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
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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

THE OWNERS - STRATA PLAN NO 84674
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification

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

Part II: Statement of issues

2. Paragraph 2 of the Amended Appellants' Submissions (and Amended Chronology), filed 5 June 2024 (**AS**) sufficiently identifies the issues raised by the Appellants' grounds of appeal.

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

3. No notices under s 78B of the *Judiciary Act 1903* (Cth) are required.

Part IV: Facts

Background

4. The respondent (**OC**) is the owners corporation in respect of a residential strata building located at 197 Walker Street, North Sydney (the **Building**).

5. The first appellant (**Builder**) was the builder of the Building.

6. The second appellant (**Developer**) was the developer of the Building and, until registration of the strata plan for the Building, the owner of the land.

7. The OC commenced the first instance proceedings against the Builder and Developer. The OC claims damages against the Builder and the Developer for breach of the duty of care imposed by s 37(1) of the *Design and Building Practitioners Act 2020* (NSW) (**DBPA**).

8. The appellants admit that the Builder owed the OC a duty of care under s 37(1) of the DBPA but deny that the Developer owed any duty. Both deny any breach of duty.

9. The appellants also plead proportionate liability defences. The appellants have pleaded that there were nine "concurrent wrongdoers" for the purposes of Part 4 of the *Civil Liability Act 2002* (NSW) (**CLA**) amongst whom liability should be apportioned.

10. The OC sought to strike out the proportionate liability defences. The OC submitted that the combined effects of s 39 of the DBPA and s 5Q and s 39(a) of the CLA precluded the appellants from utilising the proportionate liability provisions where the statutory duty was described as "non-delegable".

Decision of the Primary Judge

11. The primary judge, Rees J, refused to strike out the proportionate liability defences. Her Honour found that s.5Q of the CLA "*does not apply where a duty is non-delegable as a consequence of statute*": PJ [51]. Her Honour held that s.5Q of the CLA was not engaged in the present case because "*[a] defendant's duty* [under s.37 of the DBPA] *is non-delegable by reason of a statute, rather than by reason of the defendant's duty falling within any recognised general law category of non-delegable duty*": PJ [52]. The OC sought leave to appeal from this interlocutory judgment.

Decision of the Court of Appeal

12. The Court of Appeal granted leave and allowed the appeal. The Court of Appeal held that by providing that the duty was "non-delegable" (s 39 of the DBPA), whether as a matter of general law principle, or by operation of s 5Q of the CLA, the DBPA excluded any right the Developer and Builder might have had to apportion liability between themselves and concurrent wrongdoers under Part 4 of the CLA.

Part V: Argument

The appeal is based on a misconstruction of s 37 of the DBPA

Resurrection of argument that was rejected in 2022

13. The assumption underlying the appellants' appeal is that the duty of care under s 37(1) of the DBPA is imposed only on the person who actually carries out 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 (such as the developer of a development): AS [26], [31], [32], [51], [52].

14. That contention was made and rejected in an application made by the Developer in 2022 to have the case against it struck out: *The Owners – Strata Plan No 84674 v Pafburn Pty Ltd [2022] NSWSC 659 and The Owners – Strata Plan No 84674 v Pafburn Pty Ltd (No 2)* [2022] NSWSC 1002. The Developer did not appeal those decisions.

15. Section 37(1) of the DBPA provides:

> 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.

16. "Construction work", for the purpose of s 37 of the DBPA, is defined in s 36(1) to mean, relevantly:

> "… supervising, coordinating, project managing or otherwise having substantive control over the carrying out of [the construction work]" (emphasis added).

17. As Stevenson J correctly held, on the proper construction of the DBPA, a person "otherwise having substantive control" over the carrying out of any work for the purposes of the definition of "construction work" in the DBPA is a person who, as a matter of fact in the circumstances of the particular case, is able to control how the work is carried out: *The Owners – Strata Plan No 84674 v Pafburn Pty Ltd* [2022] NSWSC 659 at [25]-[26].

18. At AS [24], the appellants explain that one effect of their interpretation of s 37(1) is that it would have limited (if any) application to a head builder because a head builder is simply "a person who agreed 'to do' the work but did not itself carry out the work".

19. *First*, as the Builder admits in its own List Response, a head builder plainly owes a duty of care in respect of work that it agreed "to do" but did not itself carry out.

Such a head builder carries out "construction work" for the purposes of s 37(1) of the DBPA by, at the very least, having "substantive control" of (i.e. is able to control) the carrying out of the building work.

