

HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

PAFBURN PTY LIMITED & ANOR

APPELLANTS

AND

THE OWNERS - STRATA PLAN NO 84674

RESPONDENT

Pafburn Pty Limited v The Owners - Strata Plan No 84674

[2024] HCA 49

Date of Hearing: 15 October 2024

Date of Judgment: 11 December 2024

S54/2024

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation

N C Hutley SC with G A Sirtes SC and A Di Francesco for the appellants
(instructed by M&A Lawyers)

B W Walker SC with D S Weinberger for the respondent (instructed by Grace
Lawyers)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Pafburn Pty Limited v The Owners - Strata Plan No 84674

Tort – Negligence – Concurrent wrongdoers – Proportionate liability – Where owners corporation claimed damages from developer and head building contractor for construction of building – Where claim for economic loss arising from breach of duty imposed on person carrying out construction work by s 37 of *Design and Building Practitioners Act 2020* (NSW) ("DBPA") – Where duty to exercise reasonable care to avoid economic loss caused by defects in or related to building arising from construction work – Whether Pt 4 of *Civil Liability Act 2002* (NSW) can limit liability for damages for breach of s 37 of DBPA.

Words and phrases – "apportionable claim", "building work", "concurrent wrongdoers", "construction work", "direct liability", "duty of care", "non-delegable duty", "personal liability", "proportionate liability", "statutory duty", "vicarious liability".

Civil Liability Act 2002 (NSW), ss 5Q, 34, 34A, 35, 39(a).

Design and Building Practitioners Act 2020 (NSW), ss 7(3), 32, 33, 34, 35, 36(1), 37, 38, 39, 40, 41.

1 GAGELER CJ, GLEESON, JAGOT AND BEECH-JONES JJ. An owners corporation for a residential strata building ("the Building") claims damages from the developer and the head building contractor for the construction of that building. The claim against each is for economic loss arising from breach of the non-delegable duty imposed on a person carrying out construction work by ss 37(1) and 39 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. Can the developer or the head building contractor 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? For reasons to be explained, neither the developer nor the head building contractor can do so.

2 The Court of Appeal of the Supreme Court of New South Wales (Ward P, Adamson JA and Basten A-JA),¹ on appeal from the primary judge in the Supreme Court of New South Wales (Rees J),² was therefore correct to strike out paragraphs of the pleading of the developer and the head building contractor, styled a Technology and Construction List Response ("the Response"), in which they: (a) contended that the claim against them was subject to Pt 4 of the CLA; and (b) identified several alleged "concurrent wrongdoers" in respect of the claim.

The pleadings

The Statement

3 The owners corporation (the plaintiff below and the respondent in this Court) filed a Technology and Construction List Statement ("the Statement") asserting its status as the owners corporation taken to have been constituted under s 8 of the *Strata Schemes Management Act 2015* (NSW) for a strata scheme in respect of a parcel of land in North Sydney under the *Strata Schemes (Freehold Development) Act 1973* (NSW). As such, the owners corporation is the registered proprietor of the common property of the Building.

1 *The Owners – Strata Plan No 84674 v Pafburn Pty Ltd* (2023) 113 NSWLR 105.

2 *The Owners – Strata Plan No 84674 v Pafburn Pty Ltd* [2023] NSWSC 116.

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4 The Statement identifies that the claim is made exclusively pursuant to the DBPA.

5 The Statement contends that, before the registration of the strata plan for the strata scheme, the land was owned by the second appellant (the second defendant below, "Madarina"). Further, it contends that Madarina contracted with the first appellant (the first defendant below, "Pafburn") to construct the Building on the land. According to the Statement, Pafburn held a contractor licence under the *Home Building Act 1989* (NSW) ("the HBA"). Relevantly, by s 4(1) of the HBA, a person must not contract to do "residential building work" "except as or on behalf of an individual, partnership or corporation that is the holder of a contractor licence authorising its holder to contract to do that work".

6 The Statement also contends that: (a) Pafburn was (and is) the sole shareholder of Madarina; and (b) Pafburn's controlling shareholder and director, Antonios Obeid, was also the sole director of Madarina and the "nominated supervisor" of Pafburn's contractor licence as required by the HBA³ and, in that capacity, was required to and did supervise and have control of the building work Pafburn carried out under the contract between it and Madarina, and was the applicant for each of the development consent for the residential building work, the notice to commence building work, the construction certificate, and the occupation certificate for that building work, as well as the person who appointed the principal certifying authority therefor.

7 According to the contentions in the Statement: (a) Pafburn carried out residential building work within the meaning of cl 2 of Sch 1 to the HBA by constructing the Building; (b) by reason thereof, Pafburn carried out "building work" and "construction work" within the meaning of s 36 of the DBPA; (c) Madarina supervised, co-ordinated and project managed and had substantive control over the carrying out of the building work by Pafburn; and (d) Madarina, accordingly, carried out "construction work" within the meaning of s 36 of the DBPA.

8 The Statement further contends that Pafburn and Madarina each owed the owners corporation in the carrying out of the construction work a duty, as referred to in s 37(1) of the DBPA, to exercise reasonable care to avoid economic loss caused by defects in or related to the Building arising from the construction work, being: (a) the preparation of regulated designs and other designs for the building work; (b) manufacture or supply of a building product used for the building work;

3 *Home Building Act 1989* (NSW), Sch 1.

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and (c) supervising, co-ordinating, project managing or otherwise having substantive control over the carrying out of this work.

9 Further again, the Statement contends that by operation of s 39 of the DBPA and s 5Q of the CLA: (a) Pafburn and Madarina owed the owners corporation a duty to ensure that reasonable care was taken by a person carrying out any work or task delegated or otherwise entrusted to them by Pafburn or Madarina in relation to the Building; and (b) the extent of the liability of Pafburn and Madarina for breach of this duty is to be determined as if they were vicariously liable for the negligence of the person in connection with the carrying out of the work.

10 The Statement thereafter identifies alleged defects in the Building said to be caused by Pafburn and Madarina having breached this duty and the resulting economic loss said to have been incurred by the owners corporation.

The Response

11 In the Response Pafburn and Madarina, in answer: (a) admit that Pafburn carried out residential building work within the meaning of cl 2 of Sch 1 to the HBA by constructing the Building; (b) admit that, by reason thereof, Pafburn carried out "building work" and "construction work" within the meaning of s 36 of the DBPA; but (c) deny that Madarina supervised, co-ordinated and project managed and had substantive control over the carrying out of the building work by Pafburn; and (d) accordingly, deny that Madarina carried out "construction work" within the meaning of s 36 of the DBPA.

12 In the Response Pafburn and Madarina further contend 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: (a) the claim against them is an "apportionable claim" within the meaning of s 34 of the CLA; and (b) concurrent wrongdoers in respect of the claim are or include: (i) the sub-contractor(s) for the waterproofing of the Building; (ii) the manufacturer and/or supplier and installer of the aluminium composite panels on the Building; (iii) the architect for the Building; (iv) the principal certifying authority for the Building; and (v) the local council as the consent authority in respect of the Building.

13 The Response contends that each such alleged concurrent wrongdoer, under s 37 of the DBPA, owed to the owners corporation a duty in the carrying out of the construction work that each carried out to avoid economic loss caused by defects in the Building and/or a duty of care at common law which, if the alleged defects in the Building exist, they breached. Accordingly, Pafburn and Madarina contend that any liability they have to the owners corporation, 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 strike out application

- 14 The owners corporation applied for the paragraphs of the Response containing the contention that its claims were "apportionable claims" under s 34 of the CLA to be struck out under r 14.28 of the *Uniform Civil Procedure Rules 2005* (NSW), which provides, in part, that the court may at any stage of the proceedings order that the whole or any part of a pleading be struck out if the pleading "discloses no reasonable cause of action or defence".

Civil Liability Act

- 15 The CLA extensively regulates liability for damages in negligence in New South Wales. The legislative scheme of the CLA includes provisions modifying the common law in respect of, for example, duties of care, causation, and assumption of risk.⁴ It also contains proportionate liability provisions in Pt 4 modifying the common law principle of solidary liability by which one defendant who negligently caused a plaintiff loss is solely liable for the whole of that loss even if other defendants or persons also caused the same loss.
- 16 Section 3C of the CLA provides that "[a]ny provision of this Act that excludes or limits the civil liability of a person for a tort also operates to exclude or limit the vicarious liability of another person for that tort".
- 17 The CLA does not define "vicarious liability". Therefore, the term takes its common law meaning in the CLA. Vicarious liability is generally understood to mean any case in which, under common law principles or otherwise, a wrongdoer's liability for a wrong is attributable to another person.⁵ A common example of vicarious liability involves the attribution of an employee's liability to the employer (in contrast to the non-attribution of such liability as between a principal and an independent contractor).
- 18 Part 1A of the CLA is headed "Negligence", a term which is defined in s 5 to mean "failure to exercise reasonable care and skill". Section 5A(1) of the CLA provides that Pt 1A "applies to any claim for damages for harm resulting from

4 *Civil Liability Act 2002* (NSW), Pt 1A, Divs 1-4.

