

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
COMMERCIAL COURT
TECHNOLOGY, ENGINEERING AND CONSTRUCTION LIST

Not Restricted

S ECI 2017 0153

H BUILDINGS PTY LTD (ACN 091 236 912)
formerly Hickory Group Pty Ltd

Plaintiff

v

OWNERS CORPORATION 1 PS537642N & ORS
(according to attached Schedule of Parties)

Defendants

JUDGE: Digby J
WHERE HELD: Melbourne
DATE OF HEARING: 16 August 2017
DATE OF JUDGMENT: 22 December 2017
CASE MAY BE CITED AS: H Buildings v Owners Corporation
MEDIUM NEUTRAL CITATION: [2017] VSC 802

DECLARATORY RELIEF - Challenge to the jurisdiction of the Victorian Civil and Administrative Tribunal to continue to deal with applications - Whether *Domestic Building Contracts Act 1995* applies to a 'residential hotel' development - Availability of injunctive relief to restrain the Victorian Civil and Administrative Tribunal from continuing to deal with a matter beyond jurisdiction - *Domestic Building Contracts Act 1995*, ss 3, 4, 5, 6, 8, 9, 53 and 54.

INJUNCTION - Restraining the Victorian Civil and Administrative Tribunal - Want of jurisdiction to deal with disputes in relation to building works which are excluded from the *Domestic Building Contracts Act 1995* as a 'residential hotel'.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr G H Golvan QC with Mr B Mason of Counsel	Piper Alderman
For the First to Ninety-Sixth Defendants	Mr H Foxcroft QC with Mr B Reid of Counsel	McMahon Fearnley
For the Ninety-Eighth Defendant	Mr R Harris	Marchesin & Co.
For the Ninety-Ninth Defendant	Mr S Grahame	Lander & Rogers

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HIS HONOUR:

- 1 By Originating Process dated 23 June 2017, H Buildings Pty Ltd (formerly Hickory Group Pty Ltd) ('the Builder') seeks orders including in substance that the defendants be restrained from proceeding with their current claims at the Victorian Civil and Administrative Tribunal ('the Tribunal') on the basis that the Tribunal has no jurisdiction to hear and determine the claims made in that proceeding by the defendants.
- 2 The Tribunal proceeding which the Builder applies to restrain has been on foot for more than three years, is in a state of advanced interlocutory completion, and is expected to be heard at the Tribunal in about July 2018. Further, I note the proceeding before the Tribunal has also been listed for compulsory conference in about mid-February 2018.

Background

- 3 The Builder is the first respondent in the abovementioned proceeding numbered D1177/2013 ('the VCAT proceeding') before the Tribunal.
- 4 The first to ninety-sixth defendants ('the defendants') to this proceeding are applicants in the VCAT proceeding brought against the Builder as first respondent, in connection with a multitude of largely defect-related claims in respect of the Works defined below. In the VCAT proceeding, the defendants allege that the relevant Contract is a 'domestic building contract' within the meaning of the *Domestic Building Contracts Act 1995 (Vic)* ('*DBC Act*').
- 5 At the Tribunal, the defendants' claims in relation to the Works allege, inter alia, breaches of warranties which run with the land pursuant to ss 8 and 9 of the *DBC Act*. The defendants' claims also include claims of negligence against the Builder.
- 6 The defendants' claims before the Tribunal are made in relation to all of the buildings constructed as part of the Works. The defendants' claims at the Tribunal do not distinguish between those parts of the Works which are solely in the nature of

residential premises and those parts of the Works which are not.¹

7 The claims brought against the Builder in the VCAT proceeding concern alleged defects in the building works ('the Works'), which the Builder performed at a development known as The Resort Torquay, at 100 The Esplanade, Torquay, in the State of Victoria ('The Resort Torquay').

8 The Works were undertaken pursuant to a contract between Massey Pty Ltd ('the developer') as the owner/developer and the Builder, dated 1 December 2005, for a lump sum price of \$45,580,000 (exclusive of GST) ('the Contract').

Relief for remedy sought by the Builder

9 The Builder's motion seeks orders, including:

(a) a declaration that the Tribunal has no jurisdiction to hear and determine or otherwise proceed with the claims made in the VCAT proceeding;

(b) an injunction restraining the defendants (as applicants in the VCAT proceeding) from taking any further steps or otherwise proceeding with the VCAT proceeding.

Relevant legislation

10 In broad overview, the *DBC Act* provides that:

(a) section 3 of the *DBC Act* defines a 'Domestic Building Contract' 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';

(b) the term 'home' is defined in s 3 as 'any residential premises and includes any part of a commercial or industrial premises that is used as a residential premises';

¹ Plaintiff's Submissions, 7 July 2017, [2].

- (c) the definition of ‘home’ in s 3 of the *DBC Act* is expressed not to include –
 - a motel, residential club, residential hotel or residential part of licensed premises under the *Liquor Control Reform Act 1998*;
- (d) ‘Domestic Building Work’ is defined in s 3 of the *DBC Act* as ‘any work referred to in section 5 that is not excluded from the operation of this Act by section 6’;
- (e) section 4 of the *DBC Act* identifies the objects of the Act which include ‘the maintenance of proper standards in the carrying out of domestic building work’;
- (f) section 5 of the *DBC Act* describes the building work to which the Act applies. Section 5(1)(a) provides that the *DBC Act* applies to ‘the erection or construction of a home’;
- (g) section 6 sets out a number of types of building work to which the *DBC Act* does not apply, including, for example, a farm building and buildings intended to be used only to accommodate animals.

11 The key parts of the legislation necessary to understand the following summary of the parties’ submissions, and these reasons, are set out below:

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.

...

3 Definitions

(1) In this Act –

...
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 work means any work referred to in section 5 that is not excluded from the operation of this Act by section 6;

domestic building work dispute has the meaning set out in section 44;

home means any residential premises and includes any part of a commercial or industrial premises that is used as a residential premises but does not include –

- (a) a caravan within the meaning of the *Residential Tenancies Act 1997* or any vehicle used as a residence; or
- (b) any residence that is not intended for permanent habitation; or
- (c) a rooming house within the meaning of the *Residential Tenancies Act 1997*; or
- (d) a motel, residential club, residential hotel or residential part of licensed premises under the *Liquor Control Reform Act 1998*; or
- (e) a nursing home, hospital or accommodation associated with a hospital; or
- (f) any residence that the regulations state is not a home for the purposes of this definition;

...

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) A contract for the sale of land on which a home is being constructed or is to be constructed that provides or contemplates that the construction of the home will be completed before the completion of the contract is not, and is not to be taken to form part of, a domestic building contract within the meaning of this Act if –
 - (a) the home is being constructed under a separate contract that is a major domestic building contract; or
 - (b) the contract of sale provides that the home is to be constructed under a separate contract that is a major domestic building contract.

...

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 subsection (1) includes a reference to any part of a home.

6 Building work to which this Act does not apply

(1) This Act does not apply to the following work—

- (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 draftsman²;
- (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.

...

...

8 Implied warranties concerning all domestic building work

The following warranties about the work to be carried out under a domestic building contract are part of every domestic building contract—

- (a) the builder warrants that the work will be carried out in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract;
- (b) the builder warrants that all materials to be supplied by the builder for use in the work will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new;
- (c) the builder warrants that the work will be carried out in accordance with, and will comply with, all laws and legal requirements

- including, without limiting the generality of this warranty, the *Building Act 1993* and the regulations made under that Act⁴;
- (d) the builder warrants that the work will be carried out with reasonable care and skill and will be completed by the date (or within the period) specified by the contract;
 - (e) the builder warrants that if the work consists of the erection or construction of a home, or is work intended to renovate, alter, extend, improve or repair a home to a stage suitable for occupation, the home will be suitable for occupation at the time the work is completed;
 - (f) if the contract states the particular purpose for which the work is required, or the result which the building owner wishes the work to achieve, so as to show that the building owner relies on the builder's skill and judgement, the builder warrants that the work and any material used in carrying out the work will be reasonably fit for that purpose or will be of such a nature and quality that they might reasonably be expected to achieve that result.

...

53. Settlement of building disputes

- (1) VCAT may make any order it considers fair to resolve a domestic building dispute.
 - (2) Without limiting this power, VCAT may do one or more of the following –
 - (a) refer a dispute to a mediator appointed by VCAT;
 - (b) order the payment of a sum of money –
 - (i) found to be owing by one party to another party;
 - (ii) by way of damages (including exemplary damages and damages in the nature of interest);
 - (iii) by way of restitution;
 - (ba) order the payment of a sum of money representing a part payment under a major domestic building contract if –
 - (i) the requirement in paragraph (b) of section 42 has been met but the requirement in paragraph (a) of that section has not; and
 - (ii) VCAT is satisfied that the work required to complete the contract (including rectifying any defects) is minor in nature and not such as would prevent the owner from occupation and quiet enjoyment of the building;
- ...
- (c) vary any term of a domestic building contract (including the completion date, the contract price, a provisional sum or the amount to be paid for any prime cost item);
 - (d) declare that a term of a domestic building contract is, or is not, void under section 132;
 - (e) declare void any unjust term of a domestic building contract, or otherwise vary a domestic building contract to avoid injustice;
 - (f) order the refund of any money paid under a domestic building contract or under a void domestic building contract;
 - (g) order rectification of defective building work;
 - (h) order completion of incomplete building work.
- (3) In awarding damages in the nature of interest, VCAT may base the amount awarded on the interest rate fixed from time to time under section 2 of the *Penalty Interest Rates Act 1983* or on any lesser rate it thinks appropriate.
 - (4) In determining whether a term of a contract is unjust under

subsection (2)(e), VCAT may have regard to—

- (a) the intelligibility of the contract generally, and of the term in particular;
 - (b) the extent to which the term, and its legal and practical effect, was accurately explained to the building owner before the term was agreed to and the extent to which the building owner understood the term and its effect;
 - (c) the relative bargaining power of the parties to the contract;
 - (d) the consequences to the parties to the contract if the term is complied with or not complied with and the relative hardship of those consequences to each party;
 - (e) whether or not it was reasonably practicable for the building owner to reject, or negotiate for a change in, the term before it was agreed to;
 - (f) the relationship of the term to the other terms of the contract;
 - (g) whether the building owner obtained independent legal or other expert advice before agreeing to the term;
 - (h) whether unfair pressure, undue influence or unfair tactics were used to obtain the building owner's consent to the contract or the term;
 - (i) whether at the time the term was agreed to the builder knew, or could probably have found out by asking, that the term would cause the building owner hardship;
 - (j) the conduct of the parties to the contract after the term was agreed to;
 - (k) whether the term is usually found in domestic building contracts;
 - (l) the justification for the term;
 - (m) whether the term is unconscionable, harsh or oppressive;
 - (n) any other factor VCAT thinks is relevant.
- (5) Despite anything to the contrary in this section, in determining whether a term of a contract is unjust, VCAT is not to have regard to any injustice arising from circumstances that were not reasonably foreseeable when the term was agreed to.

54 What is a domestic building dispute?

- (1) A *domestic building dispute* is a dispute or claim arising —
- (a) between a building owner and —
 - (i) a builder; or
 - (ii) a building practitioner (as defined in the *Building Act 1993*); or
 - (iii) a sub-contractor; or
 - (iv) an architect —in relation to a domestic building contract or the carrying out of domestic building work; or
 - (b) between a builder and —
 - (i) another builder; or
 - (ii) a building practitioner (as defined in the *Building Act 1993*); or
 - (iii) a sub-contractor; or
 - (iv) an insurer —in relation to a domestic building contract or the carrying out of domestic building work; or
 - (c) between a building owner or a builder and —
 - (i) an architect; or
 - (ii) a building practitioner registered under the *Building Act 1993* as an engineer or draftsman —in relation to any design work carried out by the architect or

- building practitioner in respect of domestic building work;
or
- (d) between a lot owner or an owners corporation and an initial owner (within the meaning of section 68 of the *Owners Corporations Act 2006*) of land in a plan of subdivision in relation to an obligation imposed on the initial owner under section 68(2) of the *Owners Corporations Act 2006*.
 - (2) For the purposes of subsection (1), a dispute or claim includes any dispute or claim in negligence, nuisance or trespass but does not include a dispute or claim related to a personal injury.
 - (3) A reference to a building owner in this section includes a reference to any person who is the owner for the time being of the building or land in respect of which a domestic building contract was made or domestic building work was carried out.

