Article Information

Authors: Megan Calder, Scott Coffey
Service: Construction Litigation, Projects & Construction
Sector: Infrastructure

Money talks in the business of domestic building: The purpose of profit is key

The *Building and Construction Industry Security of Payment Act 2002* (Vic) (Act) will not apply to a domestic building contract unless the building owner is determined to be in the business of domestic building.[1] This means that the question of whether a company or individual is "in the business of domestic building" can have serious ramifications if a builder seeks to rely upon the security of payments regime.

In a recent case clarifying the position in Victoria, Stynes J has handed down a decision in the matter of *Saath Pty Ltd v Seascape Constructions Pty Ltd*[2] (**Saath v Seascape**), setting out when a building owner will not be considered to be in the business of domestic building for the purposes of the Act.

In *Saath v Seascape,* the plaintiff building owner was a company brought into existence for the purpose of developing four townhouses on a block of land in Bulleen, Victoria. The directors of the plaintiff were good friends, and the purpose of the development was so that their families could live close to one another.

The defendant builder was engaged in November 2015, with completion due on or around December 2016. After a protracted dispute, which included whether completion was actually achieved, on 27 November 2020 the builder served a payment claim on the plaintiff in the amount of $231,250.00. The plaintiff served its payment schedule, which certified a nil amount. The builder applied for adjudication.

In its adjudication response, the plaintiff argued that the adjudication application was invalid because the plaintiff was not in the business of building residences. This argument was not accepted by the adjudicator, who determined the amount of $157,250.00 was owing to the builder.

The plaintiff appealed the adjudicator's decision, seeking for the adjudication determination to be quashed on the basis (among other things) that the adjudicator did not have jurisdiction because the plaintiff was not in the business of building residences for the purpose of section 7(2)(b) of the Act.

In granting the application, Stynes J found that the plaintiff was not in the business of building residences and that therefore the Act did not apply to the contract.

Applicable Principles

In order for the Act to apply to a domestic building contract, it is an essential pre-condition that a building owner is in the business of building residences and, importantly, that the contract is entered into in the course of, or in connection with, that business.[3]

It was undisputed in this case that the contract was a domestic building contract.

The key time for determining whether the exemption in section 7(2)(b) of the Act applies is at the date the contract was entered into.[4] This means that if the building owner subsequently engages in the business of domestic building, this will not determine whether the Act applies.

The phrase "in the business of building residences" is not defined in the Act. In considering the meaning of this phrase, Stynes J cited a number of cases and extracted the following principles:

- the expression connotes the construction of dwelling houses as a commercial enterprise on the basis of a going concern, engaged in for the purpose of profit on a continuous and repetitive basis;[5]
- section 7(2)(b) of the Act is referable to the actual business the building owner undertakes, not whether a party in the position of the building owner has the power to undertake an activity;[6]
- the determination of this question does not depend on the scale of the business, the success of the business, the number of projects undertaken either in the past or at any one time, or as contemplated for the future;[7]
- the application of the Act is in each case an issue of fact to be determined on a case by case basis;[8] and
- a single joint venture may be sufficient to fall within the concept of carrying on a business, in spite of the apparent absence of the element of a going concern conducted on a continuous and repetitive basis.[9]

In this case, Stynes J found that the plaintiff (a corporate trustee and not the landowner) was not in the business of building residences, primarily because the undisputed evidence of the plaintiff was that there was no intention on the part of the plaintiff or its directors to profit from the project at the time the contract was entered into. The intention was for the families of the two directors to live in the four residences being constructed.

Whether the Act will apply to a domestic building contract in Victoria will largely depend on whether the building owner has entered into the building contract for the purpose of profiting from the project.

Builders should be wary of relying on the Act (or indeed entering into the contract) in circumstances where the building owner is not ostensibly in the business of developing.

However, this case should give some comfort for builders working for established developers who seek to rely on the Act.

Key Take Aways

- The Act will not apply to a domestic building contract unless the building owner is “in the business of building residences”.
- A building owner is unlikely to be considered to be in the business of building residences if the building owner entered into the domestic building contract with no intention of profiting from it.
- The relevant time for determining whether the developer intended to profit from the contract is at the time the contract was entered into, and any subsequent change in intention will not be relevant in determining whether the Act applies.

[1] Section 7(2)(b) of the Act.

[2] [2021] VSC 358.

[3] Section 7(2)(b) of the Act.

[4] *BWay Group v Pasiopolous* [2019] VCC 691, [26]-[29] (Marks J).

[5] *Director of Housing (Vic) v Structx Pty Ltd* [2011] VSC 410, [28] (Vickery J).

[6] Ibid, [37].

[7] *Promax Building Developments Pty Ltd v PCarol & Co Pty Ltd* [2017] VCC 495, [27] (Anderson J).

[8] *Golets v Southbourne Homes Pty Ltd* [2017] VSC 705, [33] (Vickery J).

[9] Ibid, [37].