5 *Darling Island Stevedoring and Lighterage Co Ltd v Long* (1957) 97 CLR 36 at 57; *Bird v DP (a pseudonym)* [2024] HCA 41 at [44], [83], [195].

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negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise". Accordingly, Pt 1A of the CLA applies to a claim for damages pursuant to s 37 of the DBPA.

19 Division 7 of Pt 1A of the CLA is headed "Non-delegable duties and vicarious liability". It contains a single provision, s 5Q, which is headed "Liability based on non-delegable duty". Section 5Q provides as follows:

- "(1) The extent of liability in tort of a person (*the defendant*) for breach of a non-delegable duty to ensure that reasonable care is taken by a person in the carrying out of any work or task delegated or otherwise entrusted to the person by the defendant is to be determined as if the liability were the vicarious liability of the defendant for the negligence of the person in connection with the performance of the work or task.
- (2) This section applies to an action in tort whether or not it is an action in negligence, despite anything to the contrary in section 5A."

20 The CLA does not define "non-delegable duty". The term therefore takes its common law meaning in the CLA. Generally, a "non-delegable duty" is a type of duty of care which, if owed by a person, means that the person cannot exclude or limit their liability for conduct within the scope of the duty of care causing reasonably foreseeable harm merely by the person exercising reasonable care in arranging for another person to perform the function to which the non-delegable duty of care attaches. That is, although the function to which a non-delegable duty of care attaches is "delegable" in that the person subject to the duty may procure performance of any function within the scope of the duty by another person, the non-delegable duty is not satisfied merely by the taking of reasonable care by the person subject to the duty, because the content of the duty is personally to ensure that that other person performing the function in fact takes reasonable care.⁶ Liability for breach of a non-delegable duty, therefore, is generally considered to be "direct" or "personal" liability (because the person subject to the non-delegable duty is taken to have breached that duty by not ensuring that reasonable care was taken by the other person performing the function) rather than "vicarious" liability (in which the person is taken to be liable for another person's breach of a duty of

6 *New South Wales v Lepore* (2003) 212 CLR 511 at 527-529 [20]-[21]; *Leichhardt Municipal Council v Montgomery* (2007) 230 CLR 22 at 29 [9]. See also *The Commonwealth v Introvigne* (1982) 150 CLR 258 at 270; *McDermid v Nash Dredging & Reclamation Co Ltd* [1987] AC 906 at 910; *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 350.

care owed by that other person in respect of the relevant act or omission constituting the wrong).⁷ In both cases the person subject to the duty is made, by law, "the insurer of some activity even when it is performed by another".⁸

21 "Tort" is also not defined in the CLA. Like "vicarious liability" and "non-delegable duty", "tort" in the CLA therefore takes its common law meaning. "Tort" is a concept of significant elasticity and indeterminacy which extends to any form of wrong which attracts a remedy in civil law and not within another recognised class of actionable wrongs (such as breach of contract or breach of trust).

22 Part 4 of the CLA creates a scheme of proportionate liability. In Pt 4 of the CLA, s 34 provides that:

"(1) This Part applies to the following claims (*apportionable claims*) –

(a) a claim for economic loss or damage to property in an action for damages (whether in contract, tort or otherwise) arising from a failure to take reasonable care, but not including any claim arising out of personal injury,

...

(1A) For the purposes of this Part, there is a single apportionable claim in proceedings in respect of the same loss or damage even if the claim for the loss or damage is based on more than one cause of action (whether or not of the same or a different kind).

(2) In this Part, a *concurrent wrongdoer*, in relation to a claim, is a person who is one of two or more persons whose acts or omissions (or act or omission) caused, independently of each other or jointly, the damage or loss that is the subject of the claim.

(3) For the purposes of this Part, apportionable claims are limited to those claims specified in subsection (1).

(3A) This Part does not apply to a claim in an action for damages arising from a breach of statutory warranty under Part 2C of the *Home*

7 *Bird v DP (a pseudonym)* [2024] HCA 41 at [36], [219].

8 *Scott v Davis* (2000) 204 CLR 333 at 416 [248].

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Building Act 1989 and brought by a person having the benefit of the statutory warranty.

- (4) For the purposes of this Part it does not matter that a concurrent wrongdoer is insolvent, is being wound up or has ceased to exist or died."

23 Section 34A(3) provides that "[t]he liability of any other concurrent wrongdoer who is not an excluded concurrent wrongdoer is to be determined in accordance with the provisions of" Pt 4 of the CLA.

24 Section 35(1) of the CLA, a key substantive provision of Pt 4, is in these terms:

"In any proceedings involving an apportionable claim –

- (a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the damage or loss claimed that the court considers just having regard to the extent of the defendant's responsibility for the damage or loss, and
- (b) the court may give judgment against the defendant for not more than that amount."

25 Section 36 of the CLA, another key substantive provision of Pt 4, is in these terms:

"A defendant against whom judgment is given under this Part as a concurrent wrongdoer in relation to an apportionable claim –

- (a) cannot be required to contribute to any damages or contribution recovered from another concurrent wrongdoer in respect of the apportionable claim (whether or not the damages or contribution are recovered in the same proceedings in which judgment is given against the defendant), and
- (b) cannot be required to indemnify any such wrongdoer."

26 Section 37 of the CLA, also in Pt 4, provides that:

- "(1) In relation to an apportionable claim, nothing in this Part or any other law prevents a plaintiff who has previously recovered judgment against a concurrent wrongdoer for an apportionable part of any

damage or loss from bringing another action against any other concurrent wrongdoer for that damage or loss.

- (2) However, in any proceedings in respect of any such action the plaintiff cannot recover an amount of damages that, having regard to any damages previously recovered by the plaintiff in respect of the damage or loss, would result in the plaintiff receiving compensation for damage or loss that is greater than the damage or loss actually sustained by the plaintiff."

27 The final provision of Pt 4 of the CLA, s 39, provides in s 39(a) that "[n]othing in this Part ... prevents a person from being held vicariously liable for a proportion of any apportionable claim for which another person is liable".

28 The basic scheme of Pt 4 of the CLA is clear. If a claim is an "apportionable claim" (s 34(1)) which is a "single apportionable claim" (s 34(1A)) in respect of which there is a "concurrent wrongdoer" (s 34(2)) then, subject to the terms of s 34(3A), the liability of each such concurrent wrongdoer is to be determined in accordance with the provisions of Pt 4 (s 34A(3)). The liability of each such concurrent wrongdoer is limited to an amount reflecting that proportion of the damage or loss claimed that the court considers just having regard to the extent of each such concurrent wrongdoer's responsibility for the damage or loss and the court may give judgment against the concurrent wrongdoer for not more than that amount (s 35(1)). If judgment on the apportionable claim is given against such a concurrent wrongdoer in respect of its liability as so determined, that concurrent wrongdoer cannot be required to contribute to any damages or contribution recovered from another such concurrent wrongdoer in respect of the apportionable claim (s 36).

29 Overlaying this basic scheme are provisions concerning vicarious liability and non-delegable duties. In respect of vicarious liability, s 39(a) of the CLA reflects the view of Professor Davis that "to apply proportionate liability in a case where one defendant's liability arose simply from its vicarious liability for another defendant would completely undermine the principles of vicarious liability and the policy behind them".⁹ In respect of non-delegable duties, s 5Q requires the extent of the liability of a person who has breached a non-delegable duty to be determined as if the person were vicariously liable for the negligence of the person who in fact carried out the work or the task (being the person to whom the carrying out of any

9 *Woodhouse v Fitzgerald* (2021) 104 NSWLR 475 at 500 [101], quoting Commonwealth of Australia, *Inquiry into the Law of Joint and Several Liability: Report of Stage Two* (1995) at 26.

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work or task within the scope of the non-delegable duty of care was "delegated or otherwise entrusted" by the person subject to the non-delegable duty). As Basten JA recognised in *Woodhouse v Fitzgerald*, s 39(a) then operates to ensure that the extent of the liability of the person owing the non-delegable duty determined under s 5Q is limited to the proportion attributed to the person delegated or otherwise entrusted with carrying out the work or task for which the person owing the non-delegable duty is deemed by s 5Q to be vicariously liable.¹⁰

30 Sections 5Q and 39(a) also operate subject to s 3C, which has a different purpose. Section 3C ensures that if the CLA excludes or limits the liability of the wrongdoer then the liability of the person who would otherwise be vicariously liable for the wrongdoer's wrong is also so excluded or limited.

Design and Building Practitioners Act

31 Part 1 of the DBPA contains a series of definitional provisions. Section 4(1) provides that:

"For the purposes of this Act, **building work** means work involved in, or involved in coordinating or supervising work involved in, one or more of the following –

- (a) the construction of a building of a class or type prescribed by the regulations for the purposes of this definition,
- (b) the making of alterations or additions to a building of that class or type,
- (c) the repair, renovation or protective treatment of a building of that class or type."