Builder's application for a declaration

Builder's submissions

12 The Builder submits that the VCAT proceeding is fundamentally misconceived and that the Tribunal has no jurisdiction to hear and determine the claims which the applicants in that proceeding have brought before it because:

- (a) the Works to be undertaken pursuant to the Contract did not constitute 'domestic building work';
- (b) the Contract was one between the Builder and a developer in relation to a large multi-storey residential hotel and was not a 'domestic building contract' as contemplated by the *DBC Act*;
- (c) the Works carried out under the Contract were intended to be for a 'residential hotel' and such Works are expressly excluded from the *DBC Act* definition of a 'home' capable of giving rise to a 'domestic building work';
- (d) to the extent that the Works, or any part of those Works, were not intended for the purpose of constructing a residential hotel, the residential part of the Works was intended, in any event, to include the residential part of licensed premises under the *Liquor Control Reform Act 1998*. These Works were also expressly excluded from the definition of a 'home' under s 3(1) of the *DBC Act*;

- (e) accordingly, the implied warranties which a Builder is required to provide with respect to 'domestic building work' under a domestic building contract, pursuant to ss 8 and 9 of the *DBC Act*, do not apply in this case and cannot be relied upon by the defendants in the VCAT proceeding; and
- (f) in the absence of a dispute in relation to 'domestic building work' or arising from a 'domestic building contract', a 'domestic building dispute' has not arisen between the parties, and the Tribunal does not have jurisdiction under s 53 of the *DBC Act* to resolve the claims brought against the Builder in the VCAT proceeding.

13 The Builder submits that the test as to whether or not a contract meets the definition of 'domestic building contract' in s 3 of the *DBC Act* depends upon the physical characteristics and the intended, and permitted, use of the premises to be constructed under that contract.²

14 The Builder highlights that the definition of 'home' in s 3(1) of the *DBC Act* comprises 'any residential premises and includes any part of a commercial or industrial premises that is used as residential premises'. The Builder also highlights that this definition is followed by a list of various residential premises which are excluded from the definition of 'home' including, as provided in s 3(1)(d):

a motel, residential club, residential hotel or residential part of licensed premises under the *Liquor Control Reform Act 1998*.

15 The Builder observes that s 46H of the *Planning and Environment Act 1987* (Vic) (*P&E Act*) provides for almost identical exclusions in relation to the definition of 'dwelling'.

16 The Builder's submission is that, on the proper construction of s 3(1) of the *DBC Act*, the definition of 'home' means premises intended to be used as residential premises, but not including the residential premises expressly excluded by s 3(1)(a) to (f) of the

² Plaintiff's Submissions, 7 July 2017, [17].

DBC Act.

- 17 The Builder submits that to ascertain whether residential premises fall within any of the exclusions to a 'home' in s 3(1) of the *DBC Act*, an assessment is required to be made in relation to the intended purpose of the premises to be constructed pursuant to the building contract.
- 18 The Builder also submits that whether the Works in question are subject to the *DBC Act* must be determined as at the time of the Contract.
- 19 The Builder submits that, in evaluating the proper characterisation of the premises to be constructed under the Contract, the Court is entitled to have regard to the terms of the Contract and also relevant extrinsic evidence which indicates the intended use of the premises to be constructed under the Contract.
- 20 The Builder also submits that there are many indicia contained within the *DBC Act* which support the construction that it is the intended use of the premises to be constructed, ascertained at the time of the Contract, and not the actual use of the premises after completion of the Works.³ For example, the Builder points out that features of the *DBC Act* make it a necessity that the contracting parties know, or at least the Builder knows, whether the *DBC Act* regulates the work to be performed under the Contract or not. Those indicia include:
- (a) the formal requirements of a domestic building contract as mandated by ss 31 and 33 of the *DBC Act*;
 - (b) it is only if the contract is a 'major domestic building contract' that it will be subject to a five-day cooling-off period pursuant to s 34 of the *DBC Act*;
 - (c) the contract, which is deemed to be a 'major domestic building contract' is, pursuant to s 35 of the *DBC Act*, one that permits the building owner to withdraw from the contract within seven days of certain requirements of the

³ Plaintiff's Submissions, 7 July 2017, [22]-[23].

Act not being satisfied; and

(d) s 32 of the *DBC Act* renders void any term of a Contract caught by the *DBC Act* that is contrary to the Act.

21 The Builder's submission is that the factual considerations and subjective intentions of individual subsequent purchases, including as to current use of the premises, are entirely irrelevant.

22 The Builder's submission is that, in this application, the Court is solely concerned with the proper construction of the Contract and the intended use of the development to be built in accordance with its terms when the contract was agreed, having regard to the exclusions contained in s 3(1) of the *DBC Act*.⁴

23 The Builder observes that neither the *DBC Act* nor any other relevant legislation defines the term 'residential hotel'.⁵

24 The Builder submits that, in the context of the *DBC Act*, the term 'residential hotel' refers to a hotel 'having residential premises and which provides hotel facilities to its occupants'.⁶

25 The Builder submits that 'residential hotel' is a facility which offers residential apartments which are accompanied by the benefits normally offered to occupants in a hotel complex. Such benefits include a hotel restaurant, recreational options such as pool and gymnasium facilities, conference and function centre facilities, a shop or shops, bars and alike.

26 The Builder observes that the resort to be constructed as part of the Works is intended to have the range of facilities and benefits referred to in the last preceding paragraph. The Builder observes that the benefits referred to are designed to be

⁴ Plaintiff's Submissions, 7 July 2017, [28].

⁵ In *Stringer v Gilandos Pty Ltd* [2012] VSC 361 [44], Croft J considered the meaning of 'residential hotel', but did so in the context of a Planning Scheme and observed that such a facility provides accommodation in serviced rooms for persons away from their normal place of residence.

⁶ Plaintiff's Submissions, 7 July 2017, [29]-[30].

available for the occupiers of the residential apartments, and also for the benefit of owners of the privately owned apartments.⁷

27 The Builder's submission is that notwithstanding this aspect, the planned 'residential hotel' includes privately owned apartments, whose occupants are entitled to enjoy the benefits of the hotel's facilities. The Builder submits that such a development should properly be characterised, as a whole, as a residential hotel.

28 The Builder submits that the Contract Drawings indicate that all the residential apartments form part of a co-joined single residential complex. The Builder submits that, in the Contract Drawings in this instance, even if some apartments comprising the Works are intended as permanent owner-occupied residences, all the residential apartments form part of a co-joined single residential hotel complex.

29 The Builder's submission is that, even though some apartments comprising the Works were intended as permanent owner-occupied residences, it was nevertheless apparent on the Contract, including the Contract Drawings, that those apartments were intended to form part of the residential hotel complex, and that the occupants of such apartments would enjoy all the facilities of the hotel. The Builder submits that, on these bases, it is not possible to separate any of the individual owner-occupied apartments from the remainder of the development, which includes a variety of residential options, all of which enjoy all of the hotel facilities.

30 The Builder contends that the Contract Drawings and Specification identify a multi-storey residential hotel resort complex with extensive facilities and dual key apartment types, some catering for long-term residents which will enable apartments to be hired out as either one or two bedroom apartments, and also observes that some apartments of the 'K type' do not have provision for a kitchen and are therefore intended to be serviced by the hotel operator.

31 The Builder's submissions include a submission that within the planned complex,

⁷ Plaintiff's Submissions, 7 July 2017, [31].

there were some owner-occupied penthouse apartments on level 3 which constitute part of the residential hotel complex. The Builder submits that it was always intended that all occupants would be entitled to take advantage of the extensive hotel facilities the Builder was required to construct as part of the Works.⁸

Residential part of licensed premises

32 The Builder also argues that the Contract Drawings demonstrate that the residential apartments form part of the complex the public areas of which were intended to include licensed areas which it submits supports the contention that the residential part of the hotel was intended to be part of the future licensed premises which included a bar, a restaurant and a conference/function centre.

33 On or about 28 November 2007, the Builder submits that an application was made for a planning permit which, inter alia, identified the planned proposal to use the land to sell and consume liquor.⁹

34 The Builder submits that, in the premises, it is clear at the time of the contract that all residential areas of the complex would constitute the residential part of licensed premises under the *Liquor Control Reform Act 1998*.¹⁰

The Court's power to make the orders sought by the Builder

35 The Builder submits that the Court has the statutory or inherent power to issue a declaratory order or judgment to resolve a dispute regarding the law applicable to the circumstances in which the Builder has sufficient interest, and as specifically sought by the Builder in relation to the VCAT proceeding.¹¹

⁸ Plaintiff's Submissions, 7 July 2017, [38(d)]. The plaintiff also refers to an exemption sought under the *Trade Practices Act 1974* (Cth) which, it asserts, demonstrated its intent at the time of the Contract to enter into exclusive letting management agreements with the apartment owners. It also refers to other information, including the Information Memorandum, stating that all residential apartments are part of the resort, including the owner-occupied apartments.

⁹ Affidavit of Megan Calder, 23 June 2017, Exhibit 'MLC-14'.

¹⁰ Plaintiff's Submissions, 7 July 2017, [47]-[54].

¹¹ Plaintiff's Submissions, 7 July 2017, [55]-[56].

Balance of convenience

36 The Builder's arguments included points made in relation to the balance of convenience in support of the injunctive relief which it sought on this application.¹²

Defendants' submissions

37 The defendants submit that the evidence establishes that, at the time the contract for design and construction of the relevant development was entered into:

- (a) it was a major domestic building contract (which the parties to that contract acknowledged it to be so by a special condition); it was held out to the purchasers off the plan as a major domestic building contract and, under s 137E of the *Building Act 1993*, it was required to be a domestic building contract for sales off the plan to take place;
- (b) the development was to be constructed or erected on land that was zoned for residential purposes under a planning scheme pursuant to the *P&E Act* and, in respect of which a building permit was required under the *Building Act 1993*, thereby coming within s 5(1)(e) of the *DBC Act*.

38 The defendants note that the Construction Contract Tender Notice 7, issued on 3 August 2015,¹³ and executed by the Builder and the developer, Massey Pty Ltd, included a new provision in clause 18.1 to be inserted into the design and construct contract. Clause 48 dealt with the application of the *DBC Act* and incorporated clause 18.1 (which had been notified by Tender Notice 7) as condition 48 of the Schedule of Amendments to PC1 contained in the Contract between the developer and the Builder.¹⁴

39 The defendants point out that by clause 48 of the Contract, inter alia, the Builder acknowledges and agrees that to the extent that the Works carried out by the Builder

¹² Given my decision in relation to the issues raised by the Builder as to the Tribunal's jurisdiction, I do not consider it to be necessary to address the balance of convenience issues in any detail.

¹³ Affidavit of Jordana Dymond, 4 August 2017, Exhibit 'JMD-23'.

¹⁴ Ibid, Exhibit 'JMD-10', Vol 1 [CB 121-122].

and the Builder's Activities under the Contract relate to 'domestic building works', as that term is defined by the *DBC Act*, the *DBC Act* applies to the Contract. Further, clause 18 contains an acknowledgment and agreement on the part of both the Builder and the proprietor (the developer, Massey Pty Ltd) that part of the Works under the contract are 'domestic building works', within the meaning of the *DBC Act*, and that part of the works under the Contract are not domestic building contract works within the meaning of the *DBC Act*.

40 The defendants also submit that the Contract entered into by the Builder is consistent with the requirements of s 137E of the *Building Act 1993* which provides, in essence, that a person must not enter into a contract for the sale of land on which a home is being constructed, in certain specified circumstances, unless the home is being constructed under a major domestic building contract.

41 The defendants submit that, under the *DBC Act*, the determination as to what type of a building is applicable is determined by the 'physical characteristics and intended use of the building rather than by its actual use'.¹⁵

42 The defendants submit that the Builder has failed to address the critical issues of the application of ss 5(1)(a) and 5(1)(e) of the *DBC Act* in its submissions, as well as the relevance of s 6 of the *DBC Act*, and the defendants point out that neither does the Builder address the critical issues, but rather advances other arguments at [10] of its Fourth Amended Points of Defence, dated 5 May 2017.

43 Further, the defendants argue that the remarks of Vickery J in *Republic of Turkey v Mackie Pty Ltd ('Republic of Turkey')*,¹⁶ relied upon by the Builder and which appear to inform the Builder's pleading at paragraph [10], are distinguishable because his Honour was therein considering an application pursuant to the *Building and Construction Industry Security of Payment Act 2002 (Vic) (SOP Act)* and, although his Honour observed that the consular residence, the subject of the application before

¹⁵ Defendants' Submissions, 4 August 2017, [18(c)], [25], [26], T68.11-19, T78.24-30.

¹⁶ [2012] VSC 309.

his Honour, comprised a single home caught by s 5(1)(a) of the *DBC Act*, it was not necessary for his Honour to consider all the circumstances in which s 5(1)(e) of the *DBC Act* applied, including its application to multi-storey developments, and his Honour did not do so.

44 The defendants submit that the language of s 3(b) of the *DBC Act*, in particular the phrase ‘intended for permanent habitation’, should be interpreted in accordance with the statements in *Maclaw*,¹⁷ as affirmed in *HIH Casualty & General Insurance Ltd v Maclaw No 651 Pty Ltd*,¹⁸ and followed by McDonald J in *Burbank*,¹⁹ such that this phrase is not intended to reference a party’s objective intention and/or subjective use of building works, but refers to the physical characteristics and intended use of the building rather than its actual use.

