

GREENWAY CHAMBERS

2024 - A Year in Review of Construction Law

Presented by Frank Hicks SC and Joseph Simpson



Cases

1. *Pafburn Pty Ltd & Anor v the Owners – SP No 84674* [2024] HCA 49
2. *Drummond v Gordian Runoff Limited ACN 052 179 647* [2024] NSWCA 239
3. *The Owners – Strata Plan No 89074 v Ceerose Pty Ltd* [2024] NSWSC 1494
4. *Cessnock City Council v 123 259 932 Pty Ltd* [2024] HCA 17
5. *EnerMech Pty Ltd v Acciona Infrastructure Projects Australia Pty Ltd* [2024] NSWCA 162
6. *McDonald v MAK Constructions and Building Services Pty Ltd* [2024] NSWCA 63



Pafburn Pty Ltd & Anor v the Owners – SP No 84674

The statutory duty of care and apportionable liability

1. [2024] HCA 49
2. The majority confirmed that apportionment under Part 4 the *CLA* is not available to those who delegate or entrust ‘construction work’ to others.
3. 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*.
4. 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.
5. Part 4 of the *CLA* may still apply to duty holders who do not delegate work.



Pafburn Pty Ltd & Anor v the Owners – SP No 84674

The statutory duty of care and apportionable liability

1. The minority would have allowed the appeal in part.
2. The proportionate liability scheme under Part 4 of the CLA does apply to a claim for damages for breach of s 37 of the DBP Act.
3. The phrase "a person who carries out construction work" in s 37 of the DBP Act does not extend beyond the actual carrying out of construction work by the person or their agent. It does not include strict liability for work carried out by sub-contractors.
4. Section 39 does not transform the s 37 duty into a common law "non-delegable duty" to ensure that reasonable care is taken by sub-contractors.



Drummond v Gordian Runoff Limited

Home Warranty Insurance and the Insurance Contracts Act

1. Refusal to indemnify an insured under a home warranty insurance policy relying on on s 103BB of the *HBA.*
2. 103BB(1): a contract of insurance under Part 6 of the HBA provides insurance cover in respect of loss only if a claim in respect of the loss is made to the insurer during the period of insurance.
3. 103BB(3): provides for claims to made after the period of insurance where:
    a. a claim cannot be made during the period of insurance because an insured event has not occurred,
    b. the insurer was properly notified of the loss during the period of insurance,
    c. the insured making the claim has diligently pursued enforcement of the statutory warranties under the HBA.



GREENWAY CHAMBERS

Drummond v Gordian Runoff Limited

Home Warranty Insurance and the Insurance Contracts Act

1. Section 54(1) of the Insurance Contracts Act:

> "Subject to this section, where the effect of a contract of insurance would, but for this section, be that the insurer may refuse to pay a claim, either in whole or in part, by reason of some act of the insured or of some other person, being an act that occurred after the contract was entered into … the insurer may not refuse to pay the claim by reason only of that act, but the insurer's liability in respect of the claim is reduced by the amount that fairly represents the extent to which the insurer's interests were prejudiced as a result of that act."



Drummond v Gordian Runoff Limited

Home Warranty Insurance and the Insurance Contracts Act

1. Stern JA (Mitchelmore JA agreeing).
2. Properly construed, the terms of the policy did not incorporate the provisions of the Home Building Act and Home Building Regulation into the policy of insurance.
3. Section 103BB(3) does not alter the contractual effect of a contract of insurance. It operates by way of statutory, not contractual, effect.
4. Section 54 of the Insurance Contracts Act was not engaged. That section focuses upon contractual and not statutory effects.
5. The words ‘but for this section’ contained in s. 54 do not signal that the section is engaged where an insurer’s refusal to pay is based on the statute, and not the terms of the insurance policy itself.



Drummond v Gordian Runoff Limited

Home Warranty Insurance and the Insurance Contracts Act

1. White JA (dissenting).
2. The terms of the policy of insurance did incorporate the provisions of the Home Building Act as governing the provision of insurance.
3. Even if s 103BB was not incorporated into the policy of insurance, it caused a change to the effect of the contract. The statute operated through the contract. The effect of a contract, and the effect of a statue regulating the contract, are not mutually exclusive concepts.
4. Where it was the ‘effect’ of the contract that an insured’s failure to notify the insurer of loss in accordance with s 103BB(3) of the HBA provided a basis for refusing the claim, then s. 54 of the Insurance Contracts Act would apply.