32 Section 7 of the DBPA, also in Pt 1, is as follows:

"(1) In this Act, **building practitioner** means –

- (a) a person who agrees under a contract or other arrangement to do building work, or
- (b) if more than one person agrees to do building work, a person who is the principal contractor for the work.

10 (2021) 104 NSWLR 475 at 499 [100].

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- (2) In this Act, **principal contractor** means a person who agrees to do building work under a contract or arrangement (the **head contract**) and for whom work is to be carried out under one or more other contracts or arrangements as part of or incidental to the work carried out under the head contract.
- (3) In this Act, a **building practitioner is taken to do building work** if the practitioner –
- (a) agrees to do building work under a contract or other arrangement, or
 - (b) is the principal contractor for the work.

..."

33 Part 2 of the DBPA concerns "regulated designs" (defined in s 5) and "building work" (defined in s 4(1)). Part 2 imposes obligations on, amongst others, registered design practitioners (ss 9, 11), registered principal design practitioners (ss 12, 14), and building practitioners (ss 15, 17-22, 24). Contravention of any of these obligations is a criminal offence punishable by a fine.

34 Part 4 of the DBPA is headed "Duty of care". Part 4 includes s 36, which contains the following provisions:

"(1) In this Part –

...

building has the same meaning as it has in the *Environmental Planning and Assessment Act 1979*.

building product has the same meaning as in the *Building Products (Safety) Act 2017*.

building work includes residential building work within the meaning of the *Home Building Act 1989*.

construction work means any of the following –

- (a) building work,
- (b) the preparation of regulated designs and other designs for building work,

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- (c) the manufacture or supply of a building product used for building work,
- (d) supervising, coordinating, project managing or otherwise having substantive control over the carrying out of any work referred to in paragraph (a), (b) or (c).

owner of land means any of the following –

- (a) every person who jointly or severally or at law or in equity is entitled to the land for an estate of freehold,
- (b) for a lot within a strata scheme, the owner of a lot within the meaning of the *Strata Schemes Management Act 2015*,

...

owners corporation means an owners corporation constituted under the *Strata Schemes Management Act 2015*.

- (2) In this Part, a reference to **building work** applies only to building work relating to a building within the meaning of this Part.
- (3) In this Part, a reference to the **owner** of land includes –
 - (a) if the land is subject to a strata scheme under the *Strata Schemes Management Act 2015*, the owners corporation constituted for the scheme, or

...

- (4) In this Part, a reference to a person who carries out construction work includes a reference to a person who manufactures, or is a supplier (within the meaning of the *Building Products (Safety) Act 2017*) of, a building product used for building work.

..."

Section 37 (Extension of duty of care) of the DBPA is in these terms:

- "(1) A person who carries out construction work has a duty to exercise reasonable care to avoid economic loss caused by defects –
 - (a) in or related to a building for which the work is done, and

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- (b) arising from the construction work.
- (2) The duty of care is owed to each owner of the land in relation to which the construction work is carried out and to each subsequent owner of the land.
- (3) A person to whom the duty of care is owed is entitled to damages for the breach of the duty as if the duty were a duty established by the common law.
- (4) The duty of care is owed to an owner whether or not the construction work was carried out –
 - (a) under a contract or other arrangement entered into with the owner or another person, or
 - (b) otherwise than under a contract or arrangement."

36 Section 38 of the DBPA provides:

- "(1) An owners corporation or an association is taken to suffer economic loss for the purposes of this Part if the corporation or association bears the cost of rectifying defects (including damage caused by defects) that are the subject of a breach of the duty of care imposed under this Part.
- (2) The economic loss suffered by an owners corporation or association for the purposes of subsection (1) includes the reasonable costs of providing alternative accommodation where necessary.
- (3) Subsection (1) applies whether or not the owners corporation or association was the owner of the land when the construction work was carried out.
- (4) Subsections (1) and (2) do not limit the economic loss for which an owners corporation, association or an owner may claim damages under this Part."

37 Section 39 of the DBPA is as follows:

"A person who owes a duty of care under this Part is not entitled to delegate that duty."

13.

38 Section 40 of the DBPA provides:

- "(1) This Part applies despite any contracts or stipulations to the contrary made after the commencement of this Part.
- (2) No contract or agreement made or entered into, or amended, after the commencement of this Part operates to annul, vary or exclude a provision of this Part."

39 Section 41 of the DBPA, the final provision of Pt 4, is as follows:

- "(1) The provisions of this Part are in addition to duties, statutory warranties or other obligations imposed under the *Home Building Act 1989*, other Acts or the common law and do not limit the duties, warranties or other obligations imposed under that Act, other Acts or the common law.
- (2) This Part does not limit damages or other compensation that may be available to a person under another Act or at common law because of a breach of a duty by a person who carries out construction work.
- (3) This Part is subject to the *Civil Liability Act 2002*."

40 The Second Reading Speech for the DBPA recorded that it "deliver[ed] on the New South Wales Government's promise to introduce a suite of new obligations on design and building practitioners to ensure that each step of construction is well documented and compliant".¹¹ This was said to be necessary as:¹²

"Modern buildings are no longer four walls and a roof. *Construction is complex, integrated and evolving*. Future occupants of buildings deserve to know they are buying a quality design and expert construction that is protected by strong and modernised building laws. They also deserve to have an avenue of recourse available in the event of a defect during a building's life. This bill is a priority for our Government. It is critical to support the building and construction sector, and provide New South Wales

11 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 23 October 2019 at 1658.

12 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 23 October 2019 at 1658 (emphasis added).

with a built environment where safety and quality is prioritised and *where there is strong consumer confidence.*"

41 The Second Reading Speech continued:¹³

"Members would be aware of the recent devastation caused by defective buildings, such as at Mascot and Opal towers. *These incidents, coupled with a number of legal cases, have reduced consumer confidence and provided uncertainty about the extent of protections available for financial damages or pure economic loss. Part 3 of the bill establishes key reforms that will significantly improve the redress available to consumers for building defects.*

For the first time in New South Wales, clause 30 establishes a statutory duty of care that eradicates any uncertainty that may exist in the common law that a duty is owed to the end user and in respect to liability for defective building work. *Any person who carries out construction work will, under the provisions of the bill and for the first time, have an automatic duty to exercise reasonable care to avoid economic loss caused by defects in or related to a building for which the construction work is done or arising out of that work. ...*

... The bill continues to safeguard the rights of owners through clauses 32 and 33 by preventing a person who performs construction work from delegating or contracting out of their duty.

This is important, as practitioners will need to accept individual and collective responsibility for their work."

42 As the Second Reading Speech indicated, and as Kirk JA and Griffiths A-JA noted in *Roberts v Goodwin Street Developments Pty Ltd*,¹⁴ the DBPA "was enacted in the context of broader public concerns about building defects highlighted by" two "much-publicised cases of widespread and serious defects". One case was a high-rise residential and commercial building known as Opal Tower at Sydney Olympic Park, which exhibited serious structural damage in 2018 requiring the building's occupants to be evacuated from the building for their own safety, leading the New South Wales Minister for Planning and Housing to obtain

13 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 23 October 2019 at 1663-1664 (emphasis added).

14 (2023) 110 NSWLR 557 at 603 [195].

independent advice on the possibility of rectifying the building to restore its structural integrity.¹⁵ The other case was a high-rise residential and commercial building known as Mascot Towers, which exhibited serious structural damage in 2019 requiring the building's occupants to be evacuated from the building for their own safety, leading to the New South Wales Department of Planning and Environment commissioning an independent adviser to investigate the role of the local council in the assessment, determination and certification of the Mascot Towers development, pursuant to s 430 of the *Local Government Act 1993* (NSW).¹⁶

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On this basis it can be taken that the context of the enactment of the DBPA was a crisis of confidence of persons considering buying a unit in a residential apartment building in New South Wales (particularly in the Sydney metropolitan area). The reference in the Second Reading Speech to the criticality of the need to restore consumer confidence was in a context in which this Court had decided in *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* that a builder who undertook the construction of a "mixed use retail, restaurant, residential and serviced apartments building" under a "design and construct contract" with a developer did not owe a duty of care "in carrying out [the] building works" to subsequent owners for latent defects in the building.¹⁷ Section 37(1) of the DBPA therefore imposes a statutory duty on a person who carries out construction work to exercise reasonable care to avoid economic loss caused by defects in or related to a building for which the work is done and arising from the construction work. Section 37(2) ensures that this duty is owed to subsequent owners. Section 38(1) deems an owners corporation to have suffered economic loss if it bears the cost of rectifying the defects the subject of the breach of the s 37(1) duty. Section 37(3) provides that a "person to whom the duty of care is owed is entitled to damages for the breach of the duty as if the duty were a duty established by the common law". To fulfil the object of the further "safeguard" for rights of owners and to establish the "individual and collective responsibility" of building practitioners for their work as referred to in the Second Reading Speech, s 39 provides that a person who owes a duty under s 37(1) "is not entitled to delegate that duty". As explained, this expression conveys that the person who owes the s 37(1) duty cannot exclude or limit their liability by delegating or otherwise entrusting the performance of any part of their duty to take reasonable care to avoid economic loss caused by defects

15 See Carter, Hoffman and Foster, *Opal Tower Investigation: Final Report* (2019).

16 See McCullough Robertson Lawyers, *Investigation Report – Mascot Towers Development* (2023).

17 (2014) 254 CLR 185. See at 205-206 [38], 206 [42].

in the building and arising from the construction work to another person. Finally, by s 40 a person subject to the duty imposed by s 37(1) also cannot contract out of any provision of Pt 4.