45 The defendants also submit that the work legally permitted to be constructed under the Contract is not defined by the Planning Permit, but rather the Building Permit dated 22 May 2006 and the attached drawings.²⁰

46 The defendants also observe that the Builder undertook and completed the design and construction of domestic building work:

(a) under the Building Code of Australia, in respect of a Building Code definition of Class 2 building, which is ‘a building containing two or more sole occupancy units (each being a separate dwelling)’;

(b) the Planning Permit, dated 22 May 2006, permitted the Builder to construct residential apartments (all classified as Class 2 building under the Building Code of Australia), offices, restaurants, gym and pool;

(c) the residential apartments constructed by the Builder contained kitchens,

¹⁷ *Maclaw No 651 Pty Ltd v HIH Casualty and General Insurance Ltd* [1999] VCAT 24, [18], [20], [25] (*Maclaw*) (reported at (1999) 15 VAR 302).

¹⁸ [1999] VSCA 217, [4].

¹⁹ *Burbank Australia Pty Ltd v Owners Corp PS 447493* [2015] VSC 160, [32] (*Burbank*).

²⁰ Affidavit of Jordana Dymond, 4 August 2017, Exhibit ‘JMD-16’.

laundry facilities, lounge areas, and bedrooms;

(d) Occupancy Permits were issued in respect of the residential apartments between 31 October 2007 and 6 December 2007, in works constructed pursuant to the Building Permit of 22 May 2006.

Impermissible use of extrinsic material

47 The defendants contend that the Builder's reliance upon extrinsic material, namely the Planning Permit dated 27 August 2004, to assist in the interpretation of the design and construct contract is impermissible and the defendants also submit, in a number of specific respects, that the owner's outline of argument contains factually incorrect assertions.²¹

Defendants' summary position in relation to cited case

48 The defendants submit that each of the cases relied upon by the Builder, namely *Kane Constructions Pty Ltd v Sopov* ('Sopov'),²² *Glenrich Builders Pty Ltd v 1-5 Grantham Street Pty Ltd & 415 Brunswick Road Pty Ltd* ('Glenrich'),²³ *Winslow Constructors Pty Ltd v Mt Holden Estates Pty Ltd* ('Winslow'),²⁴ *Fletcher Construction Australia Ltd v Southside Tower Developments Pty Ltd* ('Fletcher'),²⁵ *Jinalec Park Pty Ltd v Mornington Peninsula Shire Council* ('Jinalec'),²⁶ and *Stringer v Gilandos Pty Ltd* ('Stringer')²⁷ are distinguishable. In essence, because *Sopov* concerned the application of the *DBC Act* to variation claims; *Winslow* concerned infrastructure works to enable future homes to be constructed; *Fletcher* related to a multi-residential building on land zoned for 'mixed use', and *Jinalec* and *Stringer* related to the breadth of the permitted use described in a planning permit.

²¹ Defendants' Submissions, 4 August 2017, [31].

²² [2005] VSC 237 (reported at (2006) 22 BCL 92).

²³ [2008] VCC 1170.

²⁴ (2004) 10 VR 435.

²⁵ (Unreported, Supreme Court of Victoria, Byrne J, 9 October 1996); (1996) 11 VAR 14.

²⁶ [2007] VCAT 1238.

²⁷ [2012] VSC 361.

Builder's responsive submissions

49 The Builder submits that the defendants do not contest its primary contention that the Builder was engaged to construct building works which were intended, at the time of contract, to be a 'residential hotel' at The Resort Torquay. That is, the Builder's Works were for a resort hotel complex with various types of apartment-style accommodation, with the entitlement to full use of the hotel facilities, including type K apartments referred to in the Contract plans which were to include no kitchen and no inter-connection with apartments with kitchen facilities.

50 The Builder submits that the defendants' submissions ignore the fact that a residential hotel is not precluded from having accommodation in the form of residential-style apartments, nor the Builder submits is a resort hotel prevented from having apartments within its complex which may be owned by separate persons.

51 The Builder submits that the critical questions are:

- (a) whether the relevant Planning Permit at the time of Contract required use and development of a 'residential hotel', which is the position in this instance;
- (b) whether the apartments physically form part of a single residential hotel complex, which the Builder also submits is the position in this instance;
- (c) whether the complex as designed and specified resembled a residential hotel, which the Builder submits it does;
- (d) whether the hotel facilities were designed and intended for use by all occupants including the 'Owner Occupier Apartments'. Here, the Builder submits all owners and occupiers of different styles of apartments had the full use of all hotel facilities;
- (e) whether the contemporaneous conduct of the developer was consistent with the intention to develop a residential hotel complex as permitted by the Planning Permit, which the Builder submits it was.

- 52 The Builder submits that the questions before the Court in this proceeding:
- (a) go to the Tribunal's jurisdiction to hear and determine a 'domestic building dispute', as that term is defined by s 54 of the *DBC Act*;
 - (b) raise whether the Court can determine the above question on the material before it, without needing to determine disputed facts that may require further evidence.
- 53 Further, the Builder submits that s 54 of the *DBC Act* confines the Tribunal's power to make any order it considers fair to resolve a 'domestic building dispute'. The Builder submits that the Tribunal has no 'stand-alone' jurisdiction to determine the negligence claims as asserted by the defendants.
- 54 The Builder submits that the defendants' submissions do not dispute the interpretation of the phrase 'residential hotel' for the purpose of the *DBC Act* definition of a 'home', or that the Builders' Works were in connection with the intention to construct a 'residential hotel'.
- 55 Ultimately, in essence, the Builder submits that the proposed Work for The Resort Torquay was for the construction of a 'residential hotel' complex, with a range of resort-style facilities, within the meaning of the exclusion in s 3(d) of the *DBC Act*. The Builder submits that the development must be viewed as a whole and cannot therefore constitute work to which the *DBC Act* applies. The Builder submits that this is apparent from the description of the Works to be undertaken in the building Contract dated 1 December 2005, and was demonstrated by features of the Work detailed in the Contract, such as the construction of facilities consistent with a hotel resort complex. The Builder submits that this is also apparent from the fact that the Builder's Works were to be constructed pursuant to Planning Permit 03/0067, dated 27 August 2004, and issued by Surf Coast Shire Council. That Permit listed the permitted uses of the site as including 'a residential hotel with associated tourist recreational facilities ...'.

- 56 The Builder further submits that the Planning Permit 03/0067 is expressly incorporated by reference into the Contract between the Builder and Massey Pty Ltd, and is therefore not in the nature of extrinsic evidence.
- 57 The Builder further submits that the fact that the Contract may have described the Builder's Work as relating to 'domestic building works', and may have provided that the Contract was subject to the *DBC Act*, is entirely irrelevant.²⁸
- 58 The Builder's point is that such stipulations or indications agreed by the parties cannot confer jurisdiction on the Tribunal.
- 59 The Builder further submits that the nature of its Works, as a 'residential hotel', is further supported by the contemporaneous conduct of the developer after the Builder entered into its Contract with Massey Pty Ltd, including the Exclusion Dealing Notification, the marketing material issued in respect of The Resort Torquay, and the developer's application for a general liquor licence.
- 60 The Builder submits that extrinsic material, such as the materials referred to in the last preceding paragraph, are relevant and admissible because they are not called in aid of construing the Contract or a statute, but rather assist and support the developer's intended use of the completed development.
- 61 The Builder also submits that the time for assessing the development's intended use is at the time of entry into the Contract. The Builder also argues that, because the Contract refers to the intended use of the complex following construction, it is permissible for the Builder to rely upon the developer's post-Contract conduct in ascertaining the intended use of the complex following construction.²⁹
- 62 The Builder also submits that the interpretation of the *DBC Act* should take into account that this Act is one of several interrelated statutes governing the permitted use of land, and further that such statutes should be construed together so that they

²⁸ Plaintiff's Submissions, 11 August 2017, [18].

²⁹ Plaintiff's Submissions, 11 August 2017, [20].

operate compatibly. The Builder submits that the defendants' submissions offend such consideration in the following ways:

- (a) the Builder wrongly submits that s 137E of the *Building Act 1993* is relevant;
- (b) the defendants fail to give sufficient weight to the Planning Permit 03/0067, and the definition of s 3 of the *DBC Act* excludes a 'residential part of licenced premises under the *Liquor Control Reform Act 1998*'.

The Builder's summary position in relation to cited cases

- 63 The Builder disputes the defendants' submissions that certain authorities are of no assistance or distinguishable.
- 64 The Builder submits that a number of Victorian cases establish that the *DBC Act* is applicable to large-scale developments.³⁰
- 65 The Builder submits that McDonald J's decision in *Burbank*³¹ addresses a materially different type of building, namely a multi-apartment development solely for residential purposes, whereas the Builder describes the relevant development as one 'which was intended as a hotel complex, incorporating a range of hotel facilities, such as restaurant, indoor pool, gymnasium, conference facilities, shop reception, bar lounge etc, as well as various types of apartment which were the accommodation offered by the hotel, and which were managed by the hotel, which also made available hotel facilities such as housekeeping'.
- 66 The Builder submits that notwithstanding the decision in *Burbank*,³² including his Honour's observations in relation to *Sopov*,³³ there is still very much an open and important question as to whether the *DBC Act* applies to mixed-use developments such as The Resort Torquay, even if the Court concludes that The Resort Torquay

³⁰ *Winslow* (2004) 10 VR 435; *Sopov* [2005] VSC 237; *Glenrich* [2008] VCC 1170.

³¹ [2015] VSC 160.

³² [2015] VSC 160.

³³ [2005] VSC 237.

included a domestic residential component.³⁴

Considerations

The nature of the declaration sought by the Builder

67 The Builder's primary claim for relief is for a blanket declaration that the Tribunal has no jurisdiction to hear and determine or otherwise proceed with any of the claims made in VCAT proceeding number D1177/2013. That relief is 'blanket' in that the Builder asserts an entitlement to have the Court declare that every aspect of the defendants' VCAT proceeding is beyond the Tribunal's jurisdiction. In this way, the relief sought by the Builder is expressed in all or nothing terms.

68 The Builder defines the questions to be determined as including whether the *DBC Act* applies to mixed-use developments such as The Resort Torquay, even if the Court ultimately concludes that The Resort Torquay included some domestic residential components.³⁵

69 Both the Builder and the defendants accept in argument that, in substance, it is the physical characteristics and intended use of the premises to be constructed which is determinative under the *DBC Act*.³⁶ Further, both the Builder and the defendants' submissions contend that the physical characteristics and intended use of the subject structures are to be assessed objectively, and at the time of entry into the relevant Contract pursuant to which the development will be constructed.³⁷

The relevant legislation

70 The key parts of legislation relied on by the Builder and the defendants are set out earlier.

³⁴ Plaintiff's Submissions, 11 August 2017, [28].

³⁵ Ibid.

³⁶ Builder's Submissions, 7 July 2017, [17]. The Builder summarises its test as also including 'permitted', in addition to intended use and the Builder submits [3] (physical characteristics) 11 August 2017, [17]; 'description and the works' to be undertaken, [19] 'intended use' of the Builder's Works'; [20] and [21] and [22]. Defendants' Submissions, 4 August 2017, [18(c)], [25], [26]; T68.11-19, T78.24-30.

³⁷ Ibid [20]; Defendants' Submissions, 4 August 2017; Builder's Submissions, 7 July 2017, [21], T109.2-3.

The law

71 In chronological order, the application of ss 5(1)(a) and (e) of the *DBC Act* has been helpfully discussed by:

- (a) Byrne J in *Fletcher Construction Australia Ltd v Southside Tower Developments Pty Ltd* ('*Fletcher*');³⁸
- (b) Judge Davey in *Maclaw No 651 Pty Ltd v HIH Casualty and General Insurance Ltd* ('*Maclaw*');³⁹
- (c) the Court of Appeal in *HIH Casualty & General Insurance Ltd v Maclaw No 651 Pty Ltd* ('*HIH Casualty*');⁴⁰
- (d) Balmford J in *Winslow Constructors Pty Ltd v Mt Holden Estates Pty Ltd* ('*Winslow*');⁴¹
- (e) the Court of Appeal in *Winslow Constructors Pty Ltd v Mt Holden Estates Pty Ltd*;⁴²
- (f) Byrne J in *Mirvac (Docklands) Pty Ltd v Philp* ('*Mirvac*');⁴³
- (g) Warren CJ in *Kane Constructions Pty Ltd v Sopov* ('*Sopov*');⁴⁴ the appeal not raising any relevant issue;
- (h) Bell J in *Shaw v Yarranova Pty Ltd*;⁴⁵
- (i) the Court of Appeal in *Shaw v Yarranova Pty Ltd*;⁴⁶ and
- (j) McDonald J in *Burbank Australia Pty Ltd v Owners Corporation PS447493*

³⁸ (Unreported, Supreme Court of Victoria, Byrne J, 9 October 1996); (1996) 11 VAR 14.

³⁹ [1999] VCAT 24 (reported at (1999) 15 VAR 302).

⁴⁰ [1999] VSCA 217.

⁴¹ [2004] VSC 38.

⁴² (2004) 10 VR 435.

⁴³ [2004] VSC 301 (reported at (2005) V ConvR 54-698).

