



Navigating Liability in Construction: What You Need to Know

Case Note - The Owners – Strata Plan No 84674 v Pafburn Pty Ltd [2023] NSWCA 301

Introduction

Embarking on a construction project entails a multitude of considerations, from design intricacies to contractual agreements. The backbone of these agreements is a complex legal framework dictating liability and accountability in cases of dispute. The recent decision in *The Owners – Strata Plan No 84674 v Pafburn Pty Ltd [2023] NSWCA 301 (Pafburn)* has significantly altered the legal landscape, particularly concerning the *Design and Building Practitioners Act 2020 (DBP Act)*. Through altering the way liability is apportioned, *Pafburn* creates practical implications for both industry professionals and property owners.

Background

Pafburn concerns the liability of parties involved in a residential strata development in North Sydney which had numerous defects. The case follows the Owners Corporation who filed a claim against developers Pafburn and Madarina for breach of the statutory duty prescribed under section 37 of the *DBP Act*. This duty requires the party with **substantive control to reasonably avoid economic loss** caused by defects. The dispute questioned whether that duty should be shared between the contractors and subcontractors involved, a practice commonly employed under the proportionate liability regime.

The Decision

The crux of *Pafburn* lies in the interpretation of the *Civil Liability Act 2002 (CLA)* to equate non-delegable duties with vicarious liability. **Vicarious liability** means that an entity overseeing a project is responsible for the actions of their subordinates. This implies a strict sense of control and prevents the entity from blaming subcontractors in the event of a dispute. The Court of Appeal's ruling emphasised that **this duty cannot be fragmented** between different parties. Therefore, builders and developers can now be held accountable for breaches of this duty by their subcontractors.

Could Pafburn still claim proportionate liability?

Proportionate liability enables a defendant to share the blame and costs of a dispute with other concurrent wrongdoers. This defence is granted by the *CLA* and has been historically used by developers to reduce liability in construction projects. However, *Pafburn's* decision means that **this defence is no longer available** as vicarious liability is excluded under the *CLA*.

Implications for Builders and Developers

This causes a profound shift in the way builders and developers navigate their liability in construction projects. Previously, they could potentially mitigate some of their liability by distributing blame onto the subcontractors that performed the actual work. This decision now confirms that builders and developers bear **full responsibility** when carrying out building work. Consequently, meticulous planning, rigorous quality control, and adherence to statutory obligations throughout the construction process become vital measures to mitigate liability.

Practical Insights for Property Owners

However, there is a silver lining for property owners. The new interpretation has enhanced protection against construction defects. The ruling reaffirms property owner's rights and strengthens their ability to seek compensation for any damages incurred from breaches of the duty of care. Moving forward, property owners should proactively monitor their construction projects, ensuring that builders and developers adhere to regulatory standards and liability is placed accordingly.

Conclusion

Pafburn serves as a pivotal decision in the construction industry, reshaping the nature of liability and accountability. Through recognising the non-delegable nature of the duty of care under the *DBP Act*, the ruling epitomises the importance of diligence and compliance throughout construction projects. Armed with this understanding, both industry professionals and property owners can navigate construction projects with confidence and clarity, ensuring that integrity and longevity are prioritised.

More information

Have questions or need advice? Contact the team at [Construction Legal](#).