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

Not Restricted

S ECI 2017 0178

MARKIAN GOLETS — Plaintiff

v

SOUTHBOURNE HOMES PTY LTD
(ACN 160 896 971) — First Defendant

and

JOHN MCMULLAN — Second Defendant

JUDGE:	VICKERY J
WHERE HELD:	MELBOURNE
DATE OF HEARING:	16 NOVEMBER 2017
DATE OF JUDGMENT	23 NOVEMBER 2017
CASE MAY BE CITED AS:	GOLETS v SOUTHBOURNE HOMES & ANOR
MEDIUM NEUTRAL CITATION:	[2017] VSC 705

BUILDING CONTRACTS — *Building and Construction Industry Security of Payment Act 2002* (Vic) — Section 7(2)(b) meaning of 'in the business of building residences' — Whether the Act applies — Applicant not 'in the business of building residences' — No jurisdiction in adjudicator to determine adjudication application — Adjudication determination quashed.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr R Andrew	Moray & Agnew
For the First Defendant	Mr N J Phillpott	Ward & Co Legal Consultants

HIS HONOUR:

Introduction

1 This proceeding arises under the *Building and Construction Industry Security of Payment Act 2002* (Vic) (the 'Act').

2 The construction contract in issue provides for the construction of two residential dwellings by the First Defendant, Southbourne Homes Pty Ltd ('Southbourne Homes' or the 'Builder') on land owned by the Plaintiff, Dr Markian Golets ('Dr Golets').

3 Dr Golets seeks judicial review of an adjudication determination purportedly made pursuant to s 23 of the Act by the Second Defendant (the 'Adjudicator') dated 16 July 2017 (the 'Adjudication Determination') which was in large part favourable to Southbourne Homes.

4 By originating motion dated 1 August 2017, Dr Golets seeks orders quashing the adjudication determination on the following grounds advanced to support the contention that the adjudicator fell into jurisdictional error, or alternatively made error on the face of the record:

(1) the Adjudicator committed jurisdictional error, alternatively erred in law, in determining that the Plaintiff is in the business of building residences ('Ground 1').

(2) the Adjudicator committed jurisdictional error, alternatively erred in law, in finding that the Act permits a claimant to deliver a payment claim under the Act following termination of the relevant construction contract ('Ground 2').

(3) further, or in in the alternative to Ground 2 above, the Adjudicator committed jurisdictional error, alternatively erred in law, in finding that there was a relevant reference date supporting the payment claim, when no such reference was provided for in the construction contract ('Ground 3').

(4) the Adjudicator committed jurisdictional error, alternatively erred in law, in finding that each of the stages prior to the Final Stage was complete in accordance with the construction contract and that therefore a relevant reference date under the contract arose ('Ground 4').

(5) the Adjudicator committed jurisdictional error, alternatively erred in law, in finding that the payment claim contained sufficient information to satisfy the requirements of s 14(2)(c) of the Act ('Ground 5').

(6) the Adjudicator committed jurisdictional error, alternatively erred in law, in failing to value the payment claim ('Ground 6').

5 Further or in the alternative, Dr Golets seeks declarations that:

(a) the adjudication determination is void; and

(b) he is not in the business of building residences.

Background

6 By way of background, I find the following events occurred.

7 By written contract dated 18 November 2014 (the 'Construction Contract'), the Plaintiff owner, Dr Golets, engaged the First Defendant builder, Southbourne Homes, to construct two three storey townhouses on a site located in Wright Street, Hawthorn for the sum of $1,935,000 (including GST) (the 'Hawthorn Property')

8 The Construction Contract was a standard form domestic building contract.[1]

9 Building works commenced shortly after the Construction Contract was signed. Disputes arose during construction. The works on site were progressed at a slow rate. By October 2016, the works were substantially delayed, incomplete and defective.

1 Victorian Master Builders Association New Homes Contract (HC-6 addition 2-2014).

10 Further, promises for completion were never fulfilled. Mr Sam Taha, a director Southbourne Homes, produced at least 4 construction schedules setting out the timeline for completion of the works, none of which were ever followed.

11 On 11 November 2016, the Plaintiff sent a notice of intention to terminate the contract. Southbourne Homes failed to rectify the defects listed in the notice and the works continued at a slow pace. By around April 2017, the Plaintiff formed the view that the defects would not be rectified. On 24 April 2017, the Plaintiff sent a notice terminating the contract. Correspondence between the parties' solicitors followed.

12 On 10 May 2017, the registered building surveyor conducted an inspection and issued a building inspection report under s 37 of the *Building Act 1993* (Vic). The report noted that the frame had not been approved, and that further works were required. The report relevantly stated:

> Re ReFrame Inspection Required. Do NOT perform any additional building works until the above directions have been rectified and approved by this office.

