

JOHN RASHLEIGH SHAW v YARRANOVA PTY LTD and NEWQUAY STAGE 2 PTY LTD

Catchwords : CONTRACT – Sale of apartment "off-the-plan" by way of a contract of sale – Whether contract of sale covered by *Domestic Building Contracts Act 1995* – Whether a "Major Domestic Building Contract" *Domestic Building Contracts Act 1995*, ss 3, 4, 5, 6, & 42 – Statutory interpretation – Consideration of the position of the Act within legislative regime – Appeal dismissed.

WARREN, C.J., EAMES and NEAVE, J.J.A. Supreme Court of Victoria. Court of Appeal. Melbourne. 15th December 2006.

JUDGMENT : WARREN, C.J.:

- 1 The appellant seeks to set aside a decision of Bell, J. that a contract to purchase an apartment "off the plan" within an in-built high rise development was not a major domestic building contract within the meaning of the *Domestic Building Contracts Act 1995* (the "DBC Act"). The consequence of the judgment below was that the developer, Yarranova Pty Ltd ("Yarranova"), the first respondent to the appeal, was entitled to rescind a contract for sale between it and the plaintiff, John Rashleigh Shaw.
- 2 It was agreed between the parties as follows:
 1. The lot to be sold under the Contract of Sale ("Contract") between the plaintiff and first defendant (being Lot 1002, CPT 464 and ST166 on a proposed plan of subdivision PS 438893N "Lot 1002") did not exist at the date of the Contract.
 2. When registered, the land comprised in the proposed plan of subdivision would be known as New Quay, Docklands.
 3. The apartment constructed on Lot 1002 did not exist at the date of the Contract ("the Apartment").
 4. The defendants are not registered builders within the meaning of the Building Act 1993 (Vic).
 5. The defendant did not construct any homes on the land.
 6. No contract for the construction of a home on Lot 1002 existed at the date of the Contract.
 7. Special condition 18.1 of the Contract provides that: "The vendor will enter into a Major Domestic Building Contract with a Builder for the Works."
 8. Special condition 26.1 of the Contract provides that: "The purchaser hereby acknowledges that the vendor intends to proceed with and complete the Works in response to the market demand and the timing for commencement of the Works will be made by the vendor at its sole, absolute and unfettered discretion."
 9. Performance of the Works was necessary for the purposes of inter alia the creation of Lot 1002 and construction of the Apartment.
 10. By a design and construct contract dated 15 December 2000 ("design and construct contract"), the second defendant engaged Bovis Lend Lease Pty Limited, a registered builder, to undertake the construction and development three multi-storey buildings at New Quay, Docklands, together with the development of residential apartments, retail facilities and associated facilities ("the Works").
 11. The design and construct contract is a major domestic building contract within the meaning of the *Domestic Building Contracts Act 1995* (Vic).
 12. Each of the multi-storey buildings to be constructed as part of the Works would comprise approximately 100 apartments.
 13. The Works required a Building Permit under the Building Act 1993.
 14. The Works to be undertaken pursuant to the design and construct contract included those works necessary to achieve the creation of Lot 1002 and the construction of the Apartment.
 15. The Works were substantially carried out before the proposed plan of subdivision was registered.
 16. The Works were substantially carried out before certificates of title to the lots in the proposed plan of subdivision were issued by the Registrar of Titles.
 17. On 28 June 2002, the proposed plan of subdivision was registered.
 18. On 28 June 2002, the second defendant was registered as proprietor of Lot 1002.
 19. On 15 July 2002, an occupancy permit in relation to that building constructed as part of the Works which contained Lot 1002, was issued by a registered building surveyor which certified that that building was suitable for occupancy within the meaning of the Building regulations.
 20. On 16 July 2002, notice of completion of the Works was given by Bovis Lend Lease Pty Limited to the second defendant.
 21. On 24 July 2002, the second defendant gave written notification of each registration of the plan of subdivision, the issue of the occupancy permit and completion of the Works and called for a completion of the Contract.
 22. The plaintiff has denied that the works necessary to complete construction of the Apartment are complete in that: (1) a window in the master bedroom does not open sufficiently to provide adequate ventilation in

- accordance with the requirements of the Building Code of Australia, (2) the toilet exhaust system from the Apartment has not been installed in compliance to the relevant Australian standard and (3) a handrail installed on the balcony of the Apartment is not in accordance with the specifications to the Contract (being constructed of aluminium instead of mild galvanised steel) ("Alleged Defects").
23. The parties dispute whether the Alleged Defects exist but agree that, if proven, constitute defects in quality and not a defect in title.
24. On 29 September 2003 the second defendant served a notice of default and notice of recession of the plaintiff ("the Notice").
25. By the Notice, the second defendant stated that the plaintiff had made default under the Contract consisting of his failure to pay the balance of monies due under that contract.
26. The plaintiff did not remedy the default alleged by the Notice within the period specified therein or at all and has declined to complete the Contract on the ground that s.42 of the Domestic Building Contracts Act applies to that Contract and that the second defendant cannot demand final payment under the Contract until the Works are complete.
27. In the circumstances set forth in paragraph 25, the Contract was validly rescinded unless s.42 of the Domestic Building Contracts Act applies to that Contract.
28. The land, the subject of the proposed subdivision was zoned "Docklands zone" under clause 37.05 of the Melbourne Planning Scheme, being a planning scheme under the Planning and Environment Act 1987.
- 3 The matter came before Bell, J. who, with the consent of the parties, determined that there was a preliminary question, namely:^[1]
"On the proper construction of the provisions of the Domestic Building Contracts Act 1995 ("the Act") and in the events which have happened:
(1) Is the contract of sale dated 12 April 2000 made between the plaintiff and the first defendant a major domestic building contract within the meaning of the Act?
(2) If yes to Question 1, does s.42 apply to that contract of sale?"
- 4 In carefully considered reasons, his Honour analysed the relevant provisions of the DBC Act. Those provisions are:
" **1. Purpose**
The main purposes of this Act are--
(a) to regulate contracts for the carrying out of domestic building work; and
(b) to provide for the resolution of domestic building disputes and other matters by the Victorian Civil and Administrative Tribunal; and
(c) to require builders carrying out domestic building work to be covered by insurance in relation to that work; and
(d) to amend the **House Contracts Guarantee Act 1987**, and in particular, to phase out the making of claims under that Act.
- 3. Definitions**
(1) In this Act—
"builder" means a person who, or a partnership which--
(a) carries out domestic building work; or
(b) manages or arranges the carrying out of domestic building work; or
(c) intends to carry out, or to manage or arrange the carrying out of, domestic building work;
"building" includes any structure, temporary building or temporary structure and also includes any part of a building or structure;
"building owner" means the person for whom domestic building work is being, or is about to be, carried out;
"building site" means a place where domestic building work has been, is being, or is about to be, carried out;
"contract price" means the total amount payable under a domestic building contract and includes—
(c) the amount any third person is to receive (or it is reasonably estimated will receive) directly from the building owner in relation to the domestic building work to be carried out under the contract--
(i) for conveying to the building site or connecting or installing services such as gas, electricity, telephone, water and sewerage; or...
"domestic building contract" means a contract to carry out, or to arrange or manage the carrying out of, domestic building work other than a contract between a builder and a sub-contractor;
"domestic building dispute" has the meaning set out in section 54;
"domestic building work" means any work referred to in section 5 that is not excluded from the operation of this Act by section 6;
"major domestic building contract" means a domestic building contract in which the contract price for the carrying out of domestic building work is more than \$5000 (or any higher amount fixed by the regulations);

