



Supreme Court  
New South Wales

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Case Name: The Owners – Strata Plan No 84674 v Pafburn Pty Ltd

Medium Neutral Citation: [2022] NSWSC 659

Hearing Date(s): 20 May 2022

Date of Orders: 24 May 2022

Decision Date: 24 May 2022

Jurisdiction: Equity - Technology and Construction List

Before: Stevenson J

Decision: A person “having substantive control over the carrying out of any work” for the purposes of clause (d) of the definition of “construction work” in s 36(1) of the Design and Building Practitioners Act 2020 (NSW) is a person who is in a position where it is able to control how the work is carried out; a “person” referred to in s 37(1) of the Act includes the owner of the land in relation to which the construction work is carried out

Catchwords: BUILDING AND CONSTRUCTION – Design and Building Practitioners Act 2020 (NSW) – proper construction of definition of “construction work” – proper construction of “otherwise having substantive control over the carrying out of any work” – proper construction of s 37(1) – whether “person” includes the “owner of the land in relation to which the construction work is carried out”

Legislation Cited: Design and Building Practitioners Act 2020 (NSW)  
Design and Building Practitioners Bill 2019 (NSW)  
Environmental Planning and Assessment Act 1979 (NSW)  
Home Building Act 1989 (NSW)  
Uniform Civil Procedure Rules 2005 (NSW)

Cases Cited: The Owners – Strata Plan No 87060 v Loulach Developments Pty Ltd (No 2) [2021] NSWSC 1068

Category: Procedural rulings

Parties: The Owners – Strata Plan No 84674 (Plaintiff)  
Pafburn Pty Limited (First Defendant)  
Madarina Pty Limited t/as c/- Finn Warner and Associates Pty Limited (Second Defendant)

Representation: Counsel:  
D Weinberger (Plaintiff)  
A Di Francesco (Defendants)

Solicitors:  
Grace Lawyers (Plaintiff)  
M&A Lawyers (Defendants)

File Number(s): 2020/340673

## **JUDGMENT**

- 1 The plaintiff is the Owners Corporation in respect of a strata development in Walker Street, North Sydney.
- 2 The first defendant, Pafburn Pty Limited, was the builder of the development.
- 3 The second defendant, Madarina Pty Limited, was the developer and was, until registration of the strata plan on 6 December 2010, the owner of the land.
- 4 Mr Antonios Obeid and Mrs Maria Obeid own the shares in Pafburn (80% to Mr Obeid and 20% to Mrs Obeid). Pafburn owns all the shares in Madarina. Mr and Mrs Obeid are directors of Pafburn. Mr Obeid is the sole director of Madarina.
- 5 These relationships are summarised in the attached diagram. [Attachment A - diagram \(70715, pdf\)](#)
- 6 Pafburn and Madarina allege that the building work was carried out by Pafburn pursuant to a contract dated 2 June 2008. During submissions before me on 20 May 2022, Mr Di Francesco, who appeared for Pafburn and Madarina, informed me that his instructions were that the contract was oral. It is not yet

revealed between whom the conversations are said to have taken place, or what was said.

- 7 An occupation certificate was issued on 6 December 2010, the same date that the strata plan was registered.
- 8 The Owners Corporation commenced these proceedings on 1 December 2020, five days within the 10 year “long stop” limitation period concerning actions for defective building work prescribed by s 6.20 of the *Environmental Planning and Assessment Act 1979* (NSW).
- 9 The List Statement states that the claim is made exclusively pursuant to the *Design and Building Practitioners Act 2020* (NSW) (the “DBP Act”); evidently because of limitation problems apprehended as arising from a corresponding claim under the *Home Building Act 1989* (NSW).
- 10 The Owners Corporation alleges that each of Pafburn and Madarina acted in breach of the statutory duty of care prescribed by s 37 of the DBP Act because, as to Pafburn, it constructed the building defectively, and as to Madarina, it engaged in “construction work” for the purposes of s 37 of the DBP Act in that it:

“... supervised, coordinated, project managed and substantively controlled ... the building work carried out by [Pafburn].”<sup>1</sup>
- 11 The Owners Corporation has circulated a proposed Amended List Statement in which it makes more particular allegations about these matters.
- 12 By Notice of Motion filed on 5 November 2021, the Owners Corporation seeks leave to file that Amended List Statement.
- 13 By Notice of Motion filed on 1 December 2021, Pafburn and Madarina seek an order pursuant to r 13.4 of the *Uniform Civil Procedure Rules 2005* (NSW) (the “UCPR”) that the proceedings be dismissed or, alternatively, an order pursuant to r 14.28 of the UCPR that the List Statement be struck out.
- 14 I heard both motions together. Four issues arose.