⁴⁴ [2005] VSC 237 (reported at (2006) 22 BCL 92).

⁴⁵ [2006] VSC 45.

⁴⁶ [2006] VSCA 291 (reported at (2006) 15 VR 289.).

(*Burbank*).⁴⁷

Case summaries

72 The following assistance is to be derived from the cases cited:

*Fletcher Construction Australia Ltd v Southside Tower Developments Pty Ltd*⁴⁸

73 Byrne J, after noting that it was not necessary to enter upon the proprietor's alternative submission on s 5(1)(e), addressed the proprietor's arguments on s 5(1) of the *DBC Act*.⁴⁹ With regard to s 5(1)(e), his Honour observed that the words 'a building' should not be restricted to a residential building, but included any structure or part of a structure and the work associated with the construction or erection of a 'building of whatever kind'.

74 Relevantly, his Honour observed that work associated with the erection or construction of a home is covered by s 5(1)(a) and that, in this context, s 5(1)(e) applies to work of a non-residential character, which is carried out on land which itself has a residential character.⁵⁰ His Honour further stated that it would create an impossible distinction for s 5(1)(e) to apply to work ancillary to the erection or construction of a building, but not the erection or construction itself.⁵¹

*Port Phillip City Council v Domain Hill Properties Pty Ltd*⁵²

75 In *Port Phillip City Council*, Byrne J considered the meaning of the words 'residential building' in the context of clause 7-1.4 of the Port Phillip Planning Scheme. Byrne J held that that meaning of 'residential' in conjunction with the word 'building' refers to the physical characteristic and intended use of the building, rather than its actual use.

⁴⁷ [2015] VSC 160.

⁴⁸ (Unreported, Supreme Court of Victoria, Byrne J, 9 October 1996); (1996) 11 VAR 14.

⁴⁹ *Ibid* [6]-[15].

⁵⁰ *Ibid* [15].

⁵¹ *Ibid* [7].

⁵² [1998] VSC 35 (*Port Phillip City Council*) (reported at (1998) 102 LGERA 11).

*Maclaw No 651 Pty Ltd v HIH Casualty and General Insurance Ltd*⁵³

76 Judge Davey held that the works for the construction of a serviced apartment development were domestic building works, as they concerned the construction of a ‘home’ within the meaning of s 3 of the *DBC Act*. In so concluding, Judge Davey held the *DBC Act* applied to multi-storey apartment buildings and that the term ‘residential premises’, as it appears in the definition of ‘home’, refers to the design purpose of the premises to be determined by the application of objective criteria at the time the contract is entered into, not subjective intent, and further observed that the s 6 exclusion of ‘any residence that is not intended for permanent habitation’ is a reference to intended future use to be derived objectively from the nature of the structure.⁵⁴ In this regard, Judge Davey adopted⁵⁵ the observations of Byrne J in *Port Phillip City Council*.⁵⁶

77 Judge Davey’s reasoning and considerations in *Maclaw* are of material assistance in the present case. The task of determining whether the *DBC Act* applies to particular work as described in s 5(1) is to be approached with regard to the design purpose of the premises to be determined by the application of objective criteria, including the physical characteristics of the building, at the time the contract is entered into. For these purposes, subjective intent of the parties and actual later use of the development are irrelevant. Further, it matters not that in *Maclaw* the works were for ‘serviced apartments’ and in the present case the Planning Permit was for a ‘residential hotel’.⁵⁷ Considering this fact alone would inappropriately ignore the test as outlined in *Maclaw*.

*HIH Casualty & General Insurance Ltd v Maclaw No 651 Pty Ltd*⁵⁸

78 The Court of Appeal refused leave to appeal from the decision of Judge Davey on the basis that the decision was not attended by sufficient doubt to warrant the grant

⁵³ [1999] VCAT 24 (reported at (1999) 15 VAR 302).

⁵⁴ Ibid [23].

⁵⁵ Ibid [18], [19], [20].

⁵⁶ [1998] VSC 35, [12] (reported at (1998) 102 LGERA 11).

⁵⁷ Ibid [44].

⁵⁸ [1999] VSCA 217.

of leave.⁵⁹

*Winslow Constructors Pty Ltd v Mt Holden Estates Pty Ltd*⁶⁰

79 Balmford J, in rejecting a submission that Byrne J, in *Fletcher*, found that the word ‘building’ in s 5(1)(e) excluded a home and instead referred to structures of a non-residential character, noted that Byrne J made clear that he was not suggesting that the word ‘building’ in s 5(1)(e) was intended to exclude a residential building; but rather, in observing that s 5(1)(e) is ‘work related to a building not to a home’, and accordingly that ‘the residential flavour introduced by the definition of ‘home’ in s 3 is not present’, his Honour was emphasising that the word ‘building’ in subsection (e) cannot be restricted to a residential building. Her Honour stated that ‘building’ in s 5(1)(e) has its ‘normal wide meaning’.⁶¹

*Winslow Constructors Pty Ltd v Mt Holden Estates Pty Ltd*⁶²

80 One of the issues in *Winslow* was whether the work carried out by Winslow Constructors fell within the scope of the *DBC Act*. The Court of Appeal held that the definition of ‘associated work’ in s 5(1)(a)(i) does not apply to work performed in contemplation of prospective homes on a proposed residential development.⁶³ Hansen AJA also observed, without finally determining the point, that there was force to the appellant’s submission that the word ‘building’ in subsection (e) of s 5(1) of the *DBC Act* must exclude homes, since otherwise s 5(1)(a) would be superfluous, and further that this interpretation was supported by *Fletcher*.⁶⁴ However, Callaway and Buchanan JJA expressly left open the question of whether ‘a building’ in s 5(1)(e) might include a home.⁶⁵ The Court of Appeal also held that the *DBC Act* was enacted to regulate the rights of home owners and buildings, and was not intended

⁵⁹ Ibid [4].

⁶⁰ [2004] VSC 38.

⁶¹ Ibid [35].

⁶² [2004] VSCA 159 (reported at (2004) 10 VR 435).

⁶³ Ibid [2].

⁶⁴ Ibid [118].

⁶⁵ Ibid [3].

to apply to developers.⁶⁶

81 It was confirmed in *Sopov* and *Burbank* that the statements of the Court of Appeal in *Winslow* regarding the application of the *DBC Act* were made in obiter. The submission by the plaintiff that those observations support the interpretation that s 5(1)(e) does not apply to actual construction, but solely work ‘associated’ with the construction or erection of a building, is not persuasive because, in addition to being made in obiter, their Honours were in any event not in agreement on the issue of whether ‘a building’ in s 5(1)(e) might include a home. Accordingly, for the present proceedings, any comments in *Winslow* as to the scope of s 5(1)(e) are in my view of limited application.

*Mirvac (Docklands) Pty Ltd v Philp*⁶⁷

82 *Mirvac* concerned an ‘off the plan’ contract of sale for a residential apartment in a multi-storey building. In that case, it was not disputed that the work of constructing the apartment, the subject of the relevant contract of sale, was domestic building work as defined in s 5 of the Act. The point in issue was whether the contract of sale was a domestic building contract as defined in s 3 of the Act. Byrne J concluded that the contract was a domestic building contract because the plaintiff was obliged, under the terms of the contract of sale, to arrange and manage the carrying out of the building work despite the retention of a builder under a design and construct contract.⁶⁸

*Kane Constructions Pty Ltd v Sopov*⁶⁹

83 In *Sopov*, Warren CJ, while observing that the views expressed by the Court of Appeal in *Winslow* with respect to the application of the *DBC Act* were obiter in finding that the Act did not apply to the project in question, being a combined mixed-use development developed by a developer, nevertheless agreed with the

⁶⁶ Ibid [110].

⁶⁷ [2004] VSC 301 (reported at (2005) V ConvR 54-698).

⁶⁸ Ibid [27], [28], [31], [32].

⁶⁹ [2005] VSC 237 (reported at (2006) 22 BCL 92).

observation of Hansen AJA that the Act was not intended to apply to developers.⁷⁰ However, Warren CJ expressly left open the possibility that the *DBC Act* could have application to the residential component of the development.⁷¹

*Shaw v Yarranova Pty Ltd*⁷²

84 *Shaw v Yarranova* concerned an ‘off the plan’ contract of sale for an apartment bought from a developer and the preliminary question whether the subject contract was a ‘major domestic building contract’ under the *DBC Act*. Applying *Winslow*⁷³ and declining to follow Byrne J in *Mirvac*,⁷⁴ Bell J held that the subject contract of sale was not a ‘major domestic building contract’ within the meaning of s 3(1) of the Act⁷⁵ and further that the work under the contract was not ‘domestic building work’ of the kind specified in s 5(1) of the Act.⁷⁶ In obiter, Bell J also considered that s 5(1)(e) merely extends the definition of ‘domestic building work’ to non-residential buildings of whatever description. In this regard, his Honour stated that his preferred construction was as observed by Hansen AJA in *Winslow*, but noted the comments of Callaway and Buchanan AJA in that decision explicitly leaving the point open.⁷⁷

*Shaw v Yarranova Pty Ltd*⁷⁸

85 On appeal before Warren CJ, Eames and Neave JJA, the sole issue to be determined was whether the contract of sale was a ‘major domestic building contract’ under the *DBC Act*. Warren CJ, in the minority, allowed the appeal, preferring the approach of Byrne J in *Mirvac*.⁷⁹ Justice Neave, with Eames JA agreeing, dismissed the appeal, holding that ‘off the plan’ contracts of sale of the kind in question were not major

⁷⁰ Ibid [891]–[893].

⁷¹ Ibid [893].

⁷² [2006] VSC 45.

⁷³ [2004] VSCA 159, [2] (reported at (2004) 10 VR 435).

⁷⁴ Ibid [65]–[78].

⁷⁵ Ibid [60]–[64].

⁷⁶ Ibid [88]–[92].

⁷⁷ Ibid [86].

⁷⁸ [2006] VSCA 291 (reported at (2006) 15 VR 289).

⁷⁹ Ibid [11]–[16].

domestic building contracts.⁸⁰ However, their Honours observed that because the building included residential apartments, the *DBC Act* would apply to the contract between the developer and the builder, and accordingly a purchaser would nevertheless have the benefit of the implied warranties in s 8 of the Act with respect to the builder of a major mixed-use development under the subject design and construct contract.⁸¹

Glenrich Builders Pty Ltd v 1-5 Grantham Street Pty Ltd⁸²

86 Judge Shelton concluded that the relevant claims, relating to an owner-developer's construction of residential units, did not arise out of a domestic building dispute and held that the *DBC Act* was not intended to, and does not apply to, the owner-developers.⁸³ In so concluding, Judge Shelton followed the approaches of Hansen AJA in *Winslow*⁸⁴ and Warren CJ in *Sopov*.⁸⁵

Republic of Turkey v Mackie Pty Ltd⁸⁶

87 In *Republic of Turkey*, Vickery J considered whether a contract for the rebuilding of a new consular residence was a major domestic building contract, as defined in the *DBC Act*, and hence exempt from the provisions of the *SOP Act*. His Honour found that while s 5(1)(e) could not apply because the works in question were not works 'associated' with the construction or erection of a building, but rather were for the actual construction or erection of a building, the contract was a major domestic building contract by virtue of s 5(1)(a), (c), and (d) of the Act.

88 I agree with the defendants' submission that, in *Republic of Turkey*, Vickery J was not required to consider the broad application of s 5(1)(e) and, in particular, did not consider its application in relation to a multi-storey development, and that his

⁸⁰ Ibid [61]-[77]; [78]-[81].

⁸¹ Ibid [71]-[73], [81]; Agreed Fact 10 and 11.

⁸² [2008] VCC 1170.

⁸³ Ibid [28].

⁸⁴ [2004] VSCA 159, [104] (reported at (2004) 10 VR 435).

⁸⁵ [2005] VSC 237, [891]-[893] (reported at (2006) 22 BCL 92).

⁸⁶ [2012] VSC 309.

Honour was not assisted therefore by any reference to authority in relation to the application of subsection (e) of s 5(1) of the Act. Moreover, his Honour's observations in those respects, in *Republic of Turkey*, were made in obiter because the decision relied on s 5(1)(a), (c), and (d) of the *DBC Act* applying. Accordingly, the decision as it relates to the application and meaning of s 5(1)(e) is of limited utility in the present case. More importantly, however, Vickery J's decision does not contradict *Maclaw, Burbank, and Port Phillip*, namely, that in determining the application of the *DBC Act*, the focus is on physical characteristics and intended use of the building and nature of the works in question to be determined by the application of objective criteria at the time the contract is entered into.