4. Objects of the Act

The objects of this Act are--

- (a) to provide for the maintenance of proper standards in the carrying out of domestic building work in a way that is fair to both builders and building owners; and
- (b) to enable disputes involving domestic building work to be resolved as quickly, as efficiently and as cheaply as is possible having regard to the needs of fairness; and
- (c) to enable building owners to have access to insurance funds if domestic building work under a major domestic building contract is incomplete or defective.

5. Building work to which this Act applies

(1) This Act applies to the following work--

(a) the erection or construction of a home, including--

- (i) any associated work including, but not limited to, landscaping, paving and the erection or construction of any building or fixture associated with the home (such as retaining structures, driveways, fencing, garages, carports, workshops, swimming pools or spas); and
- (ii) the provision of lighting, heating, ventilation, air conditioning, water supply, sewerage or drainage to the home or the property on which the home is, or is to be;

(b) the renovation, alteration, extension, improvement or repair of a home;

(c) any work such as landscaping, paving or the erection or construction of retaining structures, driveways, fencing, garages, workshops, swimming pools or spas that is to be carried out in conjunction with the renovation, alteration, extension, improvement or repair of a home;

(d) the demolition or removal of a home;

(e) any work associated with the construction or erection of a building--

- (i) on land that is zoned for residential purposes under a planning scheme under the **Planning and Environment Act 1987**; and
- (ii) in respect of which a building permit is required under the **Building Act 1993**;

(f) any site work (including work required to gain access, or to remove impediments to access, to a site) related to work referred to in paragraphs (a) to (e);

(g) the preparation of plans or specifications for the carrying out of work referred to in paragraphs (a) to (f);

(h) any work that the regulations state is building work for the purposes of this Act.

(2) A reference to a home in sub-section (1) includes a reference to any part of a home.

6. Building work to which this Act does not apply

This Act does not apply to the following work--

(a) any work that the regulations state is not building work to which this Act applies;

(b) any work in relation to a farm building or proposed farm building (other than a home);

(c) any work in relation to a building intended to be used only for business purposes;

(d) any work in relation to a building intended to be used only to accommodate animals;

(e) design work carried out by an architect or a building practitioner registered under the **Building Act 1993** as an engineer or draftsman;

(f) any work involved in obtaining foundations data in relation to a building site;

(g) the transporting of a building from one site to another.

42. When work is to be considered to have been completed

A builder must not demand final payment under a major domestic building contract until--

(a) the work carried out under the contract has been completed in accordance with the plans and specifications set out in the contract; and

(b) the building owner is given either--

- (i) a copy of the occupancy permit under the Building Act 1993, if the building permit for the work carried out under the contract requires the issue of an occupancy permit; or
- (ii) in any other case, a copy of the certificate of final inspection."

5 The pivotal construction issue was the meaning of the words "to carry out, or to arrange or manage the carrying out of" in s.3 of the DBC Act. His Honour took a two step approach:^[2] first, to determine whether the subject contract was a contract under the definition provided in s.3; and, secondly, to determine whether the work in the subject contract was work within s.5 thereby arising under the definition of "domestic building work" in s.3.

6 Bell J concluded that under the contract, the "core obligation" of Yarranova was to cause the apartment building to be constructed, not to construct it.^[3] [emphasis added]. In particular, his Honour held:^[4]

"The contract imposed positive obligations on Yarranova of a kind that the developer of such a project might be expected to accept. For example, Yarranova had to procure the certification and registration of the plan of subdivision (cl. 13.2). Also, critically, Yarranova had to enter into a major domestic building contract with a builder for the works (cl. 18.1).

However, the contract did not create an obligation on the part of Yarranova itself to construct the apartment or, more accurately, the building containing the apartment, even if the project were to go ahead. If the project did go ahead, the contract required Yarranova to engage a builder to perform that task (cl. 18.1)."