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<sup>1</sup> List Statement C11 and C17.

**Should leave to amend be refused because no reasonable cause of action is disclosed as against Madarina?**

15 The relevant paragraphs of the proposed Amended List Statement are as follows :

“5A At all material times:

- (a) the sole shareholder of [Madarina] was [Pafburn];
- (b) the shareholders of [Pafburn] were Antonios Obeid and Maria Obeid;
- (c) the sole director of [Madarina] was Antonios Obeid;
- (d) the directors of [Pafburn] were Antonios Obeid and Maria Obeid.

...

8. On a date not known,<sup>2</sup> [Pafburn] and [Madarina] entered into a contract (or an arrangement) to construct the Building (**Contract**).

...

10. Pursuant to the Contract ..., [Pafburn and Madarina] carried out residential building works within the meaning of section 3 and clause 2 of schedule 1 of the [*Home Building Act 1989* (NSW)] (**residential building work**) by constructing the Building ...

10A. The residential building work that was carried out by [Pafburn] (the **Work**) contained defects (**defective work**).

**Particulars of defective work**

See attached Scott Schedule.

11. [Madarina] supervised, coordinated, project managed and otherwise had substantive control over the residential building work carried out by [Pafburn]

...

**Particulars**

The plaintiff repeats paragraph 5A above.

12. By reason of the matters set out in paragraph 10 above, [Pafburn] ... carried out construction work within the meaning of s 36 of the [DBP Act].

13. By reason of the matters set out in paragraph 11 above, [Madarina] carried out construction work within the meaning of s 36 of the [DBP Act].

**Breach of duty of care**

13A. By reason of sub-sections 36(1) and 36(3)(a) of the [DBP Act], the plaintiff is an ‘owner’ of the land in relation to which the construction work was carried out within the meaning of section 37 of the [DBP Act].

Duty of care

14. By reason of the matters pleaded in paragraphs 12, 13 and 13A above, and by operation of section 37(1) of the [DBP Act], the defendants each owed

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<sup>2</sup> But asserted by the defendants to be 2 June 2008.

the plaintiff a duty to exercise reasonable care to avoid ... economic loss ... caused by defects:

(a) in or related to the Building; and

(b) arising from construction work within the meaning of the [DBP Act], being:

(i) the preparation of regulated designs and other designs for the building work;

(ii) manufacture or supply of a building product used for the building work; and

(iii) supervising, coordinating, project managing or otherwise having substantive control over the carrying out of any work referred to in paragraphs 14(b)(i) and (ii).” (Emphasis in original.)

16 A question that arises is whether those allegations, if proved, would enable the Owners Corporation to establish that Madarina engaged in “construction work” for the purposes of s 37 of the DBP Act.

17 Section 37 is in the following terms:

**“37 Extension of duty of care**

(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.

(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 in original.)

18 “Construction work” is defined in s 36(1) of the DBP Act to mean, relevantly:

**“36 Definitions**

...

***construction work*** means any of the following—

(a) building work,

...

(d) supervising, coordinating, project managing or otherwise having substantive control over the carrying out of any work referred to in paragraph

(a) ... ” (Emphasis in original.)

- 19 As the alleged fact that the building contract between Pafburn and Madarina was oral only emerged during the course of argument, it was agreed that I should defer considering further the question of whether the Owners Corporation should have leave to amend its List Statement until such time as the Owners Corporation has had an opportunity to seek particulars about the alleged oral contract and, thereafter, to circulate any proposed Amended List Statement.
- 20 It was agreed, however, that I should decide a question of construction which arises in relation to the definition of “construction work” in subpara (d) of the definition.