Burbank Australia Pty Ltd v Owners Corporation PS 447493⁸⁷

89 In *Burbank*, McDonald J considered the application of the *DBC Act* to a multi-apartment development solely for residential purposes. McDonald J held that, subject to the nature of the works falling within the definition of 'domestic building work', the Act applies to multi-apartment developments and to developers of such developments.⁸⁸ Relevantly, his Honour held that s 5 of the Act, which prescribes the work covered by the Act, directs attention to the nature of the work undertaken and found that the development in question attracted s 5(1)(a) because the works constituted residential premises and a 'home', as defined in s 3, which includes multiple homes, and further, his Honour concluded that s 5(1)(e) of the Act applied because the building which comprised the apartments also fell within the terms of that sub-section.⁸⁹ McDonald J also observed that, in *Sopov*, the application of the *DBC Act* to the residential component of a development was expressly left open, and further confirmed that the statements of the Court of Appeal in *Winslow* regarding the application of the *DBC Act* were obiter.⁹⁰

90 I do not agree with the Builder's submission that McDonald J's decision in *Burbank*

⁸⁷ [2015] VSC 160.

⁸⁸ Ibid [3].

⁸⁹ Ibid [11], [30], [31].

⁹⁰ Ibid [15]-[19].

ought to be distinguished on the basis that the decision was made in the context of, 'solely', a multi-residential apartment development as opposed to mixed-use developments including a residential component. Nor do I consider that, in distinguishing *Sopov*, McDonald J was suggesting the exclusion of multi-use developments which include a residential component from the application of the *DBC Act*. Indeed, this is supported by his Honour's observation that this outcome was explicitly left open in *Sopov*.⁹¹

91 As stated in *Maclaw*, the test for determining the application of the *DBC Act*, inter alia, requires regard to the physical characteristics of the building, namely, the nature of the works in question to be determined by the application of objective criteria gleaned from the design purpose of the building at the time of entry into the contract. As explained in *Maclaw*, determining whether the *DBC Act* applies to particular work, as described in s 3 of that Act, is to be approached with regard to the design purpose of the premises, so as to ascertain the nature of the works, such purpose to be determined by the application of objective criteria, including the physical characteristics and intended use of the building, at the time of entry into the contract.⁹² In this evaluation, subjective intent of the parties and actual later use of the development are irrelevant.

*Jinalec Pty Ltd v Mornington Peninsula Shire Council*⁹³ and *Stringer v Gilandos*⁹⁴

92 The defendants submit that the cases of *Sopov*, *Winslow*, and *Fletcher*, relied on by the Builder in support of its submission⁹⁵ that the *DBC Act* was never intended to apply to contracts for large-scale developments, do not assist and are distinguishable because none concerned a large multi-use development on land zoned for residential purposes.⁹⁶ With respect to *Jinalec* and *Stringer*, the defendants contend that those cases concerned permitted uses in planning permits and are irrelevant to whether

⁹¹ [2015] VSC 160, [34].

⁹² In *Maclaw*, Judge Davey's accepted Byrne J's reference to the relevance of 'intended use' in *Port Philip*.

⁹³ [2007] VCAT 1238, [104], [106].

⁹⁴ [2012] VSC 361, [44].

⁹⁵ Plaintiff's Submissions, 7 July 2017, [27].

⁹⁶ Defendants' Submissions, 4 August 2017, [34].

the *DBC Act* applies. The Builder, in response, submits that the particular context in which its cited cases were decided does not diminish their relevance to the questions before the Court, and it remains an open and important question whether the *DBC Act* applies to mixed-use developments, even if they have a residential component.⁹⁷ The Builder also submits that *Jinalec* and *Stringer* inform the meaning of ‘residential hotel’ and are relevant in that respect.

93 I agree with the defendants’ submission that, in this limited respect, the observations of their Honours in *Sopov*, *Winslow*, and *Fletcher* with respect to the application of the *DBC Act* to large-scale development projects were made in the context of the particular, and materially different, factual scenario before the court on each occasion. With respect to *Jinalec* and *Stringer* I consider that, for the reasons outlined in relation to the test stated in *Maclaw*, the statements as to the meaning of a ‘residential hotel’ are not conclusive on the question of whether s 3(d) the *DBC Act* applies in this particular case.⁹⁸

The purpose and scheme of the *DBC Act*

94 Both the Builder and the defendants concede that the *DBC Act* is principally in the nature of consumer protection legislation.⁹⁹ Both the Builder and the defendants, as I have observed, also submit for substantially the same test in respect of how ‘home’ and ‘residential premises’, referred to in ss 3(1) and s 5(1)(a) of the *DBC Act*, should be ascertained.¹⁰⁰

95 Section 1 of the *DBC Act* informs the purposes of the Act as follows:

- (a) to regulate contracts for the carrying out of domestic building work;
and

⁹⁷ Plaintiff’s Submissions, 11 August 2017, [25]–[28].

⁹⁸ Rather, focus is required as to the primary question regarding whether the subject structure is primarily caught by ss 3(1) and 5(1)(a) of the *DBC Act* by reference to the design purpose and intended use, determined objectively.

⁹⁹ Plaintiff’s Submissions, 7 August 2017, [26]–[27]; Plaintiff’s Reply Submissions, 11 August 2017, [30]; Defendants’ Rejoinder, 16 August 2017, [54]; Victoria, *Parliamentary Debates*, Legislative Assembly, 24 October 1995, 695–96 (Jan Wade, Attorney-General).

¹⁰⁰ Reasons for Judgment [69].

- (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.

Section 4 identifies the objects of the Act as follows:

- (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.

96 Furthermore, s 35(a) of the *Interpretation of Legislation Act 1984* (Vic) provides that a construction which promotes the purpose or object underlying an Act (whether or not that purpose or object is expressly stated in the Act) shall be preferred to a construction that would not promote such purpose or object. Those objects include regulating some parts of the terms and conditions of a subject contract and, in that regard, incorporating a number of significant warranties into such contracts.

97 The pertinent parts of s 3 of the *DBC Act* provide:

home means any residential premises and includes any part of a commercial or industrial premises that is used as a residential premises but does not include—

- (a) a caravan within the meaning of the *Residential Tenancies Act 1997* or any vehicle used as a residence; or
- (b) any residence that is not intended for permanent habitation; or
- (c) a rooming house within the meaning of the *Residential Tenancies Act 1997*; or
- (d) a motel, residential club, residential hotel or residential part of licensed premises under the *Liquor Control Reform Act 1998*; or
- (e) a nursing home, hospital or accommodation associated with a hospital; or
- (f) any residence that the regulations state is not a home for the purposes of this definition; ...

98 The pertinent parts of s 5 of the *DBC Act* provide:

- (1) This Act applies to the following work—
 - (a) the erection or construction 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*; ...

99 The pertinent parts of s 6 of the *DBC Act* provide:

- (1) This Act does not apply to the following work—
* * * * *
 - (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.
- (2) This Act or a provision of this Act does not apply to any work that the regulations state is not building work to which this Act or that provision (as the case requires) applies.

100 On the plain ordinary language of s 3(1) of the *DBC Act*, a ‘home’ includes any premises in which a person or persons reside or intend to reside. In my view, the natural and ordinary meaning of the words ‘residential premises’ describes a structure suitable for occupation as a natural person’s permanent home. Further, it is to be noted that s 3(1) of the *DBC Act* expressly stipulates that a residential premises may form part of a commercial or industrial premises.

101 In my view, the scheme of the *DBC Act* referred to above, which inter alia imposes requirements and obligations in relation to the form of contract, and resultant contractual rights and entitlements in respect of a contract for the construction of a home, as defined by ss 3(1) and 5(1) of the *DBC Act*, renders it obvious that the operation of the Act requires the nature and status of a contract for the construction of work, falling within its scope, to be determined by the time the contract regulated by that Act is entered into.¹⁰¹

¹⁰¹ There may, however, be circumstances, for example with respect to design and construct, or unusually undeveloped contractual arrangements, where the physical characteristics and aspects of

- 102 It is equally clear, for the same reasons, that the nature and status of a contract for the performance of work regulated by the Act must, for the purposes and operation of the Act, be ascertainable before the applicable work is undertaken.
- 103 If this were not the case, the Builder and the defendants, and other similarly interested parties, would not be able to determine whether or not the subject building contract complied with the *DBC Act*, nor would those parties be able to ascertain the requirements and standards to which the works, the subject of their contract, are to be performed. Similarly, if the nature and status of the contract for the construction of a structure regulated by the *DBC Act* were not able to be determined before the parties were bound by that contract, it might not be practical for those parties to ensure that the terms and conditions required by the *DBC Act* to form part of such a contract were compliantly included and agreed.¹⁰²
- 104 By reason of the temporal imperatives referred to above, the scheme and operation of the *DBC Act* requires ascertainment of the application of the *DBC Act* at the date of contract, at the latest.
- 105 Therefore, whether a structure falls within the definition of a 'home' in ss 3 and 5 of the *DBC Act*, also taking into account the exclusions referred to in s 6 of the *DBC Act*, necessarily requires the determination, inter alia, of whether, objectively determined, that structure is, by the time of contract for the performance of those works, intended to be used as residential premises. In my view, the intended use is likely to be most reliably ascertained by reference to the proposed buildings' physical characteristics, in turn ascertained by reference to the design and specification of the relevant works.
- 106 It is unlikely the *DBC Act* intended that the determination of whether a structure was in the nature of a residential premises, or otherwise, would or could depend upon the subjective view of any one of the number of potentially relevant people

intended use are specified after contract.

¹⁰² The *DBC Act* provides for penalties for breaching many of its requirements including those stipulated for in ss 31 and 33 of the *DBC Act* in relation to the form or required contract terms.

including the proprietor or architect or builder of the building.

107 If subjective views were relevant for the purposes of the *DBC Act* in this regard, the nature of the works could, or and in some instances would, for example, be determined by what may be the owner's fanciful and unrealistic view, and or intent, in relation to the use to which he or she claims to have in relation to the relevant structure.

108 In this case, by the time of entry into the relevant Contract for the construction of The Resort Torquay, that Contract was agreed by the developer and the Builder to be a '*major domestic building contract*' pursuant to which the Builder would construct the Works, which included substantial domestic elements in the nature of residential apartments.

109 The following facts, in addition to those referred to in paragraphs [1] to [8] above, were highlighted during the course of the parties' submissions in this proceeding (*underlining emphasis added*):

(a) The Application for Building Permit in relation to the proposed building works at The Resort Torquay dated 11 January 2006 contained the following representations:¹⁰³

Cost of Building Works

Is there a contract for the building work? Yes

If yes, state the total contract price \$45,000,000

Portion of estimated total cost of domestic building work/residential construction \$30,000,000

(b) Building Permit, Stage 3 of the works dated 22 May 2006, contained the following representations:¹⁰⁴

Nature of the Building Works:

Construction of a 4 Level Residential and Commercial Development

¹⁰³ Affidavit of Jordana Dymond, 4 August 2017, Exhibit 'JMD-12'.

¹⁰⁴ Ibid, Exhibit 'JMD-16'.

above a Basement.

Details of Building Practitioners Architects:

Builder (Construction): Michael Argyrou (CBU-1588)

Builder (Construction): George Argyrou (DBU-8923).

(c) The Building Contract for the works dated 1 December 2005.¹⁰⁵

(d) Statutory Requirements – Clause 8.3

Contract must, unless otherwise specified in the Contract Particulars, comply with all applicable Statutory Requirements.

(e) The Building Contract (Contract Particulars):

Works: (Clause 1.1) (p. 156)

New construction of four (4) levels of apartments with a co-joining four (4) level public building and underground basement spanning the apartment and core blocks, together with indoor pool, day spa facility, outdoor pool, landscaping and roadworks, including all works as documented.

(f) Works Description: (Clause 1.1)

The Specifications and Drawings set out in Schedule B to these Contract Particulars. The Drawing and Specifications describe, call up and specify, inter alia, residential apportionments.

(g) The Building Contract clause 48 provided:¹⁰⁶

A new clause 18 is inserted into the Contract as follows:

18. Application of the Act

18.1 General

The builder acknowledges and agrees that, unless otherwise specially stated in these contract conditions ...

(a) the builder will fulfil and perform each and every obligation imposed upon the Builder by the Act as if each and every one of those obligations are separately contained in this Contract; and

(b) each and every one of the rights and benefits conferred upon

¹⁰⁵ Ibid [156] (original numbering), Exhibit 'JMD-10'.

¹⁰⁶ Ibid [120] (original numbering), Exhibit 'JMD-10'.

the Proprietor under the Act is conferred upon the Proprietor under this Contract as if each and every one of those rights and benefits was separately contained in this Contract.

The Proprietor and the Builder acknowledge and agree that part of the Works under this Contract are 'domestic building works' within the meaning of the Act and part of the Works under this Contract are not domestic building works with the meaning of the Act.

18.2 Builder's Warranties Implied under the Act

The Builder warrants that:

(a) the Works will be carried out in a proper and workmanlike manner in accordance with the Works Description;

...

(c) the Works will be carried out in accordance with, and will comply with, all laws and regular requirements including, without limiting the generality of the warranty, the *Building Act 1993 (Vic)* and the regulations made under that Act; ...