- 7 Next, Bell, J. considered the obligation upon the builder, Bovis, and the principal under the design and construct contract, NewQuay Stage 2 Pty Ltd ("NewQuay"), the second respondent to the appeal. His Honour concluded from the statutory warranties and registration requirements arising under the *Building Act 1993* that Bovis, the builder, was engaged to construct the subject building, finding:^[5]
- "The design and construct contract dovetailed with the contract of sale because, for example, cl. 4.3(d)(ii) of the former required the building to be designed and constructed so that, when completed, it complied with the latter.*
- The design and construct contract conferred upon NewQuay (as the principal) significant powers of supervision of the work of Bovis (as the builder). It made provision for the appointment of a superintendent (see the definition in cl. 2.1) and a project manager (see cl. 6.4), both for the purposes of representing NewQuay in particular aspects of the performance of the contract. Bovis was required to carry out the superintendent's instructions (cl. 6.2). The project manager's role was to represent NewQuay generally (cl. 6.4). But the predicate of these powers was that Bovis had been engaged to construct the building because it possessed the necessary expertise to carry out that task and, indeed, the necessary registration as a builder under the Building Act 1993."*
- 8 Bell, J. then proceeded to find that whilst the contract between Yarranova and Bovis, the design and construct contract, was one to construct the building, the contract between Yarranova and Mr Shaw was not because that contract expressly contemplated that the construction arrangements would be made under another separate contract between Yarranova and a builder. His Honour stated:^[6]
- "A contract "to carry out" domestic building work is a contract that requires the contractor to perform the building works, that is, and in essence, construct the building. The design and construct contract between Yarranova and Bovis was a contract of this kind. I have already noted that cl. 7.1 of this contract required Bovis to design and construct the building.*
- The contract of sale between Mr Shaw and Yarranova was not such a contract. This contract expressly contemplated that the building would be constructed pursuant to another contract into which Yarranova would enter with a builder (see cl. 18.1)."*
- 9 The sole issue to be determined on the appeal is whether the contract between Mr Shaw and Yarranova, later assigned to New Quay, was a major domestic building contract under the *Domestic Building Contracts Act*.
- 10 The Victorian Court of Appeal held in *Winslow Constructors Pty Ltd v. Mt Holden Estates Pty Ltd*^[7] that the literal meaning of s.5 of the *Domestic Building Contracts Act* should be determined after considering the wider object and purpose of the Act.^[8] It was further held that the intention of the Act was to protect "individual homeowners rather than commercial developers".^[9]
- 11 In this appeal, the answer to the question whether the Act applies to the subject contract turns on the expression "arrange or manage" in s.42 of the Act insofar as it relates to the term "builder". In *Mirvac (Docklands) Pty Ltd v. Philp*,^[10] Byrne J held in the context of an off-the-plan apartment purchase that the developer was responsible for arranging and managing the building work despite the retention of a builder under a design and construct contract. The approach was based upon the role of the developer in selecting the builder, retaining responsibility for completion, the capacity to order variations and alterations and the acceptance of warranties by the purchaser that imposed obligations on the developer. These matters were viewed by Byrne J as indicative of the developer arranging for the carrying out of building work or managing it.^[11] In this matter, Bell J took a different approach because the building activity or function would be performed by the retained registered builder and not the developer.^[12]
- 12 Such an approach does not pursue the plain and ordinary meaning of the expressions "arranged" and "manage". The application of the plain and ordinary meaning of the words is the obligation of those who would seek the meaning of the expressions as used in s. 42.^[13] If it was thought that the consequences of the application would give rise to difficulty, then resort might be needed to the mischief rule.^[14] What then, might those difficulties be? Bell J identified a number^[15] and it was submitted they were threefold. Firstly, an outcome of both the developer and the builder needing to take out insurance against defective works. Secondly, a requirement of double registration as a builder would arise, both for the developer and the builder. Thirdly, the inclusion of provisions of the *Domestic Building Contracts Act* in the contract between the developer and the purchaser and also between the developer and builder. I am not persuaded that these results would necessarily occur but, even if they did, they do not give rise to an absurdity or mischief such as to warrant the application of the mischief rule. They do no more than give rise to potential consequences that the Parliament may have intended. I will return to the topic of parliamentary intention. In any event, I note that the matter of double insurance obligations are not clear in light of s.135 (6) of the *Building Act*.^[16] With respect to double registration, that could not be viewed as "absurd" in the context of the residual control of the developer (highlighted by Byrne J in *Mirvac*) of selection of the builder, the responsibility for completion, the power to order variations and alterations and the application of warranties operating in favour of the purchaser from the developer.
- 13 A strongly argued submission was articulated for the developer, NewQuay, based upon an analysis of the history, policy goals and legislative context of the *Domestic Building Contracts Act*, particularly its relationship with the *Building Act*. As a starting premise, resort need only be had to those phenomena if the plain and ordinary meaning of a provision is in doubt.^[17] At the outset, it may be observed that there is a relationship between the *Domestic Building Contracts Act* and the *Building Act* by virtue of the amendment of the latter by the predecessor

of the *Domestic Building Contracts Act*, the *Domestic Contracts and Tribunals Act* 1995. If it were necessary to state a position, I observe that the Second Reading Speech to the amending legislation does not point specifically to any interrelationship between the two Acts. Indeed, the *Domestic Building Contracts and Tribunal (Amendment) Act* 1996 whereby s.137E was further amended appears to have been a vehicle to achieve a minor amendment to put "beyond all possible doubt" as to "some ambiguity" in the capacity of developers to sell off-the-plan.^[18]

- 14 However, most importantly, s. 137E was amended as to the relationship and entitlements between developers and purchasers. It was not, *prima facie*, concerned with the relationship between the developers and builders and the consequences of that relationship. Even more significantly, the Parliament did not seek to address any aspect of absurdity or mischief with respect to s.42 of the *Domestic Building Contracts Act*. Rather, the Parliament may be presumed to have intended to leave the legislative relationship between the *Domestic Building Contracts Act* and the *Building Act* as it stood, save for the specific matters addressed with respect to s. 137E. In my view, reliance upon analysis of the legislative relationship between the two Acts would undermine the plain and ordinary meaning of the expressions "arrange" and "manage" as utilised in s.42 of the *Domestic Building Contracts Act*, particularly given that the words are not expressly defined in either Act. I am led to conclude that the applicability of regarding the statutes as *in pari materia* in this respect is a course I would not follow.^[19]
- 15 Finally, insofar as it was argued that subsequent legislation, the *Domestic Building Contracts (Amendment) Act* 2004 provided that off-the-plan contracts were specifically excluded as domestic building contracts, this does not fortify the respondent's position. The argument should be rejected as contrary to the legislative fact that Parliament did not amend retrospectively. Furthermore, the principles of statutory interpretation militate against such reliance on the use of current statutory provisions to elucidate the meaning of past statutory provisions.
- 16 It follows that I prefer the approach taken by Byrne J in *Mirvac*, contrary to the approach of the learned judge below. I would allow the appeal.

JUDGMENT : EAMES, J.A.

- 17 I have had the benefit of reading in draft the judgment of Neave, J.A. and for the reasons given by her Honour I agree that the appeal should be dismissed. Her Honour's analysis of the legislation is fundamentally in agreement with that of the judge below, and without derogating from the force of her Honour's own reasons I wish to add that I also found the analysis of the primary judge in his judgment^[20] very persuasive.

JUDGMENT : NEAVE, J.A.:

Introduction

- 18 The single issue to be decided in this appeal is whether a contract of sale "off-the-plan" of an apartment to be built as part of a residential development in the Docklands area in Melbourne, is a "major domestic building contract" under the *Domestic Building Contracts Act* 1995 (the "DBC Act"). If it is a major domestic building contract under that Act, the developer cannot demand final payment for the apartment from the purchaser, Mr Shaw, unless the work has been completed in accordance with the plans and specifications.^[21] If the contract does not answer this description, it is conceded that the contract was validly rescinded by the developer, and that Mr Shaw has lost both the apartment and his deposit of \$66,550.
- 19 The learned judge below held that the contract was not a major domestic building contract, so that the developer could validly rescind the contract. His Honour declined to follow the decision of Byrne, J. in *Mirvac (Docklands) Pty Ltd v Peter Evan Philp*^[22] which dealt with an "off-the-plan" contract in similar terms to Mr Shaw's contract. Byrne, J. decided that such a contract was a "major domestic building contract" for the purposes of the DBC Act.^[23] We are therefore required to decide whether the view of his Honour, or of Byrne, J. should be preferred.