Interaction of statutory schemes

44 The appellants submitted that a person who "carries out construction work" by "supervising, coordinating, project managing or otherwise having substantive control over the carrying out of any work referred to in paragraph (a), (b) or (c)", as referred to in para (d) of the definition of "construction work" in s 36(1) of the DBPA, has a duty under s 37(1) of the DBPA only to exercise reasonable care to avoid economic loss caused by defects in the building arising from the carrying out of that construction work (being supervising, co-ordinating, project managing or otherwise having substantive control over the carrying out of any work referred to in para (a), (b) or (c)). Accordingly, s 39 of the DBPA operates on that specific duty of care in respect of para (d) of the definition only and does not extend to the construction work referred to in para (a), (b) or (c) of that definition.

45 By this, the appellants mean that if a person (eg, a "principal contractor") who "supervises etc" the carrying out of building work (in this case, the construction of the Building) arranges for another person to do that building work, then the non-delegable duty created by ss 37(1) and 39 of the DBPA attaches to the function of "supervising etc" of the building work but not to the carrying out of the building work. Therefore, the person "supervising etc" the building work is personally liable under the non-delegable duty only for a failure to exercise the required reasonable care (to avoid economic loss caused by defects in the building arising from the "supervising etc") in performing the function of the "supervising etc" and not in respect of the function of the carrying out of the building work.

46 On the appellants' submissions, the consequence of this is that: (a) the owners corporation's claim, being a claim for economic loss in tort arising from a failure to take reasonable care as referred to in s 34(1)(a) of the CLA, is an "apportionable claim"; (b) that claim is a "single apportionable claim" in respect of the same damage or loss in the proceedings as referred to in s 34(1A) of the CLA; (c) there are "concurrent wrongdoers" in relation to that claim, being the other persons whose acts or omissions in the carrying out of the building work (or the exercise of other functions in respect of the building work on the part of the principal certifying authority and the local council) also caused the damage or loss that is the subject of the claim as referred to in s 34(2) of the CLA; and (d) the liability of all such concurrent wrongdoers, in accordance with s 34A(3) of the CLA, "is to be determined in accordance with the provisions of" Pt 4 of the CLA.

47 The Court of Appeal's principal error, according to the appellants, was to fail to recognise that a person's s 37(1) duty, liability for which, by s 39 of the DBPA, cannot be avoided by delegating or otherwise entrusting functions within the scope of that duty to another person, is confined to the "construction work" that person has in fact carried out. As s 36(1) of the DBPA defines "construction work" as consisting of four distinct kinds of actions in paras (a)-(d), the duty in s 37(1) is only to exercise reasonable care to avoid economic loss caused by defects in the building for which "*the work*" was done and "*arising from the construction work*". Section 39 of the DBPA applies to prevent the person, by the taking of reasonable care in delegating or otherwise entrusting functions within the scope of that duty to another person, from avoiding liability for breach of that duty of care. Accordingly, while a person subject to the s 37(1) duty cannot exclude or limit their liability for not exercising reasonable care to avoid economic loss caused by defects in the building arising from the construction work the person in fact carried out, the person is entitled to claim that there are other persons, who carried out other construction work or performed some other function in respect of the building, whose acts or omissions caused the same loss or damage and who therefore are concurrent wrongdoers, the liability of all of whom must be determined in accordance with Pt 4 of the CLA.

48 In support of these arguments the appellants referred to the overall structure of the DBPA, particularly the difference between the concept of a person who "carries out construction work" as referred to in s 37(1) in Pt 4 of the DBPA and a person who "does" or is taken "to do" construction work in provisions of Pts 1 and 2 of the DBPA (eg, ss 7, 15, 18, 20-22). According to the appellants, the fact that a person is a "principal contractor" as referred to in s 7(2) and that s 7(3) provides that, in the DBPA, a "building practitioner is taken to do building work" if the practitioner is "the principal contractor for the work" does not mean that the principal contractor has "carrie[d] out" the "building work" (being "construction work") within the meaning of s 37(1) of the DBPA. As the appellants would have it, to be taken to do building work for the purposes of those provisions of the DBPA attaching obligations to a building practitioner "doing" building work (eg, in Pt 2) does not mean that the person has "carrie[d] out construction work" (being the "building work") for the purposes of Pt 4 of the DBPA.

49 Underlying this last series of propositions is a potential question about the interaction between ss 7(3) and 37(1) of the DBPA. The potential question is whether a person who is a "principal contractor" for building work within the meaning of s 7(2) and who is thereby taken to do that building work in accordance with s 7(3) is, for that reason alone, a person who has carried out that building work (being "construction work") for the purposes of s 37(1) of the DBPA. That question, however: (a) did not arise before the Courts below; (b) is not the subject of a ground of appeal in this Court; and (c) was not the subject of comprehensive

argument in this Court. For these reasons, this Court should refrain from expressing any answer to this question. This is particularly so given that the relevance of the question to this case is by no means clear as, in the Response, the appellants admit that Pafburn carried out residential building work within the meaning of cl 2 of Sch 1 to the HBA by constructing the Building and admit that by reason thereof Pafburn carried out "building work" and therefore "construction work" within the meaning of s 36(1) of the DBPA. In the Response, as noted, the appellants deny that Madarina carried out any such construction work.

50 Whatever the potential ambiguities involved in the pleadings, there are several problems with the arguments for the appellants.

51 The appellants' principal argument about the scope of the duty imposed by s 37(1) of the DBPA fails to engage with the nature of that duty as expounded in s 39 of the DBPA and as reflected in the substance of the owners corporation's claim. The effect of that claim is that if (as the owners corporation contends) Madarina "supervised etc" the construction of the Building (as a whole) and Pafburn constructed the Building (as a whole) then by s 37(1) each had a duty to exercise reasonable care to avoid economic loss caused by defects in the Building (as a whole) arising from such construction work – which duty they breached, causing the whole of the claimed economic loss. By s 39 of the DBPA neither Madarina nor Pafburn could discharge the s 37(1) duty by exercising reasonable care in respect of arranging for others to carry out the "supervising etc" or the carrying out of the whole of the building work; or exclude or limit their personal liability for all economic loss caused by their breach of the s 37(1) duty.

52 That is, in the case of a person who "supervises etc" construction work referred to in para (a), (b) or (c) of the definition of "construction work" in relation to the whole building (as the owners corporation contends in this case), the scope of the s 37(1) duty extends to all defects in or related to that building arising from all construction work in relation to the building whether or not the person in fact performed any of the physical acts comprising that construction work. In the case of a person who "supervises etc" work in para (a), (b) or (c) of the definition of "construction work" for part of the building (such as the foundations), the scope of the s 37(1) duty extends to all defects in or related to that part of the building (ie, the foundations) arising from all such construction work. In the case of a person who undertakes only a specific type of "building work", such as plumbing, the scope of the s 37(1) duty extends to all defects in or related to the building arising from that construction work (ie, the plumbing). By the operation of s 39 of the DBPA, within their scope, all these duties are non-delegable.

53 That s 39 of the DBPA, in terms, provides that "[a] person who owes a duty of care under [Pt 4 of the DBPA] is not entitled to delegate that duty" is important.

It establishes that the duty s 37(1) of the DBPA imposes is personal to each person "who carries out construction work", the duty being "to exercise reasonable care to avoid economic loss caused by defects ... in or related to a building for which the work is done, and ... arising from the construction work". The duty expressed in these terms is to be understood as "a non-delegable duty to ensure that reasonable care is taken by a person in the carrying out of any work or task delegated or otherwise entrusted to the person by the" person subject to the non-delegable duty, as specified in s 5Q of the CLA. This understanding is unsurprising given that the DBPA was enacted after the enactment of the CLA. The DBPA contains s 39, to the effect that a person cannot "delegate" their s 37(1) duty, and s 41(3), stating that Pt 4 of the DBPA is subject to the CLA – in which s 5Q, in terms, concerns liability in tort for breach of a non-delegable duty.

54 While s 37(1) of the DBPA refers to "a duty to exercise reasonable care to avoid economic loss caused by defects" and not to "a duty to ensure that reasonable care is taken" by another person, s 37(1) is not to be read in isolation from its context. The context of s 37(1) of the DBPA includes s 39 of that Act. As explained, s 39 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 s 37(1) duty. As such, the substance of the s 37(1) duty is to ensure that "reasonable care is taken by a person in the carrying out of any work or task delegated or otherwise entrusted to the person by the" person subject to the s 37(1) duty (as referred to in s 5Q of the CLA). By that means also, the object of s 39 of the DBPA is to ensure that liability for breach of the s 37(1) duty is personal to the person the subject of that duty.

