Long awaited decision from the High Court on Pafburn

Pafburn Pty Limited v The Owners - Strata Plan No 84674

Overview

In a much anticipated decision for the construction industry, the High Court in *Pafburn Pty Limited v The Owners - Strata Plan No 84674* [2024] HCA 49 considered whether a developer or head contractor can invoke the proportionate liability provisions uner Part 4 of the *Civil Liability Act 2002* (NSW) (‘*CLA*’) to reduce their liability when faced with claims for breaching the statutory duty under sections 37 and 39 of the *Design and Building Practitioners Act 2020* (NSW) (‘*DBPA*’).

As a result of the Court’s finding, head contractors are now significantly more exposed to risks given that they cannot delegate works to avoid liability. Moreover, the costs of litigation under the *DBPA* for head contractors and developers are expected to rise following the Court’s decision.

Procedural History

The Owners Corporation of a residential strata building in North Sydney brought proceedings against Pafburn (the head contractor) and Madarina Pty Ltd (the developer) for alleged negligence leading to defective construction works at their property. The Owners argued that Pafburn and Madarina breached their statutory duty under the DBPA to exercise reasonable care to avoid economic loss caused by defects.

In the original proceedings, Pafburn argued that its subcontractors were “concurrent wrongdoers” who contributed to the defective works, allowing Pafburn to apportion some its liability to the subcontractors under the CLA. The question before the court was whether this argument should be struck out.

The Court of Appeal held that a 'non-delegable' duty under the DBPA could not be apportioned between concurrent wrongdoers on the basis that Pafburn was vicariously liable for its subcontractor's works in the meaning of section 5Q of the CLA. Put simply, Pafburn was liable for the whole of the Owners Corporation's loss, despite those works having been delegated to subcontractors.

Pafburn appealed the decision to the High Court.

Decision

In proceedings before the High Court of Australia, the Court, a narrow 4-3 majority dismissed Pafburn's appeal. The Court clarified that, once it is established that the duty of care under the *DBPA* has been breached, the head contractor and developer are wholly liable for any loss caused by the breach of duty of care.

If a head contractor or developer wants to limit their liability for such a claim, they must cross-claim any party that they claim is liable for their loss.

High Court Findings

Claims under section 37 of the *DBPA*:

The Court held that s 37(1) of the *DBPA* should not be read absent the context provided by s 39 of the *DBPA*. The Court reasoned that the duty imposed by s 37(1) requires the person with the duty to ensure that reasonable care is taken by anyone they delegate work to. Section 39 reinforces that liability for a breach remains squarely with the person originally responsible for fulfilling the duty.

Relationship between the *DBPA* and the *CLA*:

The Court's key finding was that, because section 41(3) of the *DBPA* makes Part 4 of the DBPA subject to s 5Q of the *CLA*, the *DBPA* is subject to a "vicarious liability" regime, where those who delegate construction work are liable for the negligence of their delegees. The fact that a head contractor hired subcontractors specifically for their expertise is not relevant to whether the head contractor or subcontractor breached their duty of care, even though the head contractor may lack such expertise.

Apportionment of Liability to Certifiers and Council:

Section 37(1) of the *DBPA* imposes a duty of care on those who carry out "construction work" to take reasonable care to avoid economic loss caused by defects.

"Construction work" under section 36(1) of the *DBPA* is defined broadly to include those with "substantive control" over the work.

The Court left the question of whether this definition can include "works" done by private certifiers or local councils open, remitting it to the Supreme Court of NSW. Recent decisions in the Supreme Court, including *The Owners Corporation SP 90832 v Dyldam Developments Pty Ltd* [2024] NSWSC 1519 (*Dyldam*), indicate that this question remains vexed. In *Dyldam*, Hammerschlag CJ in Eq indicated that whether certifiers could be held liable under s 37 would, itself, be a question that may be decided by the High Court.

What This Means for Developers and Builders

Developers or head contractors facing *DBPA* claims can still pursue cross-claims against other parties who they allege breached applicable duties of care owed to them. It is also arguable that the Court's findings in *Pafburn* may not extend to situations where subcontractors delegate tasks further down the chain.

Conclusion

The decision in *Pafburn* has some strange results for the market:

1) Head contractors are now exposed to significantly

increased risks, costs and insurance premiums given that they cannot delegate works to avoid liability. Given that the *DBPA* was supposed to give consumers confidence and encourage them to purchase apartments, a result that ultimately makes apartments more expensive by increasing what head contractors will charge developers seems counterproductive.

2) After *Pafburn*, the costs of *DBPA* litigation for head contractors and developers will be extensive. Even though head contractors and developers can bring cross-claims to minimise their liability, the cost of doing so is significantly greater than would be required to apportion liability under the *CLA*. This will eventually, also, be passed onto consumers when head contractors and developers price this risk into their contracts.

It will ultimately be a question for the NSW State Government as to whether this is the result that they intended in the midst of a housing crisis where new homes were already unaffordable for most consumers.

More information

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