- (h) The building contracts referred to describe the work to be undertaken thereunder, at page 157 of Exhibit 'MLC-1' of the Affidavit of Megan Calder, 23 June 2017, as 'the works description is the specifications and drawings set out in schedule B to these contract particulars' and, further, the contract provides 'the works comprise new construction of four levels of apartments with co-joining four level public building and underground basement spanning the apartment and core blocks, together with indoor pool, day spa facility, outdoor pool, landscaping and road works including all works as documented';
- (i) The apartments at the development are owned by the Owners on separate titles. Most apartments have the indicia of a 'home' including separate entry, kitchen and laundry facilities, separate metering of power and other utilities.¹⁰⁷
- (j) The above physical descriptions of the residential parts of the works are not disputed by the Builder, save in respect of what are known as 'Type K'

¹⁰⁷ Owners Rejoinder Submissions, 16 August 2017, [9].

apartments.¹⁰⁸

(k) Surf Coast Shire Planning Permit 03/0667 issued 27 August 2004 permitted the following use for:

Use and development of the land for a retirement village and residential hotel with associated tourist recreational facilities including restaurant, convenience shop, conference facilities, removal of vegetation pursuant to Clause 52.17, and reduction in car parking provision pursuant to Clause 52.06, generally in accordance with the endorsed plan/s; and

The owners of the serviced apartments shall only occupy the dwellings for a maximum of 12 weeks per year to the satisfaction of the Responsible Authority.

- 110 A retirement village did not form part of the Works to be completed under the Contract, and the remaining permitted use was for a 'residential hotel with associated tourist facilities, including restaurant, convenience shop, conference facilities ...', with no other use approved pursuant to the Planning Permit.¹⁰⁹
- 111 The development was to be constructed on land that was zoned for residential purposes under a planning scheme under the *P&E Act*.
- 112 The Planning Permit, and the Building Permit referred to above, applicable to the Works, formed part of the Contract documentation [Contract Particulars; Clause 2(a), Clause 8 Construction – Clause 8.3 Existing and require Approvals].
- 113 I note that I accept the defendants' submission that the phrase '*intended for permanent habitation*' in subsection (b) of the definition of 'home' in s 3 of the *DBC Act* is to be interpreted in accordance with *Maclaw v HIH Casualty & General Insurance Ltd*,¹¹⁰ as affirmed in *HIH Casualty & General Insurance Ltd v Maclaw No 651 Pty Ltd*;¹¹¹ and any party or third party subjective statements as to intended use in relation to building works are irrelevant considerations, and it is the physical characteristics and

¹⁰⁸ Builder's Response Submissions, 11 August 2017, [2]. See Defendants' Submissions, T81.15–24; and Builder's Submissions, T21.27–T22.1, T22.23–T23.5.

¹⁰⁹ Plaintiff's Submissions, 7 July 2017, [9].

¹¹⁰ [1999] VCAT 24.

¹¹¹ [1999] VSCA 217; (1999) 15 VAR 302, [4].

intended use of the building, ascertained in the manner that I have elsewhere indicated, rather than its actual use which are relevant.

114 Further, part of the contract definition of work under the contract is to be found in the Building Permit, dated 22 May 2006,¹¹² and the drawings attached to that Building Permit. The Building Permit expressly authorises residential apartments to be constructed as part of the project.

115 Under the Contract for the Works, the Builder undertook to design and construct the domestic building work:

- (a) pursuant to the Building Code of Australia ('BCA') which defines a Class 2 building as 'a building containing 2 or more sole-occupancy units each being a separate dwelling'. A Class 3 building is defined by the BCA to include 'a residential part of a hotel or motel';
- (b) the Building Permit issued 22 May 2006 did not permit a Class 3 building to be built;
- (c) the Building Permit of 22 May 2006¹¹³ permitted the Builder to construct residential apartments, offices, restaurants, gym and pool. The residential apartments were all classified as Class 2 buildings;
- (d) the Builder designed and constructed the residential apartments containing kitchens, bedrooms, laundry facilities, lounge areas, bathrooms, letter boxes and so on; and
- (e) Occupancy Permits were issued between 31 October to 6 December 2007 for the Works.

¹¹² Affidavit of Jordana Dymond, 4 August 2017, Exhibit 'JMD-16'.

¹¹³ The Building Permit issued on 22 May 2006 allowed for the construction of Residential Apartments, offices, restaurants, café, gym, pool. Class 2 usage for all residential apartments: see Affidavit of Jordana Dymond, 4 August 2017, Exhibit 'JMD-16'.

Contentious facts

116 The following matters are in contention between the parties:

- (a) whether all or only parts of the residential component of The Resort Torquay development was included in the residential part of licenced premises as defined and established under the *Liquor Control Reform Act 1998*; and
- (b) the defendants contend that the Contract to construct the subject Works was entered into and indeed the residential apartment, and other components of the Works were built and Certificates of Occupancy for those parts of the Works had issued, before an applicable liquor licence was issued in respect of any part of The Resort Torquay development.¹¹⁴

The Contract

117 In clause 18.1 of the Contract, the Builder acknowledged and agreed that, to the extent that the works under the Contract relate to 'domestic building works', as that term is defined in the *DBC Act*, the Act applies to the Contract. Further, the developer and the Builder acknowledged and agreed that part of the Works under the Contract are 'domestic building works' within the meaning of the *DBC Act*, and part of the Works under the Contract were not domestic building works within the meaning of the *DBC Act*.

118 I do not accept the Builder's argument that the whole of The Resort Torquay development was a 'residential hotel' excluded from the operation of the *DBC Act* by s 3(d) of the Act, nor do I accept the Builder's argument that the whole of The Resort Torquay is excluded from the operation of the *DBC Act* by operation of s 3(d) because the residential parts of the development are all part of licensed premises under the *Liquor Control Reform Act 1998*.

119 I observe that, in the subject Contract, it is expressly agreed and accepted by the Builder pursuant to clause 18.1 of the Contract that part of the works are 'domestic

¹¹⁴ Plaintiff's Submissions, 7 July 2017, [3(d)]; Defendants' Submissions, 4 August 2017, Annexure 1, [4].

building works'. Parts of the Builder's submissions to which I have earlier made reference also appear to accept this position.

120 Further, and decisively, I am satisfied that the evidence establishes that numerous and extensive parts of the development are in the nature of residential-style apartments, sold and intended to be sold to separate purchasers, which are 'homes' within the meaning of the *DBC Act*, intended to be used as residential premises, and accordingly do not come within the meaning of 'residential hotel' as that term is intended by s 3(d) of the *DBC Act*.

121 The residential apartments which constitute a substantive component of The Resort Torquay development are parts of the Works which objectively considered have the physical characteristics of a residential premise and are intended to be used as residential premises, ascertained by reference to their design and specification. This includes because those residential apartments comprise separate entries, normal household facilities, including full kitchens and laundries, and are separately metered for services. They are structures which the Contract establishes are designed and constructed to be homes in the nature of apartments suitable for permanent residence. Furthermore, such residential apartments have not only been designed and constructed, but also marketed and sold, as such.

122 Furthermore, the above interpretation of 'home' and 'residential premises' under the *DBC Act*, in my view, promotes the stated purpose of the *DBC Act*, including so as to ensure that the statutory warranties in s 8 of the Act are in force in relation to intended structures, and should be preferred in favour of the Builder's asserted narrower interpretation.

123 I add in relation to the proper construction of the *DBC Act* that I am also unpersuaded as to the Builder's argument that the defendants' interpretation of the *DBC Act* is materially inconsistent with other legislation including the *Building Act 1993* and the *Liquor Control Act 1998*.

124 Accordingly, on the extensive evidence put forward in this application, I am satisfied that a substantial component of the Works, as designed and specified under the Contract at the date of its formation, was in the nature of residential premises intended to be constructed as part of The Resort Torquay Project.

125 I reject the Builder's contention that the development should be characterised as a whole and as a residential hotel. In my view, neither the scheme nor any particular part of the *DBC Act* requires this approach. Indeed, s 3 of the *DBC Act*, as I have earlier noted, expressly contemplates that parts of commercial and industrial premises may also be residential premises caught by the Act.

The Builder's Liquor Control Reform Act 1998 submissions

126 Nor am I persuaded as to the Builder's argument that all of the parts of the development in the nature of residential-style apartments are part of the licensed premises under the *Liquor Control Reform Act 1998*, and thereby excluded by s 3(d) of the *DBC Act*. That is because:

- (a) there was no Liquor Licence in existence when the building was constructed and/or at the time that the Certificates of Occupancy for the works were issued;
- (b) it follows that there was no relevant Liquor Licence in existence at the time of the formation and execution of the Contract;
- (c) Limited Liquor Licence 36114174, issued on 8 April 2008, authorised the supply of alcohol from small premises inside building F for consumption off the licensed premise;
- (d) this licence therefore could, in any event, not apply to the residential apartment component of the Works and is therefore not relevant because to be excluded from the definition of a home in s 3 of the *DBC Act*, the licence must be for a 'licensed premises';

- (e) the liquor licences in operation now are the On Premises Licence 32290368 and a Limited Licence 36114174. These licences were originally issued on 8 April 2009 and thereafter renewed each year.
- (f) Licence 32290368, issued on 8 April 2009, superseded and replaced Licence 32290368 issued on 14 March 2008. The 14 March 2008 Licence 32290368, depicted a licensed area (the red line) on attached drawings encompassing the entire works. This licence was obtained by The Resort Torquay (Management) Pty Ltd, although that company owned and leased only a small proportion of the relevant land;
- (g) the current, or most current Licence 32290368, dated 9 April 2009, does not encompass the residential units at the development;
- (h) all the licences referred to above post-date the Contract for the construction of the Works;
- (i) there are no (and have not been any) mini bars in any of the residential apartments;
- (j) the *DBC Act* reference to the exception 'residential part of licensed premises', in subsection (d) of the definition of 'home' in s 3 of the *DBC Act*, earlier referred to the *Liquor Control Act 1987*;
- (k) the defendants submit that under the *Liquor Control Act 1987*, there were a number of different types of licences, one of which was a residential licence provided for by s 46(2);
- (l) the defendants further submit that this type of licence entitled the licensee to sell and dispense liquor on the licensed premises for consumption on or off the licensed premises;
- (m) when the *Liquor Control Act 1987* was reformed to become the *Liquor Control Reform Act 1998*, residential licences were abandoned and the *Statute Law*

Revision Act 2000 changed the reference to the definition of ‘home’ in s 3 of the *DBC Act* to make reference to the *Liquor Control Reform Act 1998*. The defendants submit that the current *Liquor Control Reform Act 1998* does not provide for a ‘residential part of licensed premises’ licence. Furthermore, the Builder does not directly refute these matters; and

- (n) in the premises, I am satisfied that, even if a relevant Liquor Licence existed at the date of Contract (which I do not accept) and also extended to the residential components of the Works, there is, and has been, nevertheless no applicable ‘residential part of licensed premises’ for the above reasons.

The Builder’s reliance on the planning permit(s) for the Works

127 The Builder submits that the Planning Permit 03/0067 for the use and development of the Builder’s works limited the permitted uses of the relevant land to use as ‘a retirement village and residential hotel’. The Builder submits that insufficient weight has been ascribed by the defendants to this requirement, which if contravened by the developer using the land for purposes which were not permitted, would constitute an offence under s 126 of the *P&E Act*. The Builder submits that the relevant permitted use was limited to a ‘residential hotel with associated tourist facilities, including restaurant, convenience shop, conference facilities...’, and that this was the clear intended purpose of the premises to be constructed pursuant to the Contract.

128 Ultimately, in my view, the Planning Permit is not determinative of the matters in question,¹¹⁵ and its reference to ‘residential hotel’ does not foreclose the question of the true characterisation of the structures subsequently contracted to be constructed. It is the Contract including the contract design and specification which, in this case, is more persuasive and probative. The Contract is clear and unequivocal in its nature, scope and intent in relation to those components of the Contract, which are designed and intended for use as residential premises. Furthermore, this is

¹¹⁵ Reasons for Judgment [128]-[129].

expressly, and for the present purposes, admitted, acknowledged and agreed by the Builder in clause 18.1 of the Contract. Accordingly, I give no significant weight to the Planning Permit 03/0067 as reflecting the intended use of the Works and the structures built as part of the Works pursuant to the Contract.

129 Further, as explained above, it is in my view clear enough that the terms of the existing Planning Permit cannot foreclose the question of the proper classification of the form of development which it permits. This is exemplified here because, in relation to the Planning Permit in question, the subject development has in fact resulted in the construction of Works which comprise many residential apartments; residential apartments which have been constructed under a Contract in respect of which the developer applied for and obtained the Planning Permit, and the Builder obtained Building Permits for specifically domestic building components of the Works, and both parties acknowledge and agree that The Resort Torquay development includes a large domestic building works component which falls under the *DBC Act*.

Scope of aspects of the defendants' submission

130 Section 54 of the *DBC Act* extends to either a domestic building contract or the carrying out of domestic building work. Here the defendants submit that the subject Works fall within both parts of s 54 of the *DBC Act*.