**Proper construction of the definition of “construction work” in s 36(1) of the DBP Act**

- 21 As I have set out, “construction work” is defined to mean, among other matters:
- “(d) supervising, coordinating, project managing or otherwise having substantive control over the carrying out of [relevantly, building work].”
- 22 The question is whether, for the purpose of that definition, to establish that a person had “substantive control over the carrying out of” the building work, it is necessary to show that the person actually exercised such “substantive control”; or whether it is sufficient to show that the person had “substantive control” in the sense of having the ability to exercise such control, whether or not such control was in fact exercised.
- 23 Section 37(1) of the DBP Act speaks of a person who “carries out construction work”: that is, actually “carries out” such work.
- 24 Thus, in relation to the first four words of the relevant definition of “construction work”, the question is whether the relevant person actually supervised, coordinated or project managed the work, as those words bespeak actions: supervision, coordination and project management.
- 25 However, the words “otherwise having substantive control” point to a conclusion to be reached having regard to all relevant circumstances. The words used are not “otherwise substantively controlling the carrying out of” the work. A person could have “substantive control over the carrying out of” work notwithstanding the fact, at any particular moment in time, the person was not

actually doing anything to cause that control to be exercised; provided the person had the ability and the power to control how the work was carried out.

- 26 In those circumstances, in my opinion, it is sufficient to enliven the definition to establish that the person was in a position where it was able to so control how the work was carried out. That would be a question of fact in each case. The fact that, say, a developer owned all the shares in a builder, and had common directors, might lead to an inference of such an ability to control. Where, as here, the position is the other way around, namely that the builder owns all the shares in the developer, that inference may be less easily available.
- 27 These matters can be further considered once any proposed amended pleading is circulated.

**Does the Scott Schedule annexed to the proposed List Statement adequately set out the Owners Corporation’s claim?**

- 28 Evidently reflecting the views I expressed in *The Owners – Strata Plan No 87060 v Loulach Developments Pty Ltd (No 2)*,<sup>3</sup> the Owners Corporation has annexed to the proposed Amended List Statement a “Scott Schedule” which identifies some 330 alleged defects under the headings “Internal Waterproofing and General Building Defects”, “Fire and General Safety Defects” and “External Façade Defects”. In relation to each of those categories, the Owners Corporation has set out, in three columns, details of the “Item Claimed”, the “Risk of Harm” and the “Response to Risk”.
- 29 In relation to many of those alleged defects, the “Response to Risk” is expressed as to what “the defendants” ought to have done, without distinguishing between what Pafburn, as builder, should have done and what Madarina, as the party allegedly supervising, coordinating, project managing or having substantive control of the work, on the other hand, should have done.
- 30 I agree that the “Response to Risk” should identify, separately, what it is alleged that Pafburn and Madarina should have done to respond to the risk in question.

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<sup>3</sup> [2021] NSWSC 1068.

- 31 That is a matter that the Owners Corporation will need to correct if the proceedings are to continue against Madarina.
- 32 Further, at various places in the Scott Schedule, it is alleged that an appropriate response to a risk was to “inspect” the work in question. Mr Di Francesco submitted, and I accept, that the Owners Corporation should, in due course, specify how the inspection was to take place; including whether a visual inspection was sufficient or whether some kind of testing, and if so what kind of testing, or other intrusive work, is said to be required.

**Does Scott Schedule introduce “new” claim?**

- 33 In correspondence between the parties, and in a position paper presented to the Court in relation to a directions hearing last year, the solicitors for the Owners Corporation referred to its experts uncovering “new defects” and of “previously undiscovered defects appear[ing] for the first time”.
- 34 The solicitors for Pafburn and Madarina have marked up the Scott Schedule to the proposed Amended List Statement to identify the defects that they see as being “new”.
- 35 I do not accept the identification of these “new” defects as involving the Owners Corporation introducing new causes of action against Pafburn and Madarina.
- 36 The Owners Corporation relies on a single cause of action, namely, the breach by Pafburn and Madarina of their alleged statutory duties under s 37 of the DBP Act.
- 37 However, during argument, it was agreed that the Owners Corporation should be given a chance to say whether it agrees that the defects which the solicitors for Pafburn and Madarina have marked up in the Scott Schedule are “new” in the sense of not having been previously identified in the current List Statement, in expert reports, between the parties or otherwise.
- 38 In his written submissions on this question, Mr Di Francesco has set out, in general terms, the manner in which it is contended that Pafburn and Madarina will be prejudiced by allowing the Owners Corporation to rely on these “new” defects.