55 Section 41(3) of the DBPA, in providing that Pt 4 of the DBPA "is subject to the *Civil Liability Act 2002*", 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, in the present case, the extent of the liability of Madarina and Pafburn 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 Madarina and Pafburn] 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 Madarina and Pafburn delegated or otherwise entrusted to any other person in respect of the Building.

56 Contrary to the appellants' submissions, the duty created by ss 37(1) and 39 of the DBPA is precisely the kind of non-delegable duty which s 5Q of the CLA contemplates. Within the framework established by s 5Q of the CLA, and on the contentions of the owners corporation: (a) Madarina (as developer) "delegated or otherwise entrusted to" Pafburn the construction of the Building and, in so doing,

"supervised etc" the whole of that construction work; and (b) Pafburn (as head building contractor) constructed the whole of the Building and, in so doing, delegated or otherwise entrusted many kinds of construction work to others. Neither Madarina nor Pafburn, however, could discharge, exclude, or limit their s 37(1) duty by delegating or otherwise entrusting their "construction work" to another competent person. On that basis, the liability of each of Madarina and Pafburn is "as if the liability were the vicarious liability of" them for the whole of the construction work in relation to the Building.

57 On this basis, Madarina and Pafburn 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. They cannot do so because, by s 5Q of the CLA, they are to be treated as if they are vicariously liable for any failure to take reasonable care by such persons. Section 5Q of the CLA, operating on the potential liability created by ss 37(1) and 39 of the DBPA, treats Madarina and Pafburn as vicariously liable for the work of all those to whom they delegated or otherwise entrusted any part of the construction work in relation to the Building. As between Madarina and Pafburn (on the one hand) and those persons (on the other hand) there can be no apportionment of liability; rather, by s 5Q, Madarina and Pafburn are 100% liable for any failure to exercise reasonable care to avoid economic loss caused by defects in the Building on the part of wrongdoers who in fact carried out the work or task from which the defects arose.

58 Section 39(a) of the CLA also operates to ensure that nothing in Pt 4 of the CLA "prevents a person from being held vicariously liable for a proportion of any apportionable claim for which another person is liable". In the case of the liability of a defendant for a wrongdoer under s 5Q, that proportion for the defendant is necessarily 100% of the liability.

59 That Pt 4 of the DBPA operates as described does not mean that a person carrying out construction work by "supervising etc", as referred to in para (d), the work referred to in para (a), (b) or (c) of the definition of "construction work" in s 36(1) is thereby necessarily exposed to criminal liability for the acts and omissions of others under Pt 2 or 3 of the DBPA. In particular, the obligations in Pts 2 and 3 of the DBPA are not imposed on a person carrying out construction work by "supervising etc", as referred to in para (d), the construction work referred to in para (a), (b) or (c) of the definition of "construction work" in s 36(1). They are imposed only on the persons specified in the provisions in Pts 2 and 3. The provisions in Pts 2 and 3 of the DBPA operate according to their own terms.

60 Nor does the perhaps seemingly anomalous position of the local council or the principal certifying authority affect this conclusion. The analysis must assume,

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in accordance with the Response, that the local council and the principal certifying authority had "substantive control" over the carrying out of the construction work and therefore (by para (d) of the definition of "construction work" in s 36(1)) "carrie[d] out construction work" within the meaning of s 37(1) of the DBPA and owed the s 37(1) duty to the owners corporation. The alleged failure of the local council to exercise reasonable care as required by s 37(1) of the DBPA is that, in granting development consent to the construction of the Building (in response to the development application lodged by Mr Obeid), the local council failed to require that the designs, drawings and plans for the Building be amended to comply with the Building Code of Australia and "Fire safety laws". In the case of the principal certifying authority, the appellants allege that it was "contracted ... for [its] role for the residential building works" by Madarina. The appellants also allege that the principal certifying authority owed a common law duty of care to the owners corporation in performing approval functions in respect of the building work.

61 However, as explained and because the claims against the appellants concern the whole of the Building, ss 37(1) and 39 of the DBPA, as subject to the operation of s 5Q of the CLA, do not permit apportionment of the appellants' liability (to the extent it is established) as between them and any other person subject to a duty under s 37(1) of the DBPA to whom either of the appellants delegated or otherwise entrusted the carrying out of any work or task in the construction work involved in the Building (as a whole). The appellants' allegation that the principal certifying authority and the local council carried out construction work in or related to the Building necessarily means that, on the appellants' case, one or both of the appellants entrusted to the local council and the principal certifying authority functions (being ensuring that the designs, drawings and plans complied with the Building Code of Australia and "Fire safety laws") within the meaning of "construction work" as defined in s 36(1). Further, even if the source of these alleged duties on the part of the local council and the principal certifying authority is not s 37(1) of the DBPA (as pleaded), but is the common law (as also pleaded in respect of the principal certifying authority), the duties alleged to have been owed by the local council and the principal certifying authority remain within the scope of the non-delegable duties each appellant is pleaded to owe under s 37(1) of the DBPA and are therefore subject to the operation of s 5Q of the CLA, making each appellant vicariously liable for any failure by the local council or the principal certifying authority to have exercised reasonable care in the carrying out of the tasks entrusted by the appellants to them.

62 The result is that the liability of the appellants for breach of the s 37(1) duty (if established) makes them personally liable for the whole of the economic loss caused by their breach (if both causation of loss by the breach and amount of the loss are also established).

63 These conclusions give effect to and maintain the unity of all provisions of the DBPA and the CLA,¹⁸ consistent with the presumption that the one legislature (in this case, the New South Wales Parliament) does not intend to contradict itself so that, if possible, all its enactments are to apply according to their terms.¹⁹ They do so, moreover, without recourse to the doctrine of implied repeal of Pt 4 of the CLA by Pt 4 of the DBPA in the face of s 41(3) of the DBPA, which expressly subjects Pt 4 of the DBPA to the CLA. Effect is to be given to that direction by recognising the application of s 5Q of the CLA to the claim against the appellants, which, by treating them as if they are vicariously liable for the failure of all other persons who carried out construction work to exercise reasonable care to avoid economic loss caused by defects, makes the concept of apportioning liability between them and those other persons meaningless.

64 These conclusions also accord with the objects of the DBPA as disclosed in the Second Reading Speech. The Second Reading Speech discloses the intended strength and scope of the legislative response to the crisis of confidence in respect of the safety and quality of residential apartment buildings in New South Wales. The Second Reading Speech recognised that the complexity and integrated nature of construction had caused uncertainty about the effectiveness of available redress for owners, requiring reform so as to "significantly improve the redress available to consumers for building defects". This uncertainty and complexity was to be rectified including by ensuring that owners are "properly safeguarded under this law" and "by preventing a person who performs construction work from delegating or contracting out of their duty", so as to impose "individual and collective responsibility [on practitioners] for their work".²⁰ If s 5Q of the CLA did not operate on the duty created by ss 37(1) and 39 of the DBPA as explained above, the DBPA, in imposing a duty on persons carrying out construction work (defined to include the "supervision etc" of such work) to exercise reasonable care to avoid economic loss caused by defects in the building arising from the construction work (s 37(1)), and in making that duty non-delegable (s 39), would not impose "individual" liability on such persons if Pt 4 of the CLA applied to liability for a breach of that duty. It would apply only a form of "collective" liability in which recovery by the person who has suffered the economic loss would involve the

18 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [70].

19 See, eg, *South Australia v Tanner* (1989) 166 CLR 161 at 171; *Shergold v Tanner* (2002) 209 CLR 126 at 136-137 [34]-[35].

20 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 23 October 2019 at 1658, 1663-1664.

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multiple parties involved in the carrying out of the construction work and the complexity of redress that the DBPA was intended to avoid.

65 In reaching these conclusions it is also relevant to recognise that: (a) if the owners corporation fails to establish the alleged breaches by Madarina and Pafburn, Madarina and Pafburn will not be found liable at all for the claimed loss; (b) if the owners corporation establishes such alleged breaches but fails to establish that those breaches caused the whole of the claimed economic loss, Madarina and Pafburn will be found liable only to the extent that their breaches caused the loss; and (c) to the extent that Madarina and Pafburn are found liable to the owners corporation, ss 37(1) and 39 of the DBPA do not prevent them from cross-claiming against other persons who they allege breached any applicable duty of care owed to them.

Orders

66 The appeal should be dismissed with costs.

67 GORDON, EDELMAN AND STEWARD JJ. The question in this appeal is whether the proportionate liability scheme in Pt 4 of the *Civil Liability Act 2002* (NSW) ("the CL Act") applies to a claim for damages for breach of s 37 of the *Design and Building Practitioners Act 2020* (NSW) ("the DBP Act"). The answer is yes.