Facts

- 20 Mr Shaw and Yarranova Pty Ltd ("Yarranova") were the original parties to the contract of sale of an apartment to be constructed in Boyd Tower at Docklands. Yarranova later assigned its interests under the contract to Newquay Stage 2 Pty Ltd.^[24] I refer to the developer as "Newquay", throughout this judgment. The sale was effected by a contract dated 12 April 2000. Special condition 18.1 of the contract contemplated that the vendor would enter into a major domestic building contract, with a builder who would have responsibility for designing and constructing a tower block and the residential apartments and other areas within it.
- 21 Consistently with the obligation imposed on it by special condition 18.1, Newquay entered into a design and construct contract with Bovis Lend Lease Pty Ltd ("Bovis"), a registered builder, to undertake the construction and development of the tower and the residential apartments, including the one that had already been sold to the purchaser, and the other internal developments in the tower.
- 22 Clause 3.1 of the design and construct contract between Newquay and Bovis provides that - "The Contractor agrees to execute and complete the work under the Contract and, in doing so, to complete the design of and to construct the Works in accordance with this Contract."
- 23 Under clause 4.2 (a) of the same contract - "The Contractor acknowledges that the Works includes domestic building work for the purposes of the DBC Act. In addition to, and without derogation from, the Contractor's other obligations under this Contract, the Contractor shall perform the Works in accordance with the requirements of the DBC Act."
- 24 Other parts of clause 4.2 were designed to satisfy the requirements imposed by the DBC Act, and the *Building Act* 1993. For example, the contract specifies the contract sum attributable to domestic building work, as required by

the DBC Act,^[25] and warrants that at least one of its directors will be registered as a builder,^[26] and that it is the holder of insurance as required by the *Building Act*.^[27]

- 25 The work was carried out by Bovis, and on 15 July 2002 an occupancy permit was issued in relation to the building, that certified that the building was suitable for occupancy within the meaning of the *Building Regulations*. The purchaser denied that the construction was complete and, relying on a number of relatively minor defects, withheld payment of the balance of the money due under the contract.
- 26 After some negotiations and attempts by Newquay to respond to Mr Shaw's concerns, Newquay served a notice upon him, alleging default under the contract of sale. Mr Shaw did not remedy the default by paying the balance of the contract price. He argued that s 42 of the DBC Act applied to the contract of sale between himself and Newquay, and that therefore Newquay could not demand final payment under the contract until the works were complete.
- 27 Unless s 42 of the DBC Act applies, the contract was validly rescinded by Newquay. If, on the other hand, the contract was a "major domestic building contract" within the meaning of the DBC Act, Newquay could not rescind, and is required to rectify defects before final payment.
- 28 Given the fact that Mr Shaw's claim turned largely on whether or not the DBC Act applied to this contract, the learned Judge below ordered that this matter be heard and determined as a preliminary issue. His Honour defined two questions for this purpose, the first question being whether the contract was a major domestic building contract and the second whether, if so, s 42 applied.
- 29 The learned judge below decided that the contract was not a major domestic building contract. This made it unnecessary to answer the second question. Mr Shaw now appeals from the finding that the contract is not a "major domestic building contract" within the meaning of the DBC Act.

The Domestic Building Contracts Act 1995

- 30 Section 42 of the DBC Act, on which Mr Shaw relies, provides that
"A builder must not demand final payment under a major domestic building contract until--
(a) *the work carried out under the contract has been completed in accordance with the plans and specifications set out in the contract; and*
(b) *the building owner is given either—*
(i) *a copy of the occupancy permit under the Building Act 1993, if the building permit for the work carried out under the contract requires the issue of an occupancy permit; or*
(ii) *in any other case, a copy of the certificate of final inspection."*
- 31 Section 42 must be read together with the definitions in ss 3 and 5. A "builder" is defined by s 3 as
"a person who, or a partnership which –
(a) *carries out domestic building work*
(b) *manages or arranges the carrying out of domestic building work; or*
(c) *intends to carry out, or to manage or arrange the carrying out of, domestic building work."*
- 32 A "major domestic building contract" is defined as a domestic building contract in which the contract price for carrying out of domestic building work is more than \$5000. A "domestic building contract" is defined as *"a contract to carry out, or to arrange or manage the carrying out of, domestic building work other than a contract between a builder and a sub-contractor..."*
- 33 Section 3 defines "domestic building work" to mean-- *"any work referred to in section 5 that is not excluded from the operation of this Act by section 6."*
Section 6 is not relevant to this case.
- 34 Section 5(1) of the DBC Act says that
"(1) This Act applies to the following work—
(a) *the erection or construction of a home, including—*
(i) *any associated work including, but not limited to, landscaping, paving and the erection or construction of any building or fixture associated with the home (such as retaining structures, driveways, fencing, garages, carports, workshops, swimming pools or spas); and*
(ii) *the provision of lighting, heating, ventilation, air conditioning, water supply, sewerage or drainage to the home or the property on which the home is, or is to be;*
(e) *any work associated with the construction or erection of a building—*
(i) *on land that is zoned for residential purposes under a planning scheme under the Planning and Environment Act 1987; and*
(ii) *in respect of which a building permit is required under the Building Act 1993;*
(f) *any site work (including work required to gain access, or to remove impediments to access, to a site) related to work referred to in paragraphs (a) to (e);*
(g) *the preparation of plans or specifications for the carrying out of work referred to in paragraphs (a) to (f);*
(h) *any work that the regulations state is building work for the purposes of this Act."*
- 35 In this court, counsel did not contend that the work to be undertaken in constructing Mr Shaw's apartment fell outside s 5.^[28] The question for decision is therefore whether the contract is one under which Newquay is

responsible for managing and/or arranging for domestic building work, within s 3 of the DBC Act, so that s 42 of that Act also applies.

The Terms of the Contract Between Mr Shaw and Newquay

36 The contract of sale is based on the Real Estate Institute of Victoria standard form contract, modified to deal with the sale of an apartment "off-the-plan". The total purchase price for the land and buildings is \$657,500 with almost all of this amount, (\$642,431) being attributed to the construction cost.

37 As mentioned above, the contract contemplates that Newquay will enter into a contract to construct the Boyd Tower and the residential apartments, retail facilities and associated facilities within it,^[29] with "a Builder for the Works".^[30] "The Works" are defined in special condition 1.45 as "the Works described in the Plans and Specifications". These are in turn defined as the plans in "Schedule A and the specifications in Schedule B which form part of the Specification, Fixtures, Fittings and Chattels".^[31]

38 The land is described as Lot 1002 of 'The Boyd', New Quay Docklands and 'the chattels' as all fixtures, fittings and chattels described in Schedule B. Schedule A of the contract includes depictions of the external elevations of the building, plans showing the division of the levels of the Boyd Tower and plans indicating the location of the various apartments. The contract does not include detailed specifications for the tower or a detailed plan of the apartment to be erected on Lot 1002. I agree with the submission made on behalf of the respondent that "The attached plans could not rationally constitute the basis upon which a builder could carry out, arrange or manage the construction of the works necessary to erect a multi-storey development, or the construction of the Apartment."