131 Because I have found that a substantial part of the Works comprise work contracted to be performed under, and which in fact were performed under, a major domestic building contract pursuant to the *DBC Act*, I do not consider that it is necessary to further consider s 54 of the Act.

132 The defendants' submissions include a submission that in this application, it will be necessary for the Court to determine not only whether the subject development falls within the *DBC Act*, but also how that Act applies generally.¹¹⁶

¹¹⁶ T67.24-30.

- 133 I agree only with the first part of this assertion by the defendants and consider it only necessary, and also prudent, to decide only what is necessary to dispose of the Builder's current applications.
- 134 Similarly, because I have found that the subject Works are, in a substantial component, in the nature of residential premises under the *DBC Act*, and in that aspect not properly characterised as a 'residential hotel' or part thereof, it is unnecessary for me to decide whether s 5(1)(e) of the *DBC Act* also catches the Works or the residential apartments component thereof.
- 135 Further, my conclusions as to the nature of the Works also necessarily means that I do not consider that the Works all fall within the exclusion 'residential hotel' in s 3(d) of the *DBC Act*. I have found that part of that scope of Work was in the nature of residential premises and thereby caught by the Act.
- 136 In that regard, it is not determinative that neither the parties nor the planning authority has sought to comprehensively describe the development as a 'residential hotel'. Nor am I constrained by the parties' submissions and positions as to the correct meaning of the term 'residential hotel' in the *DBC Act*.¹¹⁷
- 137 In my view, given the extensive residential apartment component which forms part of the development, the Works to be undertaken under the Contract were not in the nature of a structure within the meaning of the term 'residential hotel'. In my view, the term 'residential hotel' is intended to describe premises designed to provide transitory occupants with temporary public accommodation, food, and refreshment. The term 'residential hotel' does not, in my view, encompass a home in the nature of residential apartments designed and intended for permanent habitation, irrespective of the right of access of those residing in such apartments to hotel facilities at the Torquay Resort.

¹¹⁷ The Builder's submissions included an observation that the defendants did not dispute the Builder's interpretation of the phrase 'residential hotel' in s 3(d) of the Act.

138 Further, I observe that the occupant of a residential hotel ordinarily has no kitchen or laundry facilities, is not the owner of the part of the hotel which he or she occupies, and occupies on a non-permanent basis as a mere licensee.

139 In the subject development, I also observe that each residential apartment, whether a dual key apartment or the owner/occupier type of apartment, amongst other features, consists of a separate entry, kitchen and laundry facilities, separate metering of power and other utilities, indeed all the indicia of a long-term residence, and one permanently occupied by the owner of that residence.¹¹⁸

140 Accordingly, although part of the development may be characterised as a residential hotel, on the evidence in this application, a substantial part of it is not.

141 However, although the Builder submits that this application can be resolved without the need to determine certain disputed facts, and the parties both appear to accept¹¹⁹ on this application that there is sufficient uncontested evidence to enable the nub of the central jurisdictional issue to be determined, it is not for the Court on this application, and on affidavit evidence which includes very extensive, untested and largely unexplained technical engineering and construction details relating to the Works (and alleged defects in the Works), to attempt to define exhaustively what parts of the Works, including work associated with the residential components, fall under the *DBC Act* and what parts do not. That is a task which may unenviably fall to a Tribunal Member, although there it is likely to be informed by technical evidence which is explained by witnesses, including Expert witnesses, and such evidence will probably also be tested and further explained in submissions.

142 It is enough on this application for me to find that parts of the Works fall within the *DBC Act*, and on that basis also find that the Tribunal has jurisdiction, including in relation to the defendants' claims in negligence. I so find, and as a consequence the Builder's Originating Process, which is in the nature of an all or nothing application,

¹¹⁸ T81.

¹¹⁹ Plaintiff's Response Submissions, 11 August 2017, [2]; Defendants' Submissions, T81.15-24.

must be dismissed.

143 Finally, in relation to the mix of residential premises and other commercial works, I again note that the Works as defined by the building Contract, although expressly acknowledged and agreed as comprising domestic building works, and also comprising some works which are not in the nature of domestic building works at clause 18.1 and elsewhere, do not precisely segregate the part of the Works which are in the nature of domestic building work and those parts which are not.

144 In this regard, I have also noted earlier that the Building Permit which is incorporated into the Contract by express reference also makes a consistent reference to the approximate value of the two different types of work to be undertaken as part of the planned project. The Building Permit application reflects an appropriate \$45M value for the Works, of which an approximate \$30M relates to domestic building work and \$15M relates to commercial building work.

Extrinsic materials

145 I consider that the exercise of determining the relevant physical characteristics and intended purpose of the Work admits of reference to materials extrinsic to the contract for the performance of the Works, conditioned by the usual considerations of relevance, probity, and the weight to be ascribed to such material. I do not consider that there is any warrant to strictly or rigidly confine this exercise in a way which equates to construing the Contract itself, assuming it to be unambiguous.

146 There may be relevant matters which are ambiguous or uncertain on the face of, or external to, the Contract; and in certain circumstances, there may separately be non-contractual materials which may be appropriately considered so as to accurately inform the physical characteristics or the intended use of the works in question.

147 Where, as here, materials like the Planning Permit and the Building Permit are expressly, and necessarily, incorporated into the Contract, such documents should ordinarily be referenced if they inform the necessary evaluation, or will probably do

so. I have had regard to both those Permits on this basis.

Defendants' application to strike out of the Builder's application *ab limine* as an abuse of process

Builder's earlier application at the Tribunal to have the defendants' case struck out pursuant to s 75 of the *Victorian Civil and Administrative Tribunal Act 1998 (Vic)*

Defendants' submission - that the Builder's present application is an abuse of process

148 The defendants submit that the Builder's application for declaratory relief and an injunction restraining the defendants from continuing the present VCAT proceeding should be dismissed.

149 The defendants also submit that the Builder's application is an abuse of process because it is, in effect and in substance, an attempt to re-litigate matters already determined because:

(a) the Builder's present application is brought almost four years after the subject proceeding in the Tribunal was commenced; and

(b) almost two years after the Builder's application to have the defendants' claims struck out based on identical grounds was dismissed by Garde J, sitting as the President of the Tribunal.

150 Further, the defendants refer to the steps undertaken by them in the VCAT proceeding over the intervening period between both commencement of that proceeding and the present application by the Builder, and between the decision of the President of the Tribunal in late 2015 and the date of the present application. The defendants submit that, for these additional reasons, the balance of justice is in their favour, in the circumstances.

151 The defendants also complain that the Builder's application in this proceeding is substantially the same as the application prosecuted by the Builder at the Tribunal

and disposed of in October 2015 by the President of the Tribunal.

152 On 28 October 2015, sitting as President of the Tribunal, Garde J dismissed the Builder's application that the subject VCAT proceeding be struck out under s 75 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ('the VCAT Act'). His Honour determined at [18] of his Reasons that the Builder's application did not give rise to a suitable context to decide contested issues of fact and disputed issues of law in respect of the matters in dispute. His Honour observed that:

These issues are of public importance relating to the standards to which major domestic and mixed use developments are to be constructed in Victoria. The case involves important decisions as to the extent of consumer protection available to unit owners in Victoria under the Act.

153 In reaching this conclusion, Garde J also declined to reach any conclusions about the issues arising in the VCAT proceeding, and instead concluded at [19] that '[t]he issues are substantial and are simply not appropriate for resolution by an application under s 75 of the VCAT Act'. His Honour did, however, note at [22] of his Reasons that the Builder 'intends to submit at the final hearing that the Tribunal has no jurisdiction to hear and determine this proceeding'.

154 Further, although agitated in October 2015 before Garde J sitting as President of the Tribunal, the Builder has failed to attempt to re-agitate essentially the same issues until the issue of its Originating Process, dated 23 June 2017, in this proceeding.

155 In his reasons in the matter of the Builder's application at the Tribunal in 2015, the President, Garde J, recorded and observed:¹²⁰

2. The claim before the Tribunal is for the rectification of defects in a development at 100 the Esplanade, Torquay VIC 3228, known as Resort Torquay ('the development'), constructed by Hickory and containing a mix of apartments and other facilities, and also commercial businesses. There are 129 apartments in the development. 45 apartments are said to be of a conventional type. They are located on the third and fourth floors of the development. There are, or at least were on construction, 84 'dual key' apartments on the first and second floors, with two entry points. Subsequently, I am informed that 15 apartments which were dual key have had the 'dual key'

¹²⁰ [2015] VCAT 1683 (citations omitted).

aspect removed. These apartments have become two bedroom apartments.

3. I am informed that the principal allegations of defects relate to common property, including the roof, cladding, services and structure. There are also claims of defective balconies, balustrades and other problems.
4. The roof structure is common property and is situated on top of the two levels of apartments. There have apparently been water leaks in the common property, affecting the properties below.
5. The applicants say that the residential component of the development is subject to the *Domestic Building Contracts Act 1995 (Vic)* ('the Act'). Hickory denies that any part of the development is subject to the Act. The Hickory strike out submissions rely on three grounds. First, Hickory says the contract between Hickory and Massey Pty Ltd (the original owner and developer of the land on which the works were constructed) ('Massey') is not a domestic building contract. As a result, the Act does not apply. Secondly, it relies on various exclusions in the Act. For example, Hickory submits that if the Act does apply, it does not apply to the apartments rented for short term use. Thirdly, it says that the application should be struck out because the unit owners are not parties to the proceeding. As mentioned above, this last point no longer arises due to the joinder of the unit owners.
6. Section 75(1) of the *Victorian Civil and Administrative Tribunal Act 1998 (Vic)* ('the VCAT Act') provides:

At any time, the Tribunal may make an order summarily dismissing or striking out all, or any part, of a proceeding that, in its opinion –

- (a) is frivolous, vexatious, misconceived or lacking in substance; or
- (b) is otherwise an abuse of process.

...

8. In *Forrester v AIMS Corporation*, Kaye J considered the principles applicable to s 75(1) applications. Before a proceeding can be summarily dismissed:
 - (a) it must be 'very clear indeed' that the action is 'absolutely hopeless'; or
 - (b) the action must be 'so clearly untenable that it cannot possibly succeed'.Kaye J also held that:
 - (c) the strike out power 'may not be invoked where all that is shown is that, on the material currently put before the Tribunal, the complainant may fail to adduce evidence substantiating an essential element of the complaint'; and
 - (d) the respondent to a complaint has the onus of showing 'that the complaint is undoubtedly hopeless'.

...

12. In an application under s 75 of the VCAT Act, it is appropriate to assume that the applicant will be able to prove each fact alleged in the claim in question. A proceeding should not be dismissed or struck out under s 75 if the ultimate fate of the proceeding depends upon contested questions of fact that could be established or eliminated by cross-examination. In the present case, I am presented with numerous folders of factual material. It was even suggested that I should go on a view to better understand the condition of the development. Not only are there contested issues of fact in this proceeding, there are also disputed issues of law.

Conclusion

18. In this proceeding, there are contested issues of fact and important and disputed issues of law going as to the interpretation of the Act. These issues are of public importance, relating to the standards to which major domestic and mixed use developments are to be constructed in Victoria. The case involves important decisions as to the extent of consumer protection available to unit owners in Victoria under the Act. In my view, a s 75 application is not the place for such issues to be decided.
19. It is not desirable or appropriate for me to discuss the issues that arise in this proceeding at any length. The issues are substantial and are simply not appropriate for resolution by an application under s 75 of the VCAT Act.

156 Accordingly, the defendants in substance submit that it can be seen that the essence of the Builder's above application to VCAT was that the relevant contract was not a Domestic Building Contract, and therefore not subject to the *DBC Act*, and that the defendants' application at VCAT should be struck out on that basis as misconceived or lacking in substance.

157 The defendants also note that after the dismissal of its application before the Tribunal, the Builder did not appeal the decision of the President to the Court of Appeal.

158 The defendants argue that the Builder should not be permitted to avoid a hearing before the Court of Appeal by electing not to appeal the outcome of its earlier unsuccessful application before the President at the Tribunal, waiting almost two years and then bringing the same application for declaratory relief before a single judge of the Supreme Court of Victoria.

159 The defendants submit that the Builder's application is framed so broadly that if acceded to it would result in the removal of the VCAT proceeding, even though the claims at the Tribunal include claims in negligence which are not the subject of the Builder's application.

160 Further, the defendants submit that the Builder has approbated and reprobated in that over the approximate two years which have intervened between the Builder's earlier unsuccessful application at the Tribunal seeking substantially the same relief on substantially the same grounds, the Builder has actively participated in the proceedings at the Tribunal including seeking the joinder of additional respondents in July 2016 and March 2017. The defendants highlight that, notwithstanding these positive steps, the Builder now comes to court arguing that the case before the Tribunal should not be permitted to proceed because it is not a case which falls under the *DBC Act*.