68 That answer raises the proper construction of s 37 of the DBP Act, introduced in 2020, to impose a duty upon *a person who carries out construction work* to take reasonable care to avoid economic loss caused by defects (i) in or related to a building for which the work is done and (ii) arising from construction work and, in particular, the phrase "a person who carries out construction work". If that phrase is to be construed as extending beyond the actual carrying out of construction work by a person or their agent, to include strict liability for work carried out by a sub-contractor in breach of s 37, then, as the appellants submitted, s 37 increases, dramatically, the liability of persons who carry out construction work for defects caused by sub-contractors no matter the care taken by the person in selecting that sub-contractor. As will be explained, such a broad construction of the phrase "a person who carries out construction work" should not be adopted. If Parliament had intended to expand the liability of persons who carry out construction work in such a dramatic manner contrary to the real-world considerations that Pt 4 of the CL Act sought to address (such as significantly increased risks, costs and insurance premiums arising from joint and several liability), then it would be expected that such a change would have been identified at the time it was introduced.

69 The appeal should be allowed, in part.

70 The background to this appeal is set out in the judgment of Gageler CJ, Gleeson, Jagot and Beech-Jones JJ, which we gratefully adopt.

First principles

71 The principles of statutory construction are well established and, in the context of the CL Act, were most conveniently summarised by French CJ and Hayne J in *Certain Lloyd's Underwriters v Cross*.²¹ The task of statutory construction must begin with consideration of the text.²² The language which has actually been used in the text, in light of context and purpose, is the surest guide

21 (2012) 248 CLR 378 at 388-392 [23]-[31] and the authorities cited.

22 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46 [47], quoted in *Cross* (2012) 248 CLR 378 at 388 [23].

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to legislative intention.²³ One reason that the context and purpose of a provision are important to its proper construction is that an object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of *all* the provisions of the statute.²⁴ Or, as was explained in *Project Blue Sky Inc v Australian Broadcasting Authority*, statutory construction requires deciding what is the legal meaning of the relevant provision "by reference to the language of the instrument viewed as a whole".²⁵ Further, the purpose of the legislation must generally be derived from what the legislation says, and not from any assumption about the desired reach or operation of the relevant provisions.²⁶

72 Where, as here, there are two statutes to be construed, it is necessary to construe each separately and determine the scope and operation of each Act before turning to ascertain how, if at all, the statutes are intended to work together.²⁷

DBP Act

73 Parts 1 and 4 of the DBP Act commenced on 10 June 2020.²⁸ Part 4 of the DBP Act contains six sections. Section 37 is headed "Extension of duty of care". It provides that:

- "(1) A person who carries out construction work has a duty to exercise reasonable care to avoid economic loss caused by defects—
- (a) in or related to a building for which the work is done, and
 - (b) arising from the construction work.

23 *Alcan* (2009) 239 CLR 27 at 47 [47], quoted in *Cross* (2012) 248 CLR 378 at 388 [23].

24 *Cross* (2012) 248 CLR 378 at 389 [24]. See also *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69].

25 (1998) 194 CLR 355 at 381 [69], quoted in *Cross* (2012) 248 CLR 378 at 389 [24]. See also *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 320.

26 *Cross* (2012) 248 CLR 378 at 390 [26].

27 See *Cross* (2012) 248 CLR 378 at 393-394 [37], 414 [98].

28 DBP Act, s 2(1); *New South Wales Government Gazette*, No 122, 12 June 2020 at 2628.

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- (2) The duty of care is owed to each owner of the land in relation to which the construction work is carried out and to each subsequent owner of the land.
- (3) A person to whom the duty of care is owed is entitled to damages for the breach of the duty as if the duty were a duty established by the common law.
- (4) The duty of care is owed to an owner whether or not the construction work was carried out—
 - (a) under a contract or other arrangement entered into with the owner or another person, or
 - (b) otherwise than under a contract or arrangement." (emphasis added)

74 "Construction work" is defined in s 36(1) to mean any of the following: (a) building work;²⁹ (b) the preparation of regulated designs and other designs for building work; (c) the manufacture or supply of a building product used for building work; (d) supervising, coordinating, project managing or otherwise having substantive control over the carrying out of any work referred to in (a), (b) or (c). It will be necessary to return to who or what "carries out" construction work.

75 Section 39, headed "Duty must not be delegated", then states that "[a] person who owes a duty of care *under this Part* is not entitled to delegate that duty" (emphasis added). In short, it provides that the duty owed under s 37 is personal. So, to take a common example, a head contractor cannot "delegate" the duty it owes under s 37 to exercise reasonable care in supervising the carrying out of construction work to avoid economic loss in relation to a defect.³⁰

76 Section 40, headed "No contracting out of Part", reinforces the breadth of s 37 and the operation of s 39 by stating, first, that the Part applies "despite any contracts or stipulations to the contrary made *after* the commencement of this

29 Building work is defined in s 36(1) to include "residential building work within the meaning of the *Home Building Act 1989* [(NSW)]".

30 In that circumstance, the "construction work" that the head contractor has carried out is that described by s 36(1)(d) of the DBP Act, being "supervising, coordinating, project managing or otherwise having substantive control over the carrying out of any work referred to" in s 36(1)(a)-(c).

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Part"³¹ and, second, that "[n]o contract or agreement made or entered into, or amended, *after* the commencement of this Part operates to annul, vary or exclude a provision of this Part".³²

77 The final section in Pt 4 is s 41, headed "Relationship with other duties of care and law". It contains three provisions. Each is important, although primary focus in this appeal is on s 41(3). Section 41(1) states that Pt 4 is "in addition to duties, statutory warranties or other obligations imposed under the *Home Building Act 1989*, other Acts or the common law" and its provisions "do not limit the duties, warranties or other obligations imposed under that Act, other Acts or the common law". Section 41(2) states that the Part does not limit "damages or other compensation that may be available to a person under another Act or at common law because of a breach of a duty *by a person who carries out construction work*" (emphasis added). And, finally, s 41(3) provides that the Part "is subject to the [CL Act]".

The nature of the duty in s 37 of the DBP Act

78 Before turning to the CL Act, it is necessary to describe the content of the statutory duty in s 37 of the DBP Act.

79 Section 37 of the DBP Act, in its terms, does at least two things. First, s 37(1) creates a statutory duty to take reasonable care to avoid economic loss caused by defects. Section 37(1) imposes the duty on a person *who carries out construction work* in or related to a building for which the work is done and arising from the construction work. The duty of care is owed whether or not the construction work was carried out under a contract or arrangement. The duty does not require or involve any voluntary undertaking. Section 37(2) then expressly states that the duty of care is owed to subsequent owners.³³ The combination of these provisions is important. It eradicates any uncertainty that may have existed in the common law as to whether a duty of care with respect to pure economic loss or property damage was owed to an end user and in respect of liability for defective

31 DBP Act, s 40(1) (emphasis added).

32 DBP Act, s 40(2) (emphasis added).

33 Section 38 deems the cost of rectifying defects (including damage caused by defects) that are the subject of a breach of duty of care to be economic loss suffered by the owners corporation or association.

building work.³⁴ The section imposes the same duty on each person who carries out construction work. However, given the different "construction work" each person "carries out", the scope of the duty owed by each person is different.

80 And that accords with the legislative history of the DBP Act. It was enacted partly as a response to a report commissioned by the "Building Ministers' Forum" on the subject of public concerns with building defects highlighted by publicised cases of widespread and serious defects.³⁵ Part 4, in particular, was enacted to seek to set aside the effect of the decision in *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288*,³⁶ where this Court held that the head builder of strata-titled serviced apartments did not owe a tortious duty of care at common law to subsequent owners absent special cases involving vulnerability. As was explained in the Second Reading Speech:³⁷

"[Section 37] makes it clear that a beneficiary of the duty will be entitled to seek damages for the breach of the duty as though the duty was established by the common law. This means that while a duty of care will be automatically owed, any person who wants to proceed with litigation will be required to meet the other tests for negligence established under the common law and the [CL Act]. This includes determining that a breach of the duty occurred and establishing that damage was suffered by the owner as a result of that breach. *The hurdle of establishing that a duty is owed, however, will no longer be required, saving valuable court time and expense for the owner.*"

81 The fact that s 39 prohibits a person from delegating the duty of care in s 37 does not transform that duty into a common law "non-delegable duty" to ensure that reasonable care is taken by sub-contractors. Section 39 has a more limited purpose: to ensure that a person cannot escape liability by assigning any part of the

34 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 23 October 2019 at 1663 (being the Second Reading Speech for the *Design and Building Practitioners Bill 2019* (NSW)); New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 19 November 2019 at 1781. See also *Roberts v Goodwin Street Developments Pty Ltd* (2023) 110 NSWLR 557 at 603 [196].

35 See eg *Roberts* (2023) 110 NSWLR 557 at 575 [78], 603-605 [195]-[210].

36 (2014) 254 CLR 185.

37 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 23 October 2019 at 1663 (emphasis added). See also *Roberts* (2023) 110 NSWLR 557 at 603 [196].

work that the person is carrying out to another person. The same can be said of s 40, which ensures that a person cannot contract out of liability. Those sections address different problems (escaping liability by assigning work or by contract) but are both directed to one end: ensuring that a person who carries out construction work complies with the duty in s 37. In other words, s 39 ensuring that s 37 is a *personal* duty does nothing to create strict liability for the head contractor for the defective work of a sub-contractor.³⁸ That would require the head contractor to owe a duty for the sub-contractor's work in the first place. Section 37 does not create such a duty. It is limited to work *carried out*, which includes work *being carried out*, such as work carried out by a head contractor.