39 Schedule B contains descriptions of fixture, finishes and air-conditioning sufficient to inform the purchaser about what he or she is purchasing. The first table sets out details of the construction in very broad terms. For example, it indicates that the floors will be constructed of concrete and the internal unit walls of framed plasterboard. The second table provides broad details of the finish in the common areas; for example, it indicates that the lobby entry floor will be covered with "selected tile and carpet". The third table sets out the internal finishes and fittings applicable to the various rooms in the apartment, classified according to whether the purchaser has selected the "elegant, premier, or deluxe option".^[32] The fourth table sets out heating and cooling options, again according to the option selected in the contract of sale.

40 Under special condition 13.1 of the contract the purchaser acknowledges that the land is a lot on a plan of subdivision which has not been certified or registered and under special condition 13.2 the vendor contracts to procure the certification and registration of the plan. If the plan is not registered within 36 months after the date of the contract either party may at any time after the expiration of the period rescind the contract. Under clause 13.6 the vendor reserves the right to make alterations to the plan necessary to secure its registration.

41 Special conditions 18.1–18.5 of the contract provide that:

"18.1 The vendor will enter into a Major Domestic Building Contract with a builder for the Works.

18.2 The purchaser admits that this contract is not a Major Domestic Building Contract for the purposes of the Domestic Building Contracts Act 1995 ("the Act") and that the building contract referred to in special condition 18.1 is the Major Domestic Building Contract for the purposes of the Act.

18.3 Notwithstanding special condition 18.2, if this contract is found or deemed by the Domestic Building Tribunal or by a court having competent jurisdiction to be a Major Domestic Building Contract the purchaser agrees and acknowledges that it shall join with the vendor to vary the terms of this contract so that the contract complies with the Act and the purchaser shall not be entitled to claim any compensation for any alleged non-compliance with the Act. Any such variation shall not constitute a defect in the vendor's title and the purchaser shall not be entitled to delay settlement or rescind this contract as a result of any such variations.

18.4 In satisfying special condition 18.3 the vendor shall not be required to vary the terms or conditions of the Major Domestic Building Contract referred to in special condition 18.1.

18.5 The vendor shall ensure that the Major Domestic Building Contract referred to in special condition 18.1 will require the Builder to make good all defects in the Works arising as a result of defective materials and/or workmanship provided that the defects are notified to the vendor by the purchaser within twenty-six (26) weeks after the date of issue of the Occupancy Permit."

42 Special condition 18.2 cannot determine the nature of the contract between Mr Shaw and Newquay because s 132 of the DBC Act makes void any term in a domestic building contract which purports to annul, vary or exclude any provision of the Act.^[33]

43 Although the contract does not contemplate that the design and construction will be carried out by the vendor, the contract contains provisions retaining some involvement by the vendor in the building development process. Under special condition 17.1 the vendor may "approve minor variations to the Works (including the substitution of fixtures and fittings described in Schedule B by other fixtures and fittings of the same nature and similar quality) but shall not approve any major variations to the Works without the consent of the purchaser..."

Under special condition 37.1 the purchaser acknowledges that the vendor "may be required to include additional structural elements in the Project not currently shown in the Plans and Specifications to cater for the environmental conditions associated with the MAB Precinct."^[34]

44 In special condition 24 the purchaser undertakes that it will not prevent, limit or restrict the vendor from doing various things (for example erecting barriers, taking sole and exclusive possession of parts of the property,

erecting 'for sale' signs or promotional material or using rights of way) necessary to complete the works or the project as a whole.

45 Special condition 26 of the contract provides that:

"26.1 The purchaser hereby acknowledges that the vendor intends to proceed with and complete the Works in response to market demand and that the timing for the commencement of the Works will be made by the vendor at its sole, absolute and unfettered discretion.

26.2 Notwithstanding special condition 26.1 the purchaser hereby acknowledges that the vendor may at any time prior to commencement of the Works give notice in writing to the purchaser that the Works and/or the Project cannot or will not proceed for any reason that the vendor in its sole discretion may determine and the vendor shall be entitled to rescind this contract and return the deposit and accrued interest (less bank and government charges) to the purchaser at any time."

Mirvac (Docklands) Pty Ltd v Peter Evan Philp^[35]

46 In *Mirvac*^[36] Byrne, J. had to decide whether an off-the-plan contract between Mirvac Docklands ("Docklands") and Mr Philp, was a major domestic building contract. The contract was in similar terms to the contract of sale in this case. It provided that "the Apartment and the Building will be constructed by the Builder under a major domestic building contract" and that "nothing in this Contract will be construed as imposing on the Vendor any obligation in relation to construction, which will make this Contract a Major Domestic Building Contract."

47 Byrne, J. summarised the provisions relating to the building works as follows

"The plans annexed to or referred to in the contract were of extreme generality. The area which is the subject of the contract described as 'an apartment generally described in the Building Plans and Specifications and identified by the address set out in the Particulars of Sale'. The plans referred to are 26 drawings which appear from their description to be little more than floor plans for the various levels, two sections and four elevations. Included in the contract are two undimensioned floor plans showing alternative general layouts of the department. Each is endorsed with the caveat:

'The information on this floor plan is believed to be correct but is not guaranteed. Dimensions and specifications are subject to changes without notice. Prospective purchasers must rely on their own enquiries.'

The specifications are in fact only three pages setting out nothing more than a list of fixtures, fittings and finishes without any detail as to type or quality."

48 The purchaser sought to avoid the contract on the grounds that it was a major domestic building contract, and that it breached s 11 of the DBC Act because the purchaser had been required to pay more than 5% of the purchase price before the builder had started any work under the contract.^[37]

49 Byrne, J. held that though the contract had been carefully drawn to avoid the conclusion that it was major domestic building contract, this attempt was unsuccessful. In his view Docklands was responsible for arranging and managing the building work, despite the fact that the design and construction of the building and the particular apartment were to be carried out by a separate entity, Mirvac Constructions (Vic) Pty Ltd or such other builder as Docklands might nominate from time to time. This was the case because Docklands

- 50 • was to select the builder;
- retained responsibility to complete work associated with the apartment, including the landscaping; and
- could order variations and alterations to the building specifications.

50 Byrne, J. also gave weight to the fact that the purchaser had accepted a series of warranties that imposed contractual obligations on Docklands in relation to the design and construct contract. These included provisions relating to "the identity of the builder, the form of the building contract, the provision for statutory insurance, the requirement that the work conform generally to the plans and specifications, that the work will be completed by settlement date and that defects and shrinkages will be attended to by the builder."