Builder's response to the defendants' complaint that its present application is an abuse of process

161 The Builder argues that irrespective of whether or not the Builder made a substantially similar application to the present application in this proceeding at the Tribunal in October 2015, and whether the Builder's proper avenue of redress in relation to Garde J's decision in relation to that application should have been an appeal by the Builder to the Court of Appeal of this Court, and whether the Builder has been dilatory in prosecuting its present application, all such arguments yield to the Builder's assertion (if correct) that the Tribunal has no jurisdiction to hear and determine the claims at present being pursued at the Tribunal by the defendants. Put another way, in response to the above arguments by the defendants of abuse of process, delay, and inconsistent conduct at the Tribunal, the Builder submits that if the Tribunal has no jurisdiction, the Court has no option but to restrain the defendants' current claims at the Tribunal in relation to The Resort Torquay project.

162 The Builder submits that in this proceeding it is not seeking to re-litigate matters or

re-determine, or to appeal the earlier decision of Garde J at the Tribunal in October 2015.

163 The Builder points out that in Garde J's determination in relation to an application pursuant to s 75 of the VCAT Act, his Honour determined at [19] that the issues before him 'are substantial and are simply not appropriate for resolution by application under s 75 of the VCAT Act'. The Builder contends on that basis that Garde J made no determination regarding the Tribunal's jurisdiction to hear and determine the defendants' claims against the Builder.

164 The Builder submits therefore that Garde J made no determination regarding the Tribunal's jurisdiction to hear and determine the defendants' claims against the Builder, which question the Builder now seeks to have determined in this proceeding.

165 Further, the Builder submits that in these circumstances no abuse of process or collateral attack can arise.

166 The Builder also argues that because of the final binding nature of the orders which it seeks in this proceeding, the defendants' reliance on the Builder's delay in bringing this application is overstated, if not irrelevant, because delay is 'not a proper answer to the major issue in this proceeding' to do with the Tribunal's lack of jurisdiction.

167 Further, the Builder submits that it cannot be meaningfully accused of approbating and reprobating because a party cannot, by its conduct, affect the Tribunal's jurisdiction.

168 The Builder also disputes that, in the circumstances, there is such delay as would justify precluding the Builder from obtaining the relief it seeks. The Builder submits that it commenced this proceeding shortly after all parties to the proceeding before the Tribunal were known and the disputed issues in that proceeding had crystallised, and before the parties incurred certain major interlocutory expenses in

preparation for the forthcoming final hearing of the matter before the Tribunal.

169 The Builder in this proceeding also submits that it has consistently denied in the VCAT proceeding that the Tribunal has jurisdiction to hear and determine the claims made against it and has taken steps to bring the issue to a head before the Tribunal, but without success.

Decision – Defendants’ abuse application

170 Because the determination of the anterior question of the Tribunal’s jurisdiction is necessarily intertwined with the Builder’s argument in relation to the defendants’ strike out application, the defendants’ abuse of process based application was not able to be determined until the underlying question of the Tribunal’s jurisdiction to hear the present proceedings was determined.

171 Given my findings in relation to the Tribunal’s power to deal with the defendants’ current proceedings at the Tribunal, the Builder’s primary argument as to why it has not impermissibly sought to bring this application, notwithstanding its conduct at the Tribunal, including in making application to the President of the Tribunal in late 2015 on substantially the same grounds and for substantially the same relief, namely that both applications have been founded on the subject contract not being a domestic building contract under the *DBC Act* and the Tribunal being without jurisdiction for that reason.¹²¹

172 In relation to the defendants’ abuse arguments, in my view, the Builder has also impermissibly sought to issue and prosecute this application. The Builder’s application is impermissible because it re-agitates substantially the same matter, which was both unsuccessful at the Tribunal in late 2015, and which was also not taken further to the Victorian Court of Appeal soon after 28 October 2015, as in my

¹²¹ The Builder’s application under s 75 of the VCAT Act was substantially the same as the current application before the Court and, although the President at VCAT considered that the Builder’s application should not be decided and therefore declined the relief sought by the Builder, based on the same core jurisdictional issue arising in relation to the *DBC Act* and based on the same jurisdictional facts identified in the current application, the Builder’s jurisdictional argument could have been prosecuted on appeal by the Builder, but was not.

view the Builder could and should have done in preference to waiting well over a year and initiating this application.¹²²

173 Further, and of separate significance, from October 2015, indeed throughout what the Builder submits has been an unfounded proceeding at the Tribunal, the Builder has both delayed in prosecuting its present applications in this Court and has inconsistently taken active steps in the Tribunal proceedings, steps which the defendants have expended time and costs addressing and responding to. I consider that the Builder has thereby, approbated and reprobated, impermissibly delayed the prosecution of the current application and has also waived any entitlement to raise the jurisdictional issue it now complains about and, by its conduct at VCAT in taking and responding to interlocutory steps, at least post-October 2015, has accepted the jurisdiction of VCAT to deal with the defendants' claims.¹²³

174 For these reasons, I consider that the Builder's present application is an abuse of process which may be struck out on that basis.¹²⁴

Decision

175 For the above reasons, I shall refuse the declaratory relief sought by the Builder and I shall dismiss the Builder's Originating Process.

176 I also refuse the injunctive relief sought by the Builder, which is predicated upon establishment of the Builder's primary contention, namely that the Tribunal has no jurisdiction to hear and determine or otherwise proceed with the defendants' current

¹²² The Builder's submission that there exist sufficient uncontested facts to detriment the Builder's present application before the Court also indicates that the jurisdictional issue could have been pressed on appeal from VCAT, had the Builder chosen to do so.

¹²³ Since the outset of the VCAT proceeding, which the Builder claims was without a proper jurisdictional basis, and also subsequent to the October 2015 decision by the President of VCAT, which denied the Builder's application that VCAT was not empowered to hear the defendants' applications, the Builder has prosecuted its case at VCAT by taking, and responding to, interlocutory steps, including the joinder of defendants to the proceeding after October 2015; *Verwayen v Commonwealth (No 2)* [1989] VR 712; *Commonwealth v Verwayen* (1990) 170 CLR 394.

¹²⁴ *R v Smith* [1995] 1 VR 10, [15]; *State of Victoria v Australian Education Union* [2013] FCA 72, [23]; whether it is ordered that the Builder's present application is struck out as an abuse of process is in part dependant on the orders ultimately sought by the defendants.

claims at the Tribunal.

Orders

177 I shall dismiss the Builder's originating process dated 23 June 2017.

178 I shall hear the parties, if necessary, as to the form of final orders including as to any orders appropriate in respect to the defendants' application to strike out the Builder's Originating Process and as to costs.

SCHEDULE OF PARTIES

S ECI 2017 0153

BETWEEN

H Buildings Pty Ltd (ACN 091 236 912)
formerly Hickory Group Pty Ltd

Plaintiff

- and -

Owners Corporation 1 PS537642N
Owners Corporation 2 PS537642N
Con Horomidis
Soumela Horomidis
Brian Jamieson
Marvell International Pty Ltd (ACN 105 723 831)
Pamela Anne Drechsler
Kennetta Stacey Hutchens
Anthony John Roberts
Steven Robert Kruger
Lynette Joy Foyley
Kellie Dowsett
Kerrie Long
Sagreen Pty Ltd (ACN 088 749 553)
Ian David Kett
Jacqueline Margaret Kett
Joseph Vincent Remenyi
Catherine Margaret Remenyi
Charles Wayne Stringer
Jane Stringer
SP Morrissy Pty Ltd (ACN 135 842 652)
Bronwyn Therese Hardy
Geoffrey Peter Sadler
Faye Frances Sadler
Peter Charles De Rauch
Rodney Norman Lloyd
Patricia Maree Lloyd
Edward David Powlett
Colin Dale McCoy
The Trust company (PTAL) Limited (ACN 008 412 913)
M.P. Nominees (Aust) Pty Ltd (ACN 074 649 826)
Peter Robert Lewis
Julie Anne Lewis
Qiong Chen
Zhong Zheng Qiu
Kafi Salman Medical Services Pty Ltd (ACN 110 315 887)
T&M Abate Enterprises Pty Ltd (ACN 093 184 591)
Lori Dobson
Shane Leslie Mathison
Anthony Allan Mathison
Allan Leonard Mathison
Kay Florence Mathison
Zoran Todorovski
Vineta Todorovski

First Defendant
Second Defendant
Third Defendant
Fourth Defendant
Fifth Defendant
Sixth Defendant
Seventh Defendant
Eighth Defendant
Ninth Defendant
Tenth Defendant
Eleventh Defendant
Twelfth Defendant
Thirteenth Defendant
Fourteenth Defendant
Fifteenth Defendant
Sixteenth Defendant
Seventeenth Defendant
Eighteenth Defendant
Nineteenth Defendant
Twentieth Defendant
Twenty-First Defendant
Twenty-Second Defendant
Twenty-third Defendant
Twenty-Fourth Defendant
Twenty-Fifth Defendant
Twenty-Sixth Defendant
Twenty-Seventh Defendant
Twenty-Eighth Defendant
Twenty-Ninth Defendant
Thirtieth Defendant
Thirty-First Defendant
Thirty-Second Defendant
Thirty-Third Defendant
Thirty-Fourth Defendant
Thirty-Fifth Defendant
Thirty-Sixth Defendant
Thirty-Seventh Defendant
Thirty-Eighth Defendant
Thirty-Ninth Defendant
Fortieth Defendant
Forty-First Defendant
Forty-Second Defendant
Forth-Third Defendant
Forty-Fourth Defendant

Peter Raymond Lord
Farouk Alukaidey
John Giannakopoulos
Polyxeni Giannakopoulos
William Hugh Rivers Dickinson
Werben Pty Ltd (ACN 005 341 828)
Alexandria Zavisic
Margot Zavisic
Casey Consulting Services Pty Ltd (ACN 070 047 997)
Zumbo Investments Pty Ltd (ACN 070 047 997)
Shane Patrick Morrissy
Garry Edward Lakey
Violetta Lakey
Frederick Scharkosi
Glenda Holdings Pty Ltd (ACN 142 273 925)
Tissor Nominees Pty Ltd (ACN 087 205 132)
Trida Pty Ltd (ACN 006 529 639)
Estben Pty Ltd (ACN 141 166 225)
Zelmaten Pty Ltd (ACN 006 318 645)
Torquay Holding Company Pty Ltd (ACN 135996 673)
Peter Anthony
Leanne Anthony
Tony Toskovski
Melinda Kelly Toskovski
ACD Holdings Pty Ltd (ACN 128 785 893)
Andrea Narelle Kiel
Bris Pty Ltd (ACN 080 167 513)
Ron Dawson
Andrew John Gunther
Carolyn Michele Gunther
Stuart Roydon Robottom
Alessandra Sutti
Timothy John Till
Kerr Super Investments Pty Ltd (ACN 163 044 488)
Brandt Ross Kelly
Schreib Enterprises Pty Ltd (ACN 005 155 724)
Kenneth John Baddeley
Nicholas John Abbott
Jan Peter Sloane
Torquay Units Pty Ltd (ACN 129 843 803)
Cresma Pty Ltd (ACN 105 403 307)
Dancock Pty Ltd (ACN 074 562 271)
Diavolo Properties Pty Ltd (ACN 105 021 243)
Edward Anthony Collyns Greenidge
James Steven Wood
Ingrid Marie Karen Wood
Meto Mustafa Pty Ltd (ACN 610 818 392)
Salvatore Grassa
Maria Giuseppa Grassa
Nick Lobianco
Maria Lobianco
Merstruct Pty Ltd (ACN 168 343 315)
Freyssinet Australia Pty Ltd (ACN 002 617 736)
Caelli Constructions Pty Ltd (ACN 080 995 204)
The Meyer Consulting Group Pty Ltd (ACN 007 239 376)
Danlaid Contracting Pty Ltd (ACN 079 777 914)
SDP Services Pty Ltd (ACN 054 950 920)
Structural Challenge Pty Ltd (ACN 094 640 347)

Forty-Fifth Defendant
Forty-Sixth Defendant
Forty-Seventh Defendant
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Forty-Ninth Defendant
Fiftieth Defendant
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Eightieth Defendant
Eighty-First Defendant
Eighty-Second Defendant
Eighty-Third Defendant
Eighty-Fourth Defendant
Eighty-Fifth Defendant
Eighty-Sixth Defendant
Eighty-Seventh Defendant
Eighty-Eighth Defendant
Eighty-Ninth Defendant
Ninetieth Defendant
Ninety-First Defendant
Ninety-Second Defendant
Ninety-Third Defendant
Ninety-Fourth Defendant
Ninety-Fifth Defendant
Ninety-Sixth Defendant
Ninety-Seventh Defendant
Ninety-Eighth Defendant
Ninety-Ninth Defendant
One Hundredth Defendant
One Hundred-First Defendant
One Hundred-Second Defendant

Peter Luzinat
PLP Building Surveyors and Consultants Pty Ltd (ACN 084 420 477)
Studio 35 Architecture Pty Ltd (ACN 063 258 677)
Massey Pty Ltd (ACN 070 585 456)

One Hundred-Third Defendant
One Hundred-Fourth Defendant
One Hundred-Fifth Defendant
One Hundred-Sixth Defendant