82 That approach to the construction of ss 37 and 39 is not new. In *New South Wales v Lepore*,³⁹ Gleeson CJ said that the first step is to identify the extent of the obligation that arises out of a particular relationship, whether contractual or non-contractual. That is, it is necessary to identify the duty before assessing the significance of assigning performance of that duty.

83 If "not entitled to delegate" in s 39 were to mean, despite the language of s 37, that the duty in s 37 is a "non-delegable duty" as that concept is understood at common law,⁴⁰ then "carries out construction work" would need to mean "agrees to have construction work carried out". If that contrary construction were to be adopted, a person who agrees to have construction work carried out would then be liable for a sub-contractor (who is not their agent). The result would be that s 39 would dramatically expand a person's liability under s 37 far beyond what could have been intended by s 37: it would become a duty to ensure that reasonable care is taken by sub-contractors, not merely a duty to take reasonable care in the construction work that a person carries out personally or through an agent.

84 But "carries out" cannot mean "agrees to have carried out". That is inconsistent with the natural and ordinary meaning of the text in ss 36 and 37 of the DBP Act. It is inconsistent with the prohibition in s 35 upon carrying out specialist work unless regulations authorise it or unless the person is a registered specialist practitioner and the person's registration authorises the person to carry out the specialist work. And it is irreconcilable with s 37(4) of the DBP Act, which makes clear that carrying out work gives rise to the duty whether or not a contract was made. It is also confirmed by the deeming provision in s 7(3) (located within Pt 1, Preliminary) which provides that a "building practitioner is

38 cf *Bird v DP (a pseudonym)* [2024] HCA 41 at [36]-[37], [44], [83], [220].

39 (2003) 212 CLR 511 at 529 [22].

40 See *Bird* [2024] HCA 41 at [36]-[37], [44], [83], [220].

taken to do building work" if the practitioner "agrees to do building work under a contract or other arrangement" or "is the principal contractor for the work". Part 4 of the DBP Act does not use the term "building practitioner" at all. That view is further confirmed by the extrinsic material. The Minister in the Legislative Assembly expressly noted that the Bill for the DBP Act "prevent[s] a person who performs construction work from delegating or contracting out of their duty".⁴¹

85 The respondent contended that, if "carries out construction work" in s 37 of the DBP Act means a person who actually performs the work (either themselves or through an agent⁴²), then s 39 has no work to do. That is, if s 39 applies to work that a person *in fact* carries out, it is unnecessary to clarify that the duty is not entitled to be delegated because the work has not, in fact, been assigned to anyone. But that contention misconceives the breadth of s 37, which extends to circumstances where a person has actually performed only part of the work. Further, when read with s 36(1)(d) of the DBP Act, s 37 provides that where a principal contractor (or other person) project manages, supervises, coordinates or otherwise exercises substantive control over construction work, then that person must exercise reasonable care in relation to that construction work. Section 39 ensures that, despite the use of sub-contractors, that duty (concerning the project management, supervision, coordination or substantive control) remains personal to the principal contractor. Section 39 does real work: it prevents a person who performs construction work from delegating or contracting out of their duty in relation to the work performed or being performed. But it does not otherwise extend the duty in s 37 to the work of independent contractors.

86 That conclusion is further reinforced by the fact that if the alternative construction is adopted, the criminal liability provisions in Pt 3 of the DBP Act would be engaged for people who agree to carry out work where that work is done by a sub-contractor. Within Pt 3 of the DBP Act, which deals with engineering work and specialist work, s 32(1) states that a person "must not *carry out* professional engineering work in a prescribed area of engineering unless" certain pre-requisites are met (emphasis added). If a person "carries out" professional engineering work in contravention of s 32(1), the amount paid for the carrying out of the professional engineering work is recoverable as a debt.⁴³ In addition, under s 33, a registered professional engineer must not carry out professional engineering work unless the engineer is adequately insured with

41 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 23 October 2019 at 1663 (emphasis added).

42 In this context an agent must be distinguished from an independent contractor.

43 DBP Act, s 32(2).

respect to the work.⁴⁴ A breach of s 33(1) attracts a maximum penalty of 300 penalty units in the case of a body corporate or 100 penalty units in the case of an individual.⁴⁵ "Carry out" in Pts 3 and 4 should bear the same meaning.⁴⁶ In Pt 3, "carry out" cannot mean "agrees to have carried out".

87 Many head contractors or builders rely on sub-contractors in areas where the head contractor or builder has no expertise. It would be an odd result if a head contractor or builder who agreed to procure specialised plumbing, concreting, electricity or woodworking would be personally liable if a carefully chosen specialist independent contractor performed their work carelessly. And it would be even stranger if the head contractor or builder was criminally liable for the reasonably chosen independent contractor. In the basic example where a head builder or developer must rely on independent contractors to perform specialist work, because the head builder or developer is not a "registered specialist practitioner",⁴⁷ the head builder or developer could not lawfully "carry out" the work.⁴⁸ In that common scenario, "carry out work" does not include contracting for work to be performed by a specialist independent contractor since it would be an offence for anyone other than the specialist to be "carrying out" that work.

88 In short, the head contractor's liability for the work of a sub-contractor depends on the nature of their engagement. In practical terms, the question to ask is: did the head contractor "carry out construction work" through the sub-contractor and, if so, what was that construction work, and what were the terms of the engagement? It will be necessary to return to consider these questions below.

44 DBP Act, s 33(1).

45 A penalty unit is defined in s 17 of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

46 See generally *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611 at 618; *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633 at 643; *Clyne v Deputy Commissioner of Taxation* (1981) 150 CLR 1 at 10, 15; *Murphy v Farmer* (1988) 165 CLR 19 at 26-27; *Regional Express Holdings Ltd v Australian Federation of Air Pilots* (2017) 262 CLR 456 at 466-467 [21].

47 DBP Act, ss 3(1), 34 and 35.

48 DBP Act, s 35.

CL Act

Section 5Q of the CL Act does not apply to a liability under s 37 of the DBP Act

89 Part 1A of the CL Act is entitled "Negligence". Section 5Q, in Div 7 of Pt 1A, addresses liability based on a non-delegable duty. It provides:

- "(1) The extent of liability in tort of a person (***the defendant***) for breach of a non-delegable duty *to ensure that reasonable care is taken by a person in the carrying out of any work or task delegated or otherwise entrusted to the person by the defendant* is to be determined as if the liability were the vicarious liability of the defendant for the negligence of the person in connection with the performance of the work or task.
- (2) This section applies to an action in tort whether or not it is an action in negligence, despite anything to the contrary in section 5A." (emphasis added)

90 The first question is whether s 5Q applies to the statutory duty imposed by s 37 of the DBP Act. It does not. As has been explained, s 37 imposes a "duty to exercise reasonable care to avoid economic loss caused by defects" that cannot be delegated. It is not, in terms, a duty of the kind with which s 5Q of the CL Act is concerned, namely a non-delegable duty of strict liability to ensure that reasonable care is taken. Put in different terms, the statutory duty imposed by s 37 of the DBP Act is not strict liability; it is a duty to take reasonable care in carrying out construction work. And that conclusion is reinforced by the legislative history. Part 4 of the DBP Act was not intended to, and did not, alter the nature of the common law duty to one of strict liability.⁴⁹ It sought to extend to whom the common law duty of care was owed and to provide that the duty could not be delegated, without reference to contractual arrangements or a voluntarily undertaken duty, and regardless of whether the owner of the building affected by the defect was the first or a subsequent owner.

91 That understanding of the application of s 5Q is confirmed by reference to the commentary that preceded the section in the Ipp Report.⁵⁰ First, s 5Q was intended to only apply to non-delegable duties, and, as the report made clear,

49 cf *Bird* [2024] HCA 41 at [36]-[37].

50 Commonwealth of Australia, *Review of the Law of Negligence: Final Report* (2002) ("Ipp Report") at 167-168 [11.9]-[11.16].

"a non-delegable duty is not a duty of care".⁵¹ However, the duty under s 37 is expressly described as a "duty of care" – not a non-delegable duty – and was intended to extend the common law duty of care with respect to defective building work. Second, the Ipp Report considered that "a non-delegable duty is a duty imposed on the employer alone. The worker is not, and cannot be, under the duty. The worker's duty is an ordinary duty to take reasonable care."⁵² The duty under s 37 *does* apply to all persons who carry out construction work in the same terms, and applies in terms to sub-contractors as well as a head contractor or developer, suggesting it was not intended to be "non-delegable". Third, the "fundamental problem"⁵³ that s 5Q was intended to address was plaintiffs evading the operation of the proposed CL Act by "inviting a court to impose a non-delegable duty on a defendant employer that would not be subject to the provisions of the Proposed Act" when a claim against the worker *would* be subject to that Act.⁵⁴ That problem could not arise in respect of s 37 of the DBP Act, which applies to all persons who carry out construction work. In other words, the concerns which underlay the enactment of s 5Q do not arise in respect of s 37 of the DBP Act.