- 39 Mr Di Francesco has now agreed to produce a more detailed document setting out, precisely, what prejudice Pafburn and Madarina contends they would suffer if the Owners Corporation were to be permitted to rely upon the “new” defects; whether in terms of limitation problems concerning potential cross-claims which would not have arisen had these defects been identified when the List Statement was filed on 1 December 2020, or because of an inability to inspect the allegedly defective work that did not exist when the List Statement was filed; or otherwise.
- 40 I invited Mr Di Francesco and Mr Weinberger, who appeared for the Owners Corporation, to confer and agree on a timetable to deal with these matters.

### **The proper construction of a “person” in s 37 of the DBP Act**

- 41 Finally, Mr Di Francesco raised a question as to the proper construction of s 37 of the DBP Act.
- 42 I have set out the provisions of s 37 at [17] above.
- 43 Mr Di Francesco submitted that, on the proper construction of s 37(1), a “person” who carries out construction work does not include a person who was the owner of the land at the time the construction work was carried out.
- 44 Mr Di Francesco submitted that this was a complete answer to the Owners Corporation’s case against Madarina.
- 45 Mr Di Francesco pointed to the terms of s 37(2) of the DBP Act which speak of the statutory duty of care in s 37(1) being owed “to each owner of the land in relation to which construction work is carried out” *and* “to each subsequent owner of the land”.
- 46 Mr Di Francesco submitted that if “a person who carries out construction work” referred to in s 37(1) includes the “owner of the land in relation to which the construction work is carried out”, then, read literally, the effect of s 37(2) is that such an “owner” would owe a duty to itself to avoid a loss referred to in s 37(1); an obvious absurdity.
- 47 Mr Di Francesco referred to the Explanatory Note accompanying the *Design and Building Practitioners Bill 2019* (NSW) which included:

“[The equivalent clause to s 37] imposes a duty of care 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 work. *The duty is owed to the present and subsequent owners of the land* on which the work is carried out and the owners are entitled to damages for the breach of the duty”. (Emphasis added.)

48 The passage I have emphasised highlights, rather than provides a solution to, the conundrum to which Mr Di Francesco pointed.

49 Mr Di Francesco also drew attention to the following passage from the Second Reading Speech for the Bill:

“The duty [now contained in s 37] deliberately does not extend to owners who are developers or large commercial entities, as the Government considers these entities to be sufficiently sophisticated and able to contractually and financially protect their commercial interests.”

50 However, as Mr Di Francesco pointed out, the exclusion of “developers” or “large commercial entities” does not appear to have made its way into the wording of the DBP Act.

51 One is therefore driven back to the text of the DBP Act to resolve the issue that Mr Di Francesco has identified.

52 The principal operative provision is s 37(1), which provides, without any qualification, that any “person” who “carries out construction work” has the prescribed duty. Section 37(1) is therefore directed not only to a builder who engages in the relevant “building work” but to any other “person” who carries out “construction work” as defined in s 36(1). As I have set out above, that includes a “person” who supervised, coordinated, project managed or “otherwise” had “substantive control over the carrying out of” the work. That “person” may well be the “owner of the land in relation to which the construction work is carried out”.

53 Mr Di Francesco accepted that the construction for which he contended would, in effect, involve reading into s 37(1) after the words “a person who carries out construction work”, the words “other than the owner of the land in relation to which the construction work is carried out”.

54 It would thus also involve attributing to Parliament an intention that even if such an owner in fact “carried out construction work” then it would not owe any party the prescribed statutory duty.

- 55 It appears to me very unlikely that this is what the Parliament intended.
- 56 On the other hand, it is obvious that Parliament cannot have intended to create a duty owed by an “owner of the land in relation to which the construction work is carried out” to itself.
- 57 But that anomalous result can readily be avoided by reading the expression “each owner” in s 37(2) as not including an owner that has itself carried out the construction work in question.
- 58 In my opinion, that is the preferable way to construe the section.
- 59 Thus, I do not accept Mr Di Francesco’s submission that s 37(1) should be construed so that “person” does not include an “owner of the land in relation to which the construction work is carried out”; nor that the Owners Corporation’s case against Madarina fails for this reason.

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