20. *Second*, the appellants' interpretation is inconsistent with the purpose of Part 4 of the DBPA. As stated by the appellants at AS [20], "*Pt 4 DBPA specifically seeks to set aside the effect of the decision in* ***Brookfield*** *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*" (emphasis added). The plain intention of the legislature was to impose a duty of care upon head builders. The appellants' interpretation does not achieve that purpose.

Attempt to give some other meaning to s 39 of the DBPA

21. As the Court of Appeal held, the fact that the duty of care in s 37 of the DBPA is non-delegable (see s 39) excludes by necessary implication the provisions of Part 4 of the CLA dealing with proportionate liability: AJ [1], [11].

22. The plain effect of s 39 of the DBPA is that a person who owes a duty under s.37 of the DBPA cannot utilise the proportionate liability provisions to cast that person's liability onto those to whom that person has delegated its duty.

23. If the appellants were to be permitted to utilise the proportionate liability provisions to limit their liability, s 39 of the DBPA would have no work to do. As stated at AJ [55], "*as a matter of statutory construction, it should be accepted that in using the concept of a non-delegable duty, in a statute passed in 2020, the Parliament was conscious of the legal significance of that concept and intended it to have the well-established effects reflected in the case law, including the passages set out above by way of example*."

24. The legal significance of the concept of a non-delegable duty is that the defendant who is under a non-delegable duty cannot escape liability if the duty has been delegated and then not properly performed: AJ [46]-[50]; *The Commonwealth v Introvigne* (1982) 150 CLR 258 at 269-270 (Mason J); *Leichhardt Municipal Council v Montgomery* (2007) 230 CLR 22 at [9] (Gleeson CJ). In other words, the defendant who is under a non-delegable duty is rendered liable for the whole of the loss or damage caused by a breach of duty by a third party: AJ [53].

25. Section 39 of the DBPA reflects the general law concept of a non-delegable duty by rendering the duty-holder liable for the conduct of employees and independent contractors. To apply proportionate liability (which divides the loss among

wrongdoers according to their share of responsibility) would give s 39 of the DBPA no work to do.

26. The appellants seek to give s 39 work to do by arguing the following steps:

(a) the statutory duty 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 of the work: AS [26], [31], [32], [57], [58];

(b) 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: AS [31];

(c) "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": AS [52];

27. As to (a) and (b) above, the interpretation propounded by the appellants - that the statutory duty is imposed only on the particular person who "*actually carries out the construction work*" - must be rejected for the reasons set out in paragraphs 18 to 20 above.

28. As to (c), the appellants submit that the purpose of s 39 is to simply "underscore" what is already in s 37 (see paragraph 26(c) above). *First*, nothing in the language of s 39 "*underscores*" that the s 37 duty is only imposed upon the person who "*actually carries out the construction work*".

29. *Second*, a statutory provision that simply "underscores" another statutory provision is merely "surplusage". The appellants' argument that s 39 "underscores" s 37 continues making s 39 redundant and leaving it without any work to do.

First Appeal Ground: s 5Q of the CLA applies to a claim under Part 4 of the DBPA

30. As to AS [57], the Respondent agrees that Pt 4 DBPA does not use the expression "a building practitioner who does building work" or is "a building practitioner is taken to do building work". That is because Part 4 is broader. It applies to a "person" and not just a "building practitioner" and it applies to "construction work" and not just "building work". A person is taken to carry out "Construction work" if it has "substantive control", whereas a "a building practitioner who does building work" only if it agreed to do building work or is the principal contractor

for the work. The difference in wording is plain – an owner/developer is a "person" who has "substantive control" over the "construction work". He/she might engage someone to prepare designs for the building work (which is a type of "construction work"). A Developer can delegate the performance of the work but cannot delegate its duty in respect of the work.

31. As to AS [58], the Respondent agrees that the duty set out in s 37(1) DBPA does not require that the holder "ensure" reasonable care is taken to avoid economic loss. That is the work of s 39 of the DBPA. Section 37 applies to construction work carried out by the person. Section 39 applies where the construction work is carried out not by the person, but by some other person.

32. Contrary to AS [58], it is a matter of semantics to suggest that s 5Q of the CLA does not apply to s 39 of the DBPA simply because the latter does not expressly employ the word "ensure". The appellants overread s 5Q of the CLA and its use of the word "ensure". As explained by Gummow and Hayne JJ in *New South Wales v Lepore* (2003) 212 CLR 511 at [265]:

> "... the party having the care, supervision or control of others will itself act with reasonable care and will ensure that all others to whom it delegates that task, whether as servant or as independent contractor, act with reasonable care. If the delegate acts without reasonable care, the party who owes the duty is held liable. It is said that the party has not performed its duty to take reasonable care of the person and to ensure that reasonable care is taken."

