

Episode 123: Summary

Episode name: Brick by Brick: Unpacking *Pafburn* and its Effect on Proportionate Liability in NSW

Guest(s): Keith Redenbach

What area(s) of law does this episode consider?

Construction law, particularly the recent decision of *The Owners – Strata Plan No 84674 v Pafburn Pty Ltd* [2023] NSWCA 301 ("*Pafburn*").

Why is this topic relevant?

The recent NSW Court of Appeal decision of *Pafburn* marks a significant shift in the legal landscape concerning proportionate liability in NSW construction cases, fundamentally altering over two decades of legal practice.

The Court of Appeal's decision is due to be heard in the High Court, and if upheld, will have profound implications, impacting not only legal practitioners but also developers, builders, and subcontractors who must navigate the new legal terrain.

What legislation is considered in this episode?

Civil Liability Act 2002 (NSW) ("*Civil Liability Act*")

Design and Building Practitioners Act 2020 (NSW) ("*DPB Act*")

Home Building Act 1989 (NSW)

What cases are considered in this episode?

The Owners – Strata Plan No 84674 v Pafburn Pty Ltd [2023] NSWCA 301

- The owners corporation of a strata development sued the developer, Mandarin Pty Ltd, and the builder, Pafburn Pty Ltd, for defective construction, claiming a breach of the statutory duty of care under section 37 of the *DBP Act*. Pafburn and Mandarin relied on proportionate liability under the *Civil Liability Act* naming several subcontractors as concurrent wrongdoers. The owners argued that the duty of care was non-delegable, and the proportionate liability defence was unavailable. The NSW Court of Appeal ruled that the statutory duty under the *DBP Act* could not be limited by proportionate liability provisions, making Pafburn and Mandarin fully liable for the construction defects.

The Owners - Strata Plan No 87060 v Loulach Developments Pty Ltd (No 2) [2021] NSWSC 1068

- In a dispute over alleged construction defects in a Parramatta residential development, the owners' corporation sued developer Loulach, citing breach of statutory duty of care under the *DPB Act*. The court required the owners to submit an amended list statement and a Scott Schedule of defects. The owners submitted these in September 2021, but Loulach opposed their method of pleading. The court ruled against the owners, stating that identifying defects alone does not prove a breach of duty; additional negligence criteria must also be met, including foreseeability and the actions of a reasonable person.

- The High Court unanimously allowed Brookfield Multiplex Ltd's appeal against the NSW Court of Appeal decision, which had previously established a common law duty of care owed by Brookfield to a subsequent Owners Corporation for latent defects in a strata-titled serviced apartment building. The High Court determined that, given Brookfield's detailed contract with the developer, which included provisions for defect management and liability limitation, and the standard sale contracts providing specific rights to subsequent purchasers against the developer, no duty of care existed to prevent pure economic loss from latent defects. The Court also found no independent duty of care owed to the Owners Corporation.

Kazzi v KR Properties Global Pty Ltd t/as AK Properties Group [2024] NSWCA 143

- KR Properties and AS Coaching contracted Oxford Pty Ltd to build a 6-unit apartment building, with Pierre Kazzi as the supervisor. After Oxford missed the completion date, the Owners terminated the contract and Oxford sued for unpaid invoices. The Owners counterclaimed against Oxford and Kazzi for breach of contract and duty under section 37 of the *DPB Act*. The Owners' cross-appeal, seeking \$918,545.46, challenged the primary judge's rulings on interest accrual, failure to prove loss, and rejection of the project architect's evidence. The NSW Court of Appeal sided with the Owners on all issues, finding the primary judge erred in assessing damages and interpreting the architect's testimony.

Woolcock Street Investments Pty Ltd v CDG Pty Ltd [2004] HCA 16

- In 1987, CDG Pty Ltd was engaged to design the foundations of a commercial complex. After the building's purchase by Woolcock Street Investments Pty Ltd in 1992, significant structural defects emerged due to alleged negligent design or supervision. Woolcock sought damages for the cost of repairs and loss of rent. The Supreme Court of Queensland referred the case to the Court of Appeal, which found no cause of action in negligence, noting the lesser vulnerability of commercial purchasers. The High Court, referencing the agreed facts and the appellant's claim, ruled by a 6:1 majority that no duty of care was owed, with the majority finding that the principles in *Bryan v Maloney* did not support Woolcock's claim. Kirby J dissented, while Gleeson CJ, Gummow, Hayne, and Heydon JJ provided a joint judgment, distinct from McHugh and Callinan JJ's individual findings.