51 In his view, these were aspects of either arranging for the carrying out of building work or managing it.^[38]

52 In the present case, his Honour respectfully declined to follow the approach in *Mirvac* finding, in his view: "[the provisions of that contract] like the corresponding provisions in the present case, required Docklands to ensure that the building would be constructed under a major domestic building contract with the result that those activities would be carried out, managed or arranged by a registered builder."^[39]

53 I agree with his Honour that there are no material differences in the terms of the contract for sale between Shaw and Newquay and the contract for sale considered by Byrne J in *Mirvac*, except perhaps that Mirvac had responsibility for carrying out "associated works" such as landscaping. I also note that in *Presser v Ocean View Properties Pty Ltd*^[40] Habersberger, J. in obiter preferred the approach taken by the learned judge below to that of Byrne, J. in *Mirvac*.

Counsels' submissions

54 Counsel for the appellant, Mr Merralls, contended that the judge below had erred by reading down the clear meaning of the word "arrange" to exclude a developer in the position of Newquay and that this court should follow the decision in *Mirvac*.^[41] Consequently the contract between Mr Shaw and Newquay was a "major domestic building contract", within s 42 of the DBC Act.

- 55 The value of the apartment which was to be constructed exceeded \$5000 and Newquay had responsibility for arranging and managing the carrying out of the construction of Mr Shaw's apartment. It was said that the word "arrange" in the definition of domestic building contract in s 3, should be given its dictionary definition as "[planning] or [settling] beforehand the details of something to be done or [giving] instructions for something to take place".^[42]
- 56 Mr Merralls submitted that a major domestic building contract was not limited to contracts to carry out building work, but extended to contracts under which a developer arranged for such work to be carried out by another company or person. In this case both the builder Bovis and the developer Newquay were builders within s 3, because the developer was responsible for "arranging" the work and Bovis for building the apartment. Newquay's role in arranging the work was evident from its responsibility for selecting the builders, its power to approve minor variations to the works under clause 17.1 of the contract of sale with Mr Shaw and its power to include additional structural elements in the Project to cater for various environmental conditions under clause 37.1 of the contract.
- 57 In response to a question from Eames, J.A. about whether the definition of "Builder" in s 3 would apply to a person whose role was limited to receiving a "spotters fee" for acting as an intermediary between the purchaser and the builder, Mr Merralls said that they might be.
- 58 The broad thrust of the submission made by counsel for the appellant, Mr Kelly, was that the words "arrange or manage" in the definition of "domestic building contract" should be interpreted so that it did not cover both Newquay and Bovis. It was submitted that the *DBC Act* should be read alongside other legislation which protects purchasers of homes off-the-plan, including the *Subdivision Act 1988*, which regulates the subdivision of land (including airspace, in the case of multi-storey buildings) and the *Building Act 1995*, which regulates building and building standards and imposes obligations on builders to take out insurance.
- 59 Mr Kelly said that the court should construe the *DBC Act* to "produce a sensible, efficient and just operation" of these three inter-related statutes. Interpreting the words "arrange or manage" so as to include a contract of sale by a developer of an off-the-plan apartment, to be designed or constructed under a separate contract between the developer and a builder, would create absurdities and inefficiencies in the interaction of these three Acts. I return to these alleged absurdities later in this judgment.

Is the Agreement a "major domestic building contract" within the meaning of the DBC Act?

- 60 As the learned judge below recognised,^[43] the provisions of the *DBC Act* must be interpreted in light of its history, the policy goals it was intended to achieve and the legislative context in which it appears.^[44]

The Domestic Building Contracts Act in context

- 61 The *DBC Act* is intended to ensure the maintenance of proper standards for the carrying out of domestic building work, to enable disputes about domestic building work to be resolved as quickly fairly and cheaply as possible and to enable building owners to have access to insurance if domestic building work carried out under a major domestic building contract is incomplete or defective.^[45]
- 62 It achieves these goals by, among other things
- implying statutory warranties on the quality of work into domestic building contracts;^[46]
 - enabling any person who becomes the owner of a building or land which has been built under a domestic building contract, to enforce these warranties;^[47]
 - prohibiting unregistered builders from entering into major domestic building contracts;^[48] and
 - requiring various provisions to be included in major domestic building contracts.^[49]
- 63 The provisions of the *DBC Act* operate together with the *Building Act 1993*, which requires building practitioners to be registered, and makes it an offence for a builder to carry out, manage or arrange the carrying out of domestic building work under a major domestic building contract, without an appropriate level of insurance.^[50] Domestic builders were originally regulated by the *Housing Guarantee Act 1987*, but the *Building Act* was extended to require registration of domestic as well as commercial builders, by the enactment of the *Domestic Building Contracts and Tribunal Act 1995* (now the *DBC Act*).^[51]
- 64 Section 137E of the *Building Act* imposes insurance requirements in relation to homes sold before completion of the contract, including homes sold "off-the-plan". The provision was introduced by an amendment made to the *Building Act* by the *Domestic Building Contracts and Tribunal Act 1995* (now the *DBC Act*). That Act phased out the Housing Guarantee Fund, which provided for payment of compensation to people who suffered loss because their houses were defective or were not completed,^[52] and replaced it with provisions requiring builders to take out private insurance.^[53]
- 65 In its original form, s 137E(a) provided that "A person must not enter into a contract for the sale by the person of land on which a home is being constructed, or is to be constructed, if the contract provides for or contemplates that the construction of the home will be completed before the completion of the contract unless-- (a) the home is being constructed under a major domestic building contract;..."^[54]
- 66 Section 137E(a) was amended by s 11 of the *Domestic Building Contracts and Tribunal (Amendment) Act 1996*, so that, in paragraph (a) after "contract" the words "or the contract of sale is a major domestic building contract or provides that the home is to be constructed under a major domestic building contract" were inserted.