33. 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.

34. Contrary to AS [58]-[59], the "content" of the non-delegable duty referred to in s 5Q CLA is not different from the "content" of the non-delegable duty referred to in s 39 of the DBPA simply by reason of the absence of the word "ensure" in s 39 of the DBPA. They both concern the same concept of a non-delegable duty of care. The plain effect of s 39 of the DBPA is to make the duty in s 37 non-delegable in the sense that the defendant cannot escape liability if the task has been delegated and then not properly performed: *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 per Mason CJ, Deane, Dawson Toohey and Gaudron JJ at 550. It is a personal duty that will be breached if the task in question is performed negligently by another person:

> "… if the defendant is under a personal duty of care owed to the plaintiff and engages an independent contractor to discharge it, a negligent failure by the independent contractor to discharge the duty leaves the defendant liable for its breach. The defendant's liability is not a vicarious liability for the independent contractor's negligence but liability for the defendant's failure to discharge his own duty."

35. It is plain from Part 1B of the CLA that s.5Q of the CLA can apply to the statutory duty of care in Part 4 of the DBPA.

36. Under ss.6D(b) and 6E(3) of the CLA, organisations and individuals associated with organisations owe a non-delegable duty to prevent child abuse. Part 1B of the CLA does not employ the word "ensure". Section 6B(1) of the CLA expressly provides that "[n]othing in section 5Q … protects a person from civil liability arising under this Part or places any restriction or limitation on an award of damages made pursuant to this Part." If s.5Q of the CLA did not apply to non-delegable duties imposed by statute then s.6B(1) of the CLA would have no work to do.

37. The use of the words "not … delegate that duty" was deliberate. As stated at AJ [55], as a matter of statutory construction, it should be accepted that in using the concept of a non-delegable duty, in a statute passed in 2020, the Parliament was conscious of the legal significance of that concept and intended it to have the well-established effects reflected in the case law, including the passages set out above by way of example.

38. Contrary to AS [60], there is nothing in the text, context or purpose of the DBPA that supports the Appellants' interpretation of the duty in s 37 of the DBPA.

39. At AS [63]-[65], the Appellants contend that a claim under Part 4 of the DBPA is not a claim in "tort" as that word is used in s 5Q of the CLA. The appellants make no attempt to address the reasoning of the Court of Appeal. It is surely wrong to assert that Parliament cannot create torts, or label a statutory wrong as a "tort".

Second and Third Appeal Grounds - "necessary implication"

40. AS [67]-[75] comprise of two submissions of substance:

    a. there is no basis to find that Parliament cannot legislate for apportionment of non-delegable duties: AS [68]; and

    b. the DBPA does not expressly state that the proportionate liability provisions do not apply: AS [72]-[73].

41. These two observations do not advance the matter. It remains the position that the Court of Appeal's interpretation gives meaning and effect to all words of the DBPA whereas the appellants' does not.

42. As stated at AS [65], Part 4 of the DBPA is law reform enacted to meet the decision in *Brookfield*. The statute should be interpreted to meet that purpose. The appellants' interpretation fails to do so (see paragraph 20 above).

Fourth and Fifth Appeal Grounds

43. The appellants' case depends on the appellants' incorrect interpretation of s 37 of the DBPA, which is dealt with above.

44. The short answer is that the appellants – as the Developer and Head Contractor – had "substantive control" over all of the construction work. Anyone engaged by the Developer and/or the Head Contractor to be involved in the construction work must be dealt with by s 39 of the DBPA.

Part VII: Estimate of time for oral argument

45. The OC estimates that it will require less than two hours for oral argument.

26 June 2024

Bret Walker

5th Floor St James' Hall

(02) 8257 2527

caroline.davoren@stjames.net.au

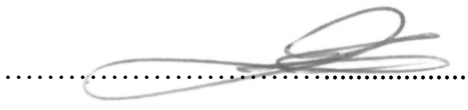
26 June 2024

D S Weinberger

9 Wentworth Selbourne Chambers

(02) 8815 9239

david.weinberger@ninewentworth.com.au



Signed by Daniel Radman

Grace Lawyers - for the respondents

The respondent is represented by Grace Lawyers.

ANNEXURE TO THE APPELLANTS' SUBMISSOINS

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 June 2022
Civil Liability Regulation 2014 (NSW), cl 5 (repealed)	As at 1 September 2014
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
Unform Civil Procedure Rules 2005 (NSW), r 14.28	As at 11 November 2022