The Owners – Strata Plan No 89074 v Ceerose Pty Ltd

Mitigation of damages

1. [2024] NSWSC 1494
2. A review of the common law law principles of mitigation.
3. The party bringing the claim has no positive duty to mitigate but does have a duty not to act unreasonably.
4. The defendant has the onus of proving the steps that should have been taken to mitigate losses.
5. What is reasonable for a person to do in mitigation is a question of fact determined by the circumstances of each case.



The Owners – Strata Plan No 89074 v Ceerose Pty Ltd

Mitigation of damages

1. Consideration of whether an owner's conduct was reasonable includes a review of events since building work was undertaken, when defects were identified, subsequent negotiations, conduct during litigation and the outcome of the claims.
2. Relevant facts in defects cases:
    a. Extent and seriousness of defects;
    b. Quality of any repairs effected by the builder;
    c. If there has been timely, fair and serious engagement with issues raised by the owner;
    d. The efficacy or futility of continuing to negotiate.



Cessnock City Council v 123 259 932 Pty Ltd

Reliance damages

1. [2024] HCA 17
2. Joint judgment (Edelman, Steward, Gleeson and Beech-Jones).
3. Damages for consequential loss are measured as the amount that would place the plaintiff in the same situation had the contract been performed. That is the only measure of damages.
4. Claims for 'reliance' or 'expectation' losses are not an alternative to the general rule for assessing damages between which a plaintiff can elect to claim.
5. A plaintiff bears the legal onus of proving its loss was caused by the defendant’s breach.



Cessnock City Council v 123 259 932 Pty Ltd

Reliance damages

1. To attract an award of damages for wasted expenditure, a plaintiff must prove that the expenditure was *wasted* due to the defendant's breach, i.e. plaintiff would have recovered the money expended in the absence of breach.
2. Where the defendant's breach has caused or increased uncertainty about the position the plaintiff would have been in had the contract been performed, the plaintiff's legal burden of proof will be facilitated by assuming or inferring that the plaintiff would have recovered any expenditure reasonably incurred in anticipation of, or reliance on, the contract's performance.
3. The more difficult the defendant's breach has made it for the plaintiff to prove its position had the contract been performed, the stronger the assumption or inference will be that the plaintiff would have recovered its wasted expenditure.



EnerMech Pty Ltd v Acciona Infrastructure Projects Australia Pty Ltd

Security of Payment Act, nature of a payment claim, jurisdiction

1. [2024] NSWCA 162
2. It is not a precondition to the validity of a payment claim that it is ‘for construction work’.
3. The Act itself does not purport to limit the amount or nature of a payment to which a party is entitled under a construction contract.
4. The two critical elements of a valid payment claim are that there be a ‘construction contract’, and that there be consideration or amounts payable under it .
5. If an amount is *in fact* payable will depend on the proper construction of the contract, identification of the work carried out and determination of what work has already been paid for.
6. Those matters are to be determined by an adjudicator and will not determine the *validity* of a payment claim.



GREENWAY CHAMBERS

EnerMech Pty Ltd v Acciona Infrastructure Projects Australia Pty Ltd

Security of Payment Act, nature of a payment claim, jurisdiction

1. Generally, there is little scope under the Act for implying unstated conditions as essential to the validity of a payment claim.
2. It was not relevant that the Act is not concerned with ensuring security of payment in respect damages or restitution.
3. Prior authority that limited the character of a progress payment to claims for ‘work done’ only confirmed that the focus of consideration is on payments due under the construction contract.
4. With few exceptions, an adjudicator’s jurisdiction under the Act extends to *all* questions arising from the construction of the contract and the provisions of the Act, as applied to the factual circumstances raised by the claim and payment schedule.



McDonald v MAK Constructions and Building Services Pty Ltd

Security of payment, stay of proceedings

1. Application for stay of a defect claim following a builder filing an adjudication certificate as a judgment debt.
2. Rejected a construction by the primary judge that s 32 of SOPA only preserved the rights of parties in civil proceedings ‘after the judgment has been satisfied’.
3. Undue emphasis by the primary judge on legislative policy.
4. Emphasised that the circumstances were different to cases that involved a developer seeking a stay of proceedings brought by a builder to enforce a judgment debt.





GREENWAY CHAMBERS

Questions?