- 67 In his second reading speech the Minister for Planning and Local Government said that *"Representations have been received by government to the effect that there may be some ambiguity in the ability of developers of large scale domestic high-rise properties to sell off the plan before they have entered into a construction contract with a registered builder. While the government has received legal advice that there is no such ambiguity, the government is anxious to put the matter beyond all possible doubt and is therefore proposing a minor amendment to s 137E of the Building Act 1993."*^[55]
- 68 The second reading speech indicates that s 137E was intended to differentiate between registered builders who carry out construction works and developers who sell properties off-the-plan, but who do not undertake construction themselves. That distinction would be meaningless if developers who sell properties off-the-plan were treated in the same way as builders. I note that Byrne, J. did not refer to the inter-relationship between the *DBC Act* and the *Building Act* in his judgment in *Mirvac*, presumably because this was not argued.
- 69 Section 137E now covers several different types of arrangements which may be made when a sale is made "off-the-plan" and the contract provides for or contemplates that the construction of the home will be completed before the completion of the contract—
- the home may already be in the course of construction under a "major domestic building contract";
 - construction of the home may not have commenced, but the contract of sale is itself a major domestic building contract; or
 - construction of the home may not have commenced, but the contract may provide that it is to occur "under a major domestic building contract." [emphasis added]
- 70 This case raises the issue of whether s 42 applies to all of these arrangements, or only to the situation in which the developer is also responsible for the design and construction of the home.
- 71 Leaving aside this question for the moment, a purchaser who buys land off-the-plan (including an apartment or a building which is to be constructed) is protected by the existence of a major domestic building contract whichever of these options is followed.
- 72 The registration requirements in the *Building Act* will apply to the person or body carrying out the work. Because the building includes residential apartments, the contract will have to include the provisions specified in Part 3 of the *DBC Act*. Under s 137E of the *Building Act*, depending on the nature of the contract either the developer or the builder will be required to take out insurance. Warranties will be implied into the contract by s 8 of the *DBC Act*. If the contract of sale to the purchaser is not itself a major domestic building contract the warranties implied into the contract between the developer and the builder will run with the land under s 9.
- 73 Although the *Building Act* applies to all forms of buildings, some parts of it operate together with the *DBC Act* as a legislative scheme which provides consumer protection for people who enter into domestic building contracts. It was the latter legislation which amended the *Building Act 1993* to include provisions to deal with "off-the-plan" contracts in s 137E. It is therefore legitimate to take account of the way that s 137E deals with such contracts in interpreting s 42 of the *DBC Act*.
- 74 The excerpt from the second reading speech set out in [67] above supports the respondents' submission that the words "arrange or manage" in s 3 of the *Domestic Building Contracts Act* were not intended to cover a developer who enters into a contract to sell a home off-the-plan, which provides that the building in which the home is situated will be constructed under a separate major domestic building contract made between the developer and a builder.
- 75 In *Sweeney v Fitzhardinge* Griffith, C.J. said that *"When there is fresh legislation dealing with matters that have already been the subject of legislation, then, ex necessitate rei, all the acts must be construed together for the purpose of answering any question arising under them."*^[56]
- 76 Similarly, in *Commissioner of Stamp Duties v Permanent Trustee Company* Kirby, P (as he then was) said that where there were several statutes making up a legislative scheme *"[w]e should presume that Parliament intended its legislation to operate rationally, efficiently and justly, together."*^[57]
- 77 This supports a construction of the *DBC Act* which enables it to operate rationally alongside the provisions of the *Building Act*, which cover persons undertaking domestic building work.

Difficulties which arise if the contract of sale is a "major domestic building contract"

- 78 The respondent submitted that interpreting the *DBC Act* so as to treat the off-the-plan contracts of sale of the kind made between Mr Shaw and Newquay as major domestic building contracts, would lead to absurd results. The learned judge below also identified absurdities which would follow from this approach.^[58]
- 79 Section 136 makes it an offence for a builder to carry out major domestic building work without being covered by the required insurance. It was said that if contracts of sale of the kind under consideration here were classified as major domestic building contracts, the three different types of contracts contemplated by s 137E would be elided, so that both developers and builders would have to take out insurance against the risk that the works were defective. The cost of double insurance would be passed on to the purchasers of off-the-plan apartments. Developers would be required to register as builders, whether or not they were actually involved in building work. Contracts for sale off-the-plan would have to contain the provisions required by Parts 2 and 3 of the *DBC Act*, though such provisions would also have to be included in the contract between the developer and the builder.

80 With one qualification, I agree with the learned judge below^[59] that this interpretation would produce absurd results. The qualification relates to the concern that a broad interpretation of "major domestic building contract" would require both developers and builders to insure against the same risk. Even if it were found that the contract between Mr Shaw and Newquay were a major domestic building contract, this might not require both Newquay and Bovis to insure. As Mr Merralls pointed out, s 135(6) says that "a person is covered by the required insurance if (c) in the case of a person who manages or arranges the carrying out of domestic building work, the work carried out by the person and the building work which the person manages or arranges is covered by the required insurance."

Thus, the conclusion that this was a major domestic building contract would not necessarily require both the builder and the developer to take out insurance.

81 This provision does not, however, overcome the other difficulties identified by the respondent and relied upon by his Honour. Further, it is not necessary to conclude that a contract of sale of the kind made between Mr Shaw and Newquay is a major domestic building contract, in order to protect purchasers under off-the-plan contracts. The builder under the design and construct contract must be registered under the *Building Act* and the implied warranties in s 9 run with the land, so that a purchaser in the position of Mr Shaw would have their benefit.

82 While the fact that the contract itself does not fall within the *DBC Act* deprives off-the-plan purchasers of the right conferred by s 42 to refuse to complete the contract until the work has been carried out in accordance with the plans and specifications set out in the contract, this does not deprive them of the common law right to rescind the contract if a major breach occurs.

Conclusion

83 In order to give effect to the legislative scheme established by the inter-related provisions in the *Building Act*, and the *DBC Act*, and to avoid the absurd results identified above, it is necessary to read down the words "arrange or manage" in s 3 of the *DBC Act* to exclude contracts of sale which contemplate that a building or a home will be constructed by a builder under a major domestic building contract.

84 I agree with the learned judge below that this requires the words "manage or arrange" and "carrying out of domestic building work" to be read as referring to the "practical activities involved in the work of constructing a building". Under special condition 18.1 Newquay contracted to enter into a major domestic building contract with a builder, not to construct the building itself. As his Honour said: "*What [Newquay] had to do was commission a registered builder to construct the apartment building and in various ways facilitate the construction of the building by that builder. This did not make it a builder for the purposes of the Domestic Building Contracts Act and did not make the contract of sale a domestic building contract as defined in that Act.*"^[60]

85 In some cases the level of control maintained by the developer may be such as to bring it within ss 3 and 5 of the *DBC Act*.^[61] A developer which is directly responsible for design and construction of the building would be caught by the *DBC Act*, including s 42. But the fact that a developer has the powers mentioned in [43]–[44] above, together with the power to select the builder and approve variations, is insufficient, to bring it within the provision. This does not deprive the words "manage or arrange"^[62] of meaning, as they will apply to a situation where a builder who is under a contractual obligation to carry out domestic building work employs sub-contractors to carry out some aspects of that work.

86 Since these proceedings were initiated, the *DBC Act* has been amended to provide that contracts for sale of land on which a home is being constructed or is to be constructed, that contemplate that the construction of the home will be completed before the completion of the contract are not to be taken as domestic building contracts if

"(a) the home is being constructed under a separate contract that is a major domestic building contract.

(b) the contract provides that the home is to be constructed under a separate contract that is a major domestic building contract."

