No More Sharing the Blame - Proportionate Liability for DBPA Claims

Case Note: Kapila v Monument Building Group Pty Ltd [2025] NSWSC 1306

Executive Summary

In Kapila v Monument Building Group Pty Ltd [2025] NSWSC 1306, the Court was asked to answer the question of whether liability for defective works undertaken by a building company and its sole director can be apportionable within the meaning of Part 4 of the Civil Liability Act 2002 (CLA). The Court delivered judgement further reinforcing that the proportionate liability regime in NSW does not apply to such claims.

Facts

Dr Shrutti Kapila (the Owner) entered into a contract with Monument Building Group Pty (the Builder) for the renovation of a terrace house. Mr Brujic (the Second Defendant) was the sole director of the Builder and the supervisor of its contractor license as required under the Home Building Act 1989 (NSW) (HBA).

The Owner claimed damages against the Builder for breach of contract for defective work as well as against the Second Defendant for breach of his duty of care to the plaintiff under s 37 of the Design and Building Practitioners Act 2020 (NSW) (DBPA).

Issues to be Determined

The Supreme Court was asked to determine the following issues:

1. Whether each alleged defect constituted a breach of the Contract by the Builder.
2. Whether the Second Defendant breached s 37 DBPA.
3. Whether the defendants could rely on proportionate liability under the CLA. as litigation costs or lacking proof.

Supreme Court Decision

The Court found that the Builder breached the contract and statutory warranties and that the Second Defendant carried out construction work in that he supervised the construction work undertaken by the Builder.

Legal Reasoning

The Court found that the Second Defendant had breached the duty of care imposed by s 37(1) of the DBPA. Section 37(1) of the DBPA imposes a non-delegable 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 Second Defendant was found to have carried out construction work in that he supervised construction work undertaken by the Builder. His non-delegable duty required him to ensure reasonable care was taken.

The Builder and the Second Defendant (together, the Defendants) denied liability for defective work. Relevantly, the Second Defendant pleaded alternatively that certifiers, engineers and architects engaged on the project were concurrent wrongdoers. The Second Defendant argued that the High Court decision in Pafburn Pty Limited v The Owners – Strata Plan No 84674 [2024] HCA 49 was distinguishable because the Second Defendant, as supervisor of the works and Director of the First Defendant, had not delegated the works to any of the alleged concurrent wrongdoers.

In finding against the Defendants, the Court found that the High Court decision in Pafburn did not disturb the prior Court of Appeal decision and that the fact that the Second Defendant had not delegated any works did not mean that the claim was apportionable. The Court determined that all claims under s 37 of the DBPA fall outside the proportionate liability regime, regardless of whether any third party was a delegate. Therefore, the appropriate remedy for the Defendants would be to pursue a cross claim against any concurrent wrongdoers.

The Court also considered that a claim for contributory negligence may be available for defendants who face a claim under s 37 of the DBPA, but that such a claim was not made out on the facts of this case.

Key Takeaways

Builder and developer clients are reminded that s 37 DBPA claims are not apportionable, meaning liability cannot be reduced even if there is no delegation to third parties. The s 37 duty is also non-delegable, and you must ensure reasonable care is taken by subcontractors and consultants, not merely exercise reasonable care yourself.

While builders 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.

More information

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