HIGH COURT OF AUSTRALIA

11 December 2024

PAFBURN PTY LTD & ANOR v THE OWNERS - STRATA PLAN NO 84674
[2024] HCA 49

Today, the High Court dismissed an appeal from a judgment of the Court of Appeal of the Supreme Court of New South Wales. The issue was whether the developer or the head building contractor ("the appellants") can rely on the failure of another person to take reasonable care in carrying out construction work, or otherwise performing any function in relation to that work, to limit their liability under Pt 4 of the *Civil Liability Act 2002* (NSW) ("the CLA") to an amount reflecting the proportion of the loss that a court considers just having regard to the extent of the responsibility of each for the damage or loss.

An owners corporation for a residential strata building ("the respondent") claimed damages from the appellants for the construction of the building. The claim against each was for economic loss arising from breach of the duty imposed on a person carrying out construction work by s 37(1) of the *Design and Building Practitioners Act 2020* (NSW) ("the DBPA") to exercise reasonable care to avoid economic loss caused by defects in or related to the building arising from the construction work. In their Technology and Construction List Response ("the Response"), the appellants contended that, if the owners corporation suffered loss or damage by reason of either or both of them having breached s 37(1) of the DBPA, then the claim against them is an "apportionable claim" within s 34 of the CLA, and identified several alleged "concurrent wrongdoers" in respect of the claim. Accordingly, the appellants contended that any liability they have to the respondent, in accordance with s 35(1)(a) of the CLA, is limited to an amount reflecting that proportion of the damage or loss that the court considers just having regard to the extent of the responsibility of each of them for the damage or loss. The Court of Appeal of the Supreme Court of New South Wales, on appeal from the primary judge in the Supreme Court of New South Wales, struck out the paragraphs of the Response which relied on Pt 4 of the CLA.

The High Court, by majority, dismissed the appeal. Section 39 of the DBPA ensures that a person subject to the duty imposed by s 37(1) cannot discharge the duty merely by exercising reasonable care in arranging for another person to carry out any work or task within the scope of the duty. Section 41(3) of the DBPA, in providing that Pt 4 of the DBPA is subject to the CLA, ensures that Pt 4 (including ss 37(1) and 39) is subject to, amongst other provisions of the CLA, s 5Q of the CLA. The consequence is that the extent of the liability of the appellants for their alleged respective breaches of the duty imposed by s 37(1) of the DBPA, if liability is established, "is to be determined as if the liability were the vicarious liability of [each of the appellants] for the negligence of the person in connection with the performance of the work or task" involving construction work (as defined in s 36(1) of the DBPA) that each of the appellants delegated or otherwise entrusted to any other person in respect of the building. The liability of each of the appellants is "as if the liability were the vicarious liability of" them for the whole of the construction work in relation to the building. On that basis, the appellants cannot exclude or limit their liability by apportioning any part of that liability to any of those persons to whom each, in fact, delegated or otherwise entrusted any part of the construction work in relation to the building.

This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.

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