

JUDGMENT : Nicholas J : Supreme Court New South Wales Equity Division T&C List. 4th March 2008

- 1 These proceedings concern the plaintiff's entitlement to recover from the defendants the amount of \$272,649.77, and interest, under a contract for the construction of a complex of 10 residential units on the premises at xx xx Street, Wagga Wagga (the premises).
- 2 By its notice of motion filed 3 December 2007, the plaintiff seeks summary judgment under the *Uniform Civil Procedure Rules 2005*, Pt 13, r 13.1 for the amount claimed as a consequence of the defendants' failure to reply to its payment claim in accordance with the provisions of s 14 and s 15 of the *Building and Construction Industry Security of Payment Act 1999* (the Act).
- 3 The defendants challenge the plaintiff's claim for summary judgment on the basis that the contract under which the work was carried out is not one to which the Act applies, contending that it is a contract within the meaning of s 7(2)(b) of the Act.
- 4 The questions for consideration are, firstly, the proper construction of s 7(2)(b), and secondly, whether on the evidence, the contract in this case is one to which the Act applies.

Background

- 5 The following history was undisputed and shows the circumstances in which the claim arises.
- 6 The plaintiff is a builder. The defendants are the owners of the premises.
- 7 On about 22 January 2006 the parties entered into a contract whereby the plaintiff agreed to build for the defendants on the premises a complex of 10 residential units with common facilities including a gymnasium, meeting room, and gardens. The contract sum was \$4,250,533.64. The contract described the project as "Serenity Luxury Apartments". The written form of the contract was executed in May 2006.
- 8 At the time of the hearing the court was informed that the construction of the complex was almost complete, and was at a stage where the plaintiff was no longer working on the premises.
- 9 On 21 October 2007 the plaintiff served progress claim no. 17 for the amount of \$272,649.77, purportedly as a payment claim under s 13 of the Act. The defendants did not provide a payment schedule within 10 business days after service of the payment claim under s 14. The amount claimed remains unpaid.
- 10 Since the time the contract was made, it has been the defendants' intention to live in unit xx as their permanent residence, and this intention remains. The first defendant, Mr Shorten, gave oral evidence that he informed Mr Hurst, the plaintiff's director, of this intention either at the end of 2005 or the beginning of 2006 prior to 22 January 2006 when the contract was entered into. Nevertheless, although the existence of the intention is undisputed, it is common ground that Mr Hurst does not accept Mr Shorten's evidence as to when he was informed of it.

The legislation

- 11 Relevantly, the Act provides:
"3 *Object of Act*
(1) *The object of this Act is to ensure that any person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.*
(2) *The means by which this Act ensures that a person is entitled to receive a progress payment is by granting a statutory entitlement to such a payment regardless of whether the relevant construction contract makes provision for progress payments.*
...
7 *Application of Act*
(1) *Subject to this section, this Act applies to any construction contract, whether written or oral, or partly written and partly oral, and so applies even if the contract is expressed to be governed by the law of a jurisdiction other than New South Wales.*
(2) *This Act does not apply to:*
...
(b) *a construction contract for the carrying out of residential building work (within the meaning of the Home Building Act 1989) on such part of any premises as the party for whom the work is carried out resides in or proposes to reside in ..."*
- 12 Under *Home Building Act 1989*, s 3 the term "residential building work" is defined, and includes the following:
"... any work involved in, or involved in co-ordinating or supervising any work involved in:
(a) the construction of a dwelling, or
(b) the making of alterations or additions to a dwelling, or
(c) the repairing, renovation, decoration or protective treatment of a dwelling."

Construction of s 7(2)(b)

- 13 Section 7(1) was enacted to give effect to the legislature's intention that the Act will apply to any construction contract with the exception of the classes of contract described in s 7(2), s 7(3), s 7(4) and s 7(5). As s 7(1) is a

statement of general application, a party wishing to avoid its application must demonstrate that the contract is within an excepted class. For the reasons given in *Walter Construction Group v CPL (Surry Hills) Pty Ltd* [2003] NSWSC 266, par 75, in my opinion, the onus of proof concerning the exception is on the party claiming that the contract is within it.

14 Section 7(2)(b) provides:

“(2) *This Act does not apply to:*

...

(b) *a construction contract for the carrying out of residential building work (within the meaning of the Home Building Act 1989) on such part of any premises as the party for whom the work is carried out resides in or proposes to reside in ...”*

15 The plaintiff submitted that, upon its proper construction, the exemption under s 7(2)(b) applies to a contract for building work the scope of which is confined to work on such part of any premises as the party for whom the work is carried out (the party) resides in or proposes to reside in. It was put that the phrase “on such part of any premises” serves to identify where, or the part of the premises on which, the work is to be carried out. It was put that the provision had been carefully drafted to limit the exemption to a contract for residential building work on a particular site, namely the site where the party resides or proposes to do so. It follows, so it was put, that a contract for work which extends to work on a part or parts of premises in which the party does not reside or proposes to reside is a contract outside the ambit of the provision, and thus is a contract which attracts the application of the Act.

16 In support, the plaintiff referred to the legislative history of the provision. When introduced to Parliament on 29 June 1999 the Bill included cl 7(2)(b) in the following terms:

“(2) *This Act does not apply to:*

...

