expression "building practitioners" is misplaced when read in context. As stated in the second reading speech of the DBP Act:

> Part 1 of the bill sets out who is taken to be a building practitioner under the bill. If one person agrees under a contract or other arrangement to do building work, then that person is taken to be the building practitioner under the legislation. Where more than one person agrees through contract or other arrangement to do building work, the building practitioner is taken to be the person who is the principal contractor for the work. The drafting of the bill intentionally places the obligation on one practitioner soit is clear who is responsible for issuing a compliance declaration. This approach also mirrors the chain of responsibility that currently exists under the Home Building Act 1989 where the principal contractor is responsible for ensuring that the subcontractors properly carry out work.

10. Even if it were accepted that the statutory duty of care is only imposed on those that "actually perform the construction work", that would leave s 39 of the DBP Act with no work to do.

11. The appellants place too much importance on the use of the word "ensure" in s 5Q of the CLA. It is the defining characteristic of the relationship of a non-delegable duty of care that it requires a person to "ensure" that reasonable care is taken (see AJ [48]). The fact that the word "ensure" is missing from the DBPA is not to the point.

12. The appellants overread s 41(3) of the DBP Act which provides that Part 4 of the DBP Act is "s*ubject to*" the CLA. The phrase "subject to" does nothing when there is "*no clash*": *Medical Council of New South Wales v Lee* [2017] NSWCA 282 at [87].

13. Section 37(1) imposes a duty of care. Section 39 makes that duty of care non-delegable. The existence of a duty of care is to be determined in accordance with the general law. Although the CLA has a division headed "Duty of care", it is accepted that the CLA relates to breach and not to the existence of a duty: *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48 ; [2009] ; 239 CLR 420 at [12].

14. The purpose of s 41 is not to impose the proportionate liability regime upon owners in stark contradiction with s 39. Its purpose is to require a person who has the benefit of the duty of care to satisfy the breach provisions of the CLA in order to obtain damages.

15. The evident beneficial purpose of the DBP Act militates against reducing the exposure of those liable for a breach of the s37 duty, by means of resort to the CLA proportionate liability regime.

Dated: 14 October 2024

Bret Walker