87 According to the second reading speech the purpose of the legislation was to ensure that off-the-plan contracts of sale between purchasers and developers were not major domestic building contracts.^[63] The amending legislation specifically provides that it does not affect a contract, such as this one, which is the subject of a proceeding commenced before 16 March 2004.^[64]

Application for leave to amend the grounds of appeal

88 In the course of oral argument, the appellant sought leave to add a ground of appeal to the effect that the learned Judge below erred in making an order for indemnity costs, and that an order for costs on a part and party basis should be substituted if the appellant were unsuccessful on the appeal.

89 No explanation was provided for the delay or omission in alleging that his Honour erred in making the indemnity costs order. Accordingly, the Court declined to grant leave to add the ground of appeal.

90 I would dismiss the appeal.

Mr J.D. Merralls, Q.C. with Mr J.A.F. Twigg instructed by Coadys
Mr A.J. Kelly, S.C. instructed by Arnold Bloch Leibler

- [1] *Shaw v Yarranova Pty Ltd & Anor* [2006] VSC 45 at [9].
- [2] [2006] VSC 45 at [17].
- [3] *Ibid* at [24].
- [4] *Ibid* at [22]–[23].
- [5] *Ibid* at [29]–[30].
- [6] *Ibid* at [32]–[33].
- [7] (2004) 10 VR 435.
- [8] *Ibid* at [94].
- [9] *Ibid* at [95]; see also [110].
- [10] [2004] VSC 301.
- [11] *Ibid* at [31]; cf. *Presser v. Ocean View Properties Pty Ltd* [2006] VSC 143.
- [12] At [76].
- [13] See, eg, *Stingel v. Clark* [2006] HCA 37 at [26]–[29] (Gleeson CJ, Callinan, Heydon and Crennan JJ) and at [117]–[118] (Kirby J). See also *Cody v J. H. Nelson Pty Ltd* (1947) 74 CLR 629 at 648 (Dixon J).
- [14] See *Heydon's Case* (1584) 3 Co Rep 7a at 7b; D.C. Pearce and R.S. Geddes, *Statutory Interpretation in Australia* (first published 1974, 5th ed, 2001) at [2.5].
- [15] At [63].
- [16] Section 135(6) of the *Building Act* provides that: "A person is covered by the required insurance if (c) in the case of a person who manages or arranges the carrying out of domestic building work, the work carried out by the person and the building work which the person manages or arranges is covered by the required insurance."
- [17] See, eg, *Stingel v. Clark* [2006] HCA 37 at [26] (Gleeson CJ, Callinan, Heydon and Crennan JJ) and at [117] (Kirby J). See also D.C. Pearce and R.S. Geddes, *Statutory Interpretation in Australia* (first published 1974, 5th ed, 2001) at [3.11].
- [18] Victoria, *Parliamentary Debates*, Legislative Assembly, 16 May 1996, 196 (Robert Maclellan, Minister for Planning and Local Government).
- [19] See D.C. Pearce and R.S. Geddes, *Statutory Interpretation in Australia* (first published 1974, 5th ed, 2001) at [3.35]. See also *R v Yager* (1977) 139 CLR 28 at 43 (Mason J).
- [20] *Shaw v Yarranova Pty Ltd & Anor* [2006] VSC 45, especially at [45]–[64].
- [21] *Domestic Building Contracts Act 1995*, s 42.
- [22] [2004] VSC 301.
- [23] It was also a "major domestic building contract" because the contract price was more than \$5000.
- [24] The assignment took place by deed dated 13 December 2000.
- [25] Clause 3.6 which specifies the amount of the contract sum attributable to domestic building work and for other building work, as required by *DBC Act 1995*, s 12.
- [26] *Building Act 1993*, s 176(2A), (4).
- [27] *Building Act 1993* s 136(2).
- [28] This issue was considered by the judge below at [86] where he said that it was not necessary to decide whether the developers work came within s 5(1)(e) as the provision did not apply for other reasons, and see also [88] and [89] where he concluded that the work to be done by Newquay was associated with its work as developer and not with the construction and erection of the building itself.
- [29] See definition of "Project" in special condition 1.34.
- [30] Special condition 18.1.
- [31] As defined in special condition 1.31.
- [32] Interestingly clauses 1 and 21 provide for the selection of the "a colour option" as described in Schedule B. The option selected was "contemporary" which is not listed as an option in Schedule B.
- [33] Refer to s 132(1)(a) or (b) of the *DBC Act* which renders void any part of an agreement that purports to "exclude, modify or restrict" any right conferred by the Act in relation to a domestic building contract.
- [34] The MAB Precinct is the part of the Docklands Area being developed by the vendor and any adjacent land see special condition 1.24.
- [35] [2004] VSC 301.
- [36] *Ibid*.
- [37] It was also said that Docklands was in breach of s 42 and that VCAT lacked jurisdiction to determine the matter. The latter issue arose because Mr Philp had filed an application with VCAT seeking declaratory relief.
- [38] [2004] VSC 301 at [31].
- [39] [2006] VSC 45 at [76].
- [40] [2006] VSC 143.
- [41] *Supra*.
- [42] Lesley Brown (ed), *The New Shorter Oxford Dictionary* Vol 1 definition of "arrange".
- [43] [2006] VSC 45 at [35].
- [44] Cf *Stingel v Clark* [2006] HCA 37 at [89], per Kirby J.
- [45] See s 1 of the *DBC Act*.
- [46] *DBC Act* s 8.
- [47] *DBC Act* s 9.
- [48] *DBC Act* s 29.
- [49] *DBC Act* Part 3, Division 2.
- [50] *Building Act 1993* s 136.
- [51] Parliament of Victoria, Hansard, second reading of *Domestic Contracts and Tribunal Bill*, Mrs J Wade, Attorney-General, 24 October 1995, Assembly, 695–696.
- [52] *Ibid*.
- [53] *Ibid* at 696–7. Mrs Wade said that "the insurance cover for building owners will be privatised; and that 'a range of insurance options will be open to the builder, which will be supplied by private insurance companies'.
- [54] Sub-section (b) is not relevant here.
- [55] Parliament of Victoria, Hansard, Second Reading of the *Domestic Building Contracts and Tribunal (Amendment) Bill*, Mr Maclellan, 16 May, 1996 at 196.
- [56] (1906) 4 C.L.R. 716 at 726.
- [57] (1987) 9 N.S.W.L.R. 719 at 724.
- [58] [2006] VSC 45 at [63].
- [59] *Ibid*.
- [60] *Ibid* at [60].
- [61] Note that the *Domestic Building Contracts (Amendment) Act 2004*, discussed in [67] does not exclude this situation from the operation of the *DBC Act*.
- [62] In s 3 they appear in the present tense ie "manages or arranges".
- [63] The legislation was recently considered in *Pan Urban Watergate Pty Ltd v Graham* [2005] VSC 505.