(b) *a construction contract for the carrying out of residential building work (within the meaning of the Home Building Act 1989) on premises in which the party for whom the work is carried out resides or proposes to reside ...”*

17 After its introduction the Bill was amended by the addition of the phrase “... on such part of any ...” as now appears in s 7(2)(b). When the Bill was reintroduced the intention underlying the amendment was stated in the following passage from the Second Reading Speech, New South Wales Legislative Assembly, (Hansard), 8 September 1999, p 103:

“Since its initial introduction, a minor anomaly has been drawn to my attention regarding the effect of the original bill on home buyers and home owners. The Government deliberately decided to exempt these people from the effects of the proposed legislation as they were not seen as being part of the construction industry. Also, contractors working for home owners and home buyers have access to other security of payment mechanisms established under the Home Building Act. A slight drafting anomaly in clause 7(2) (b) designed to create this exemption can result in a scenario where, say, a developer, building a 50-storey apartment block, by proposing to reside in one of the apartments can be exempted from the effects of the bill. This was never intended as an outcome and the amendment is designed to close this off.”

The Minister also said (p 104):

“Particular types of contracts are excluded from the operation of the legislation. The main exclusions are: contracts for residential building work with the person who resides in or proposes to reside in the premises on which the work is carried out; ...”

18 The defendants submitted that all that is required to come within the ambit of the provision is that the contract be for work which includes work to be carried out on the part of the premises where the party resides, or proposes to reside. It was put, in effect, that if a component of the contract is for work on such part of any premises in which the party resides, or proposes to reside, it is within the provision although another component is for work on other parts of the premises in which the party does not, or does not propose to, reside. In essence, it was submitted that it is enough for exemption that the contract include residential building work on any part of the premises where the party resides, or proposes to do so. The defendants accepted that, so understood, the provision as enacted did not reflect the legislature’s intention stated in the Second Reading Speech.

19 In construing the legislation a construction promoting its purpose or object is to be preferred to a construction that would not promote that purpose or object (e.g. *Vigolo v Bostin* [2005] HCA 11; (2005) 221 CLR 191, par 53). This is the approach required by the *Interpretation Act 1987*, s 33. Context is also an important consideration (*CIC Insurance Ltd v Bankstown Football Club Ltd* [1997] HCA 2; (1997) 187 CLR 384, p 408). Ultimately, in every case, statutory construction is a text-based activity (*Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* [2004] HCA 14; (2004) 218 CLR 273, pars 87, 89).

20 The purpose of s 7(2)(b), read in context, is to define a category of construction contract to which the Act does not apply. It follows that parties to such contracts are not subject to the statutory regime whereby any person who undertakes to carry out construction work is entitled to claim and recover progress payments in relation to that work.

- 21 In deciding whether a construction contract is within s 7(2)(b), the only matter for consideration is whether it is one “... for the carrying out of residential building work ... on such part of any premises as the party for whom the work is carried out resides in or proposes to reside in”. There is no other requirement or qualification which is expressly or by implication included in the definition to be satisfied. It may be safely assumed that had the legislature intended any additional requirement or qualification it would have included it in the definition.
- 22 In my opinion, the natural and ordinary meaning of the words of the provision is fairly plain, and must be understood to confine the contract to one which, in substance, is for the residential building work it specifies, namely work on such part of any premises as the party for whom it is carried out resides in, or proposes to reside in. That is to say, by the use of the phrase “on such part of any premises” the scope of the work to be done is confined to work at the particular place where the party resides, or proposes to reside. I find nothing in the language of the provision to support a conclusion that a contract which is for residential building work on the premises in addition to work of the kind specified should fall within its ambit. In other words, in my opinion, it does not operate to exclude from the application of the Act a contract which is for some residential building work which fits the description, and is also for some residential building work which does not.
- 23 It follows, in my opinion, that the only relevant issue is whether, in substance, the contract is limited to the carrying out of the work specified by s 7(2)(b). If the contract extends to the carrying out of additional residential building work on other parts of the premises it would be a contract for something more than that envisaged, and therefore one to which the Act would apply.
- 24 This conclusion accords with the underlying purpose of the Act. As the plaintiff submitted, if the wide construction for which the defendants contended was correct, it would be simple indeed for a developer to enter into a construction contract which avoided the application of the Act by proposing to reside in a part of the premises on which the residential building work was carried out. Such a situation is an example of the very mischief referred to in the Second Reading Speech, which the enactment of s 7(2)(b) was intended to overcome. Because such a construction would negate the statutory purpose it should be rejected.
- 25 Accordingly, the plaintiff’s submissions on the construction issue generally should be accepted.
- 26 The remaining question is whether, on the evidence, the contract in this case is one to which the Act applies.
- 27 It was common ground that the contract was for residential building work within the meaning of the *Home Building Act 1989*. It was also common ground that the building of unit xx in which the defendants propose to reside was part only of the residential building work carried out by the plaintiff under the contract.
- 28 With regard to my finding as to the proper construction of s 7(2)(b) the finding is inevitable that the contract is outside this provision and, accordingly, attracts the application of the Act.
- 29 The proceedings were conducted before me on the basis that if it was decided that the contract is one to which the Act applies the plaintiff was entitled to summary judgment. I therefore propose to make the order sought in the notice of motion.
- 30 However, prior to finally disposing of the matter it is appropriate for the parties to have the opportunity, failing agreement, to deal with any question of costs. Arrangements for re-listing the matter are to be made with my associate by 4pm 11 March 2008.

G A Sirtes – for the plaintiff instructed by The Builders’ Lawyers – plaintiff
M Christie/C P Carter – for the defendants instructed by Pilley McKellar Pty Ltd – defendants