Article Information

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The Pafburn Supremacy – HCA decides against DBPA apportionment

Pafburn Pty Limited v The Owners – Strata Plan No 84674 [2024] HCA 49 (Pafburn)

In Pafburn, the High Court via a split 4:3 decision has handed down one of the most highly anticipated judgments of the year for the construction industry.

On appeal from the NSWCA – this decision set out whether a claim under the DPBA can be apportioned in accordance with the proportionate liability scheme in Pt 4 of the CLA[1].

The majority judgment

At a glance, the majority (Gageler CJ, and Gleeson, Jagot and Beech-Jones JJ) judgment provides guidance on the non-apportionability of a claim for breach of the DBPA[1] duty of care based on:

1. an analysis of what is vicarious liability, a non delegable duty and a tort, and the operation of the relevant sections of the DBPA pertaining to the statutory duty; and
2. the intention of the NSW legislature in introducing the DBPA[2] amidst a "crisis of building confidence" following incidents like the Opal Tower and parliamentary findings[3] in accordance with first principles of statutory interpretation.[4]

The key takeaway of the majority judgment is that a developer, builder and a person within either institution capable of supervision and control of "building work" is personally liable for the whole of the economic loss caused by breach of their s 37(1) duty (if established, subject to causation of loss and proof of the quantum).

Of note, the majority:

1. highlighted how the CLA neglects to define concepts of "vicarious liability" ([17]), "non delegable duty" ([20]) and what constitutes a "tort" ([21]), leaving it to common law imbuing each with the flexibility which statute cannot provide; and
2. refrained from deciding but noting there is a question [49] re whether a person who is a principal contractor for building work within the meaning of a s 7(2) and who is thereby taken to do building work in accordance with a s 7(3) is for that reason alone a person who carried out building work (being construction work) for the purposes of s 37(1) of the DBPA.

The minority's concerns

In contrast, the minority (Gordon, Edelman and Steward JJ), applying the same principles of statutory construction but with a greater emphasis on the practical implications of placing all liability on the main contractor or developer, held that the DBPA duty must be apportionable. The key implications of the DBPA duty being non-apportionable of which the minority were concerned included the following (at [99] – [102]):

1. the effect on costs and insurance premiums, as main contractors and developers would need to price for the risks placed on them;
2. forcing defendants to bring cross claims against concurrent wrongdoers (and the associated bars and costs of such

litigation);
3. leading to what the "unusual situation" where the common law and DBPA duty of care co-exist; and
4. apportionability better promotes the individual and collective responsibility which the legislature aimed to facilitate vis-à-vis the enactment of the DBPA.

The minority ultimately reasoned (at [87]) that a head contractor should not be responsible for the acts of a specialised and/or independent subcontractor given the degrees of separation when many head contractors or builders rely on sub-contractors to provide expertise in areas they lack.

Takeaways and potential implications

While we will see the effect of Pafburn's clarifications in the new year, the majority's comments on how the any duty is still subject to causation and proof of loss may be the answer to some of the minority's concerns.

Apportionable or not, the DBPA only assists a Plaintiff in providing for a statutory duty of care – a Plaintiff must still prove breach, causation and loss. As Loulach[5] and a series of cases have proven, this is no easy feat, the threshold for establishing negligence pursuant to the DBPA being akin to that at common law.

That said, the HCA's confirmation on non-apportionability is clearly a "win" for plaintiff OCs, streamlining their litigation by removing the need to comply with the procedurally complex apportionment regime under the CLA.

There is also no doubt that, moving forward, increased scrutiny will be applied to the drafting and negotiation of construction contracts in NSW in an attempt to reallocate risk in response to the minority's concerns noted above, possibly focusing on the majority's unanswered question on the deeming of a principal contractor as a "person who carried out construction work".[6]

[1] *Design and Building Practitioners Act 2020* (NSW) (***DBPA***).

[2] Including by reference to the Second Reading Speech (New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 23 October 2019).

[3] of the Commonwealth of Australia, *Inquiry into the Law of Joint and Several Liability: Report of Stage Two* (1995) cited in *Woodhouse v Fitzgerald* (2021) 104 NSWLR 475 at 500 [101].

[4] citing *Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355* at 382 [70]; *South Australia v Tanner* (1989) 166 CLR 161 at 171; *Shergold v Tanner* (2002) 209 CLR 126 at 136-137 [34]-[35].

[5] *The Owners – Strata Plan No 87060 v Loulach Developments Pty Ltd (No 2)* [2021] NSWSC 1068 (***Loulach***).

[6] See the majority's unanswered question above, i.e., on the deeming of a principal contractor within the meaning of s 7 as caught by s 37(1) of DBPA as a person who carried out construction work.