Abdel-Kader and ors -v- Royal Borough of Kensington and Chelsea and ors [2022] EWHC 2006 (QB)

- The Grenfell Tower fire in June 2017, caused by an electrical fault in a refrigerator, spread rapidly due to combustible cladding and became the UK's deadliest structural fire since 1988. Following the fire, the Kensington and Chelsea Council's leadership resigned, and a review of building regulations was commissioned. The Grenfell Tower inquiry began in September 2017, with reports identifying regulatory non-compliance related to the building's cladding. Survivors and families filed a civil lawsuit in the US against the cladding

manufacturers and refrigerator company, but the case was dismissed in 2020, leading to a civil settlement by April 2023 with 22 organisations involved.

Tanah Merah Vic Pty Ltd & Ors v Owners Corporation No 1 of PS613436T & Ors [2021] VSCA 72

- A fire at the Lacrosse apartment building, caused by a discarded cigarette, spread rapidly due to the use of combustible aluminium composite cladding. The owners of the building suffered over \$12 million in losses. The Victorian Civil and Administrative Tribunal (VCAT) found the builder liable for these damages due to breaches of statutory warranties in its Design and Construct contract, specifically regarding the suitability of materials, compliance with the law, and fitness for purpose. The builder's liability was apportioned among the building surveyor, architect, and fire engineer, who had breached their consultancy agreements by failing to exercise due care and skill. The consultants appealed the decision, but the Victorian Court of Appeal largely upheld VCAT's findings, maintaining the apportionment of liability: 39% to the fire engineer, 33% to the building surveyor, 25% to the architect, and 3% to the resident who discarded the cigarette. The Court ruled that the builder's breach of warranties was not apportionable under the *Wrongs Act* and upheld VCAT's findings that the architect's cladding specifications and the building surveyor's compliance checks were deficient.

Icon Co (NSW) Pty Ltd V Liberty Mutual Insurance Company Branch Trading As Liberty Specialty Markets [2020] FCA 1493

- Icon, a construction company, built the Opal Tower at Sydney Olympic Park. During the 12-month defect liability period that followed the building's completion in August 2018, major cracks appeared in wall panels and floor slabs, necessitating resident evacuation. A class action by residents against Sydney Olympic Park Authority led to a cross-claim against Icon, resulting in Icon's liability for \$31 million in rectification, accommodation costs, and legal fees. Icon sought indemnity from its insurers, Liberty and QBE, and succeeded against both. Although the defects occurred outside the original policy period, the court rectified the Liberty policy to include the defects liability period based on the intent of the parties. Additionally, Icon's claim under QBE's product liability policy was upheld, with the court defining the building as a "product" within the policy's terms.

What are the main points?

- Prior to the *Civil Liability Act 2002*, joint tortfeasors could be 100% liable for each other's actions. However, the Act introduced the concept of proportionate liability, wherein liability for damages is apportioned between tortfeasors in proportion to their overall contribution to the damage.
- The *DPB Act* has reverted liability back to the old 100% model in the context of apportioning liability between tortfeasors in the design and building process.
- Following incidents at La Crosse Towers in November 2014, Grenfell Tower in June 2017, and Opal Towers in December 2018, a new duty of care was introduced under section 37 of the *DPB Act*.
- Section 37 of the *DPB Act* establishes a non delegable statutory duty of care for building professionals to prevent economic losses due to defects or poor

construction. It outlines the responsibilities of building practitioners in exercising reasonable care in their work.

- The incidents at La Crosse and Grenfell Towers involved combustible cladding in the supply chain leading to significant damage, injuries, and even death. The Opal Towers faced issues with structural integrity, including cracking, which forced residents out of their homes just before Christmas.
- The interaction between the *Civil Liability Act* provision 5Q and the *DPB Act* provision, section 37, raised questions about the creation of a non-delegable duty. These duties are not eligible for a proportionate liability defence.
- The pending High Court appeal in *Pafburn* and possibly *Kazzi* could impact the liability of directors. Now, it is possible that directors can be held 100% liable, personally, for damage caused by issues with buildings constructed by their company.
- Liability in construction cases could shift into a hybrid model wherein plaintiffs initially seek judgement under the section 37 duty where a party is insured, and where that fails, a judgement apportioning liability between the parties at fault.

What are the practical takeaways?

- The new duty under the *DPB Act* impacts everyone involved in supervising, coordinating, or managing construction projects.
- Individuals with a statutory duty of care will be held accountable for the actions of those to whom they delegate construction work to. Developers and builders will be responsible for the misconduct of subcontractors and consultants who violate this duty of care.
- From a professional perspective, passion and dedication are key to success. Keith found success by pursuing his interest in building and architectural liability early in their career. It is important to find your passion, receive proper training, and learn from experienced mentors. Be patient, learn continuously and learn from your mistakes.

Show notes

Keith Redenbach, *The death of proportionate liability in NSW: is the obituary written in Pafburn?* ([link](#))