A claim under s 37 of the DBP Act is an apportionable claim

92 The conclusion that s 5Q of the CL Act does not apply then compels consideration of Pt 4 of the CL Act, headed "Proportionate liability". Section 34 identifies the claims to which the Part applies, described as "apportionable claims", in the following terms:

- "(1) This Part applies to the following claims (*apportionable claims*)—
 - (a) a claim for economic loss or damage to property in an action for damages (whether in contract, tort or otherwise) *arising from a failure to take reasonable care, ...*
 - ...
- (1A) For the purposes of this Part, there is a single apportionable claim in proceedings in respect of the same loss or damage even if the claim

51 Ipp Report at 167 [11.12].

52 Ipp Report at 167 [11.13].

53 Ipp Report at 168 [11.14].

54 Ipp Report at 168 [11.15].

34.

for the loss or damage is based on more than one cause of action (whether or not of the same or a different kind).

- (2) In this Part, a **concurrent wrongdoer**, in relation to a claim, is a person who is one of two or more persons whose acts or omissions (or act or omission) caused, independently of each other or jointly, the damage or loss that is the subject of the claim.
- (3) For the purposes of this Part, apportionable claims are limited to those claims specified in subsection (1).
- (3A) This Part does not apply to a claim in an action for damages arising from a breach of statutory warranty under Part 2C of the *Home Building Act 1989* and brought by a person having the benefit of the statutory warranty.
- (4) For the purposes of this Part it does not matter that a concurrent wrongdoer is insolvent, is being wound up or has ceased to exist or died." (emphasis added)

93 In the paradigm case of a head contractor who carries out construction work with several sub-contractors, each of them will be concurrent wrongdoers within s 34(2) of the CL Act to the extent that their wrongful acts or omissions caused, independently or jointly, the damage or loss that is the subject of the claim, because a claim under s 37 of the DBP Act arises from a failure to take reasonable care.

94 Nothing in s 39 of the CL Act compels a different conclusion. Section 39, headed "Application of Part", relevantly provides:

"Nothing in this Part—

- (a) prevents a person from being held vicariously liable for a proportion of any apportionable claim for which another person is liable, or ...
- ...
- (c) affects the operation of any other Act to the extent that it imposes several liability on any person in respect of what would otherwise be an apportionable claim."

95 Section 39(a) of the CL Act does no more than provide that if a concurrent wrongdoer claims the benefit of apportionment, they cannot avoid liability for the proportion for which they are vicariously liable, being an employer's vicarious liability for an employee. A consequence of the fact that s 5Q of the CL Act does

not treat liability under s 37 of the DBP Act as "vicarious liability" is that s 39(a) of the CL Act does not mean that liability for a breach of s 37 of the DBP Act cannot be apportioned.

96 In the case of multiple wrongdoers causing the same damage or loss jointly or independently, s 39(c) also does not apply because the DBP Act does not impose several liability in respect of what would otherwise be an apportionable claim. Such wrongdoers would be in the position of concurrent wrongdoers at common law and thus jointly and severally liable for the loss caused.⁵⁵

97 The conclusion that a claim for damages for breach of s 37 of the DBP Act is an apportionable claim under Pt 4 of the CL Act is reinforced by the fact that Pt 4 has a list of specific exclusions, none of which are directed to claims under the DBP Act. First, s 34(3A) provides that Pt 4 does not apply to actions for damages arising from breaches of statutory warranties in the *Home Building Act 1989* (NSW) but there is no similar provision for actions for damages under the DBP Act. Second, s 34A(1)⁵⁶ provides that "[n]othing in [Pt 4] operates to limit the liability of a concurrent wrongdoer (an *excluded concurrent wrongdoer*) in proceedings involving an apportionable claim if", among other things,⁵⁷ the concurrent wrongdoer *intended* to cause,⁵⁸ or fraudulently caused,⁵⁹ the economic loss or damage to property that is the subject of the claim. Whilst those features might be present in a specific case, those exceptions are not directed to liability under the DBP Act. In conjunction with that definition, s 34A(3) of the CL Act provides that "[t]he liability of any other concurrent wrongdoer who is *not* an excluded concurrent wrongdoer is to be determined in accordance with the provisions" of Pt 4 (emphasis added). Therefore, because a person who breaches s 37 of the DBP Act is not an "excluded concurrent wrongdoer", s 34(3) directs that their liability for a concurrent wrongdoer under the CL Act may be apportioned under Pt 4.

55 See Rolph et al, *Balkin & Davis Law of Torts*, 6th ed (2021) at 998, 1008. See also *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613 at 624 [10].

56 The heading to s 34A is "Certain concurrent wrongdoers not to have benefit of apportionment".

57 Specifically, the matters which are excluded from the operation of the CL Act in s 3B of that Act.

58 CL Act, s 34A(1)(a).

59 CL Act, s 34A(1)(b).

98 Finally, it is worth emphasising that Pt 4 of the DBP Act expressly provides, by s 41(3), that it is subject to the CL Act. Whilst that provision says nothing unless the CL Act would apply to the duty in s 37,⁶⁰ the analysis above demonstrates that it does. Persons who jointly or independently cause loss by breach of s 37 are "concurrent wrongdoers" and their liability is not deemed to be vicarious liability. Therefore, s 41(3) of the DBP Act is a clear statement that Pt 4 of the CL Act is intended to condition liability under the DBP Act.

99 The contrary construction, treating s 37 of the DBP Act as creating a non-delegable duty – a duty of strict liability – would alter the liability of those who carry out construction work in unintended ways. For example, if a head contractor sued for a breach of the s 37 duty was liable for the economic loss caused by defects, without any apportionment under Pt 4 of the CL Act, the head contractor would be exposed to significantly increased risks, costs and insurance premiums, the real-world considerations that Pt 4 of the CL Act sought to address.⁶¹ If the liability of a head contractor was intended to be extended in such a way, it is reasonable to expect the legislation to expressly say so. Second, that construction would increase other costs and risks for persons who owe the statutory duty of care under s 37 of the DBP Act. They would be required to bring cross-claims against any other concurrent wrongdoers for contribution under s 5 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW). There is nothing to suggest that the DBP Act was intended to bring about such a result.

100 Third, that construction would also produce an unusual result where, as here, the concurrent wrongdoers are alleged to have breached both s 37 of the DBP Act and a duty of care at common law. A consequence of s 41(2) of the DBP Act in that circumstance is that any liability at common law would be apportionable but the liability under the DBP Act would not. That would be a strange result, given that the common law duty is also pleaded as a duty to take reasonable care.

101 Adopting the preferred construction identified above resolves the problems arising after *Brookfield* by extending the duty of care to subsequent owners. In that situation, it would be open to a building owner to sue the builder (or head contractor) and the developer responsible for the construction of the building and for those parties to seek apportionment under Pt 4 of the CL Act from alleged

60 As Basten A-JA correctly recognised below: *The Owners—Strata Plan No 84674 v Pafburn Pty Ltd* (2023) 113 NSWLR 105 at 119-120 [60].

61 *Hunt & Hunt Lawyers* (2013) 247 CLR 613 at 625 [14].

concurrent wrongdoers.⁶² If that were to occur, then it would be for the owner to determine which, if any, of the alleged concurrent wrongdoers they would seek to join to the proceeding. In making that decision, in addition to questions of apportionment, other questions, including solvency and likely recovery, would need to be considered.

102 Finally, this construction advances the purpose of addressing public concern about building defects highlighted by certain cases of widespread and serious defects.⁶³ Where a head contractor or a builder carries out construction work under the broad definition of supervising, or project managing, or otherwise having "substantive control" over construction work,⁶⁴ then that person has a duty to exercise reasonable care in carrying out that construction work. Such a duty promotes individual and collective responsibility.

Conclusion

103 The appeal should be allowed in part. The orders of the Court of Appeal which struck out the list response filed by the appellants to the extent it relied upon the proportionate liability scheme in Pt 4 of the CL Act should be set aside.

104 It is not self-evident that a certifier or the local council, in performing their duties, is "a person who carries out construction work" within the meaning of s 36(1)(d) of the DBP Act. On the other hand, the work done by the manufacturer or the supplier of a building product used for building work is separately identified as falling within the definition of "construction work" in s 36(1)(c). The matter should be remitted to determine the question whether the list response pleading can be maintained against all of the alleged wrongdoers, which turns on whether they can truly be characterised as persons who carry out construction work under the DBP Act.

62 See *Latteria Holdings Pty Ltd v Corcoran Parker Pty Ltd* (2014) 224 FCR 519 at 526 [31]. See generally *Victoria v Sutton* (1998) 195 CLR 291 at 316-317 [77]; *Ross v Lane Cove Council* (2014) 86 NSWLR 34 at 46 [51].

63 See *Roberts* (2023) 110 NSWLR 557 at 603 [195]. See also [80] above.

64 DBP Act, s 36(1).