13 On 19 May 2017, the solicitors for the First Defendant, sent a letter to the solicitors for the Plaintiff, accepting an alleged repudiation of the Construction Contract. That letter relevantly stated:

> We are instructed to hereby notify your client that pursuant to the above, our client accepts your client's repudiation of Contract and consequently, the Contract is now at an end.

14 The Plaintiff does not accept that he repudiated the contract. The parties agree that the contract was terminated either by:

(a) the Plaintiff's notice on 24 April 2017; or

(b) Southbourne Homes' solicitor's letter on 19 May 2017.

The payment claim and its disposition

15 On 1 June 2017, Southbourne Homes purported to serve a payment claim dated 31 May 2017 under the Act seeking payment of the sum of $438,870.63.

16 On 14 June 2017 the Plaintiff served a payment schedule under the Act, stating that NIL would be paid. The reasons given by the Plaintiff in the payment schedule were that the payment claim:

(a) was not a valid payment claim under the Act because the contract was for 'domestic building work' and the Plaintiff is not in the business of building residences;

(b) included 'excluded amounts' under s 10B of the Act;

(c) did not contain sufficient information as required by s 14(2) of the Act; and

(d) failed to identify a reference date.

17 On 28 June 2017, the solicitors for Southbourne Homes referred the claim to adjudication under the Act. The Adjudicator accepted appointment the following day.

18 On 5 July 2017, the Plaintiff provided the Adjudicator with an adjudication response.

19 On 6 July 2017, the Adjudicator issued a notice under s 21(2B) of the Act. The Plaintiff objected to this notice and correspondence followed.

20 On 10 July 2017, the solicitors for Southbourne Homes served further submissions.

21 On 11 July 2017, the Plaintiff provided the Adjudicator with further submissions in response.

22 On 16 July 2017, the Adjudicator delivered the Adjudication Determination in which he found in favour of Southbourne Homes on jurisdictional issues and awarded its claim to the extent of $351,427.

The Adjudication Determination

23 At paragraph [63] of the Adjudication Determination, the Adjudicator identified seven issues which he considered relevant to jurisdiction based on the submissions received.

24 Addressing Ground 1, namely 'whether the Construction Contract was excluded from the Act by operation of s 7(2)(b)', having set out each parties' respective submissions[2] and made findings of fact[3] in relation to this issue, the Adjudicator decided that Dr Golets *was* 'in the business of building residences' and on this basis determined that the Construction Contract was not excluded by the sub-section and founded his jurisdiction to properly make the Adjudication Determination.[4]

25 The Adjudicator concluded:[5]

> Firstly, [Dr Golets] seems, on balance, to be more logically described as a "commercial developer", albeit that he intended to live in the residence long-term, in that he seems to have, a number of times, bought land and built residences, on a commercial basis, as opposed to a non-commercial home owner entering into a building contract with a builder for the construction of their single residential home.
>
> Secondly, in my view, in this case, the development process of [Dr Golets], including identifying and purchasing land, and building multiple dwellings on that land, with the purpose of selling some of the created dwellings, is to be owned, long-term, by [Dr Golets], seems to have the characteristic of "continuous and repetitive", as expressed in in [sic] *Structx*,[6] and in [*Hope*],[7] and in *Promax*.[8]
>
> I determine, therefore, that the Contract was a construction contract in respect of which the Act applies.
>
> For completeness, I record my view that mere registration for GST, though consistent, would not be sufficient on its own to constitute being in the "business of building residences", for the purpose of Section 7(2)(b) of the Act.

Does the Act apply to the Construction Contract?

Plaintiff's contentions

26 In essence, the Plaintiff, Dr Golets, contended under Ground 1 that pursuant to s 7(2)(b) of Act, the Adjudicator did not have jurisdiction to make the Adjudication

2 Adjudication determination [66]–[68].
3 Ibid [69]–[71].
4 Ibid [72]–[81].
5 Ibid [77]–[81].
6 *Director of Housing of the State of Victoria v Structx Pty Ltd* [2011] VSC 410.
7 *Hope v Bathurst City Council* (1980) 144 CLR 1.
8 *Promax Building Developments Pty Ltd v PCarol & Co Pty Ltd* [2017] VCC 495.

Determination because the Construction Contract in issue was a domestic building contract and he was, at all relevant times, *not* 'in the business of building residences'.

27 Save for the possible application of the exception provided by s 7(2)(b) of the Act, it was accepted by both parties that the Construction Contract in this case was a construction contract to which the Act applies. By operation of s 7 of the Act, in combination with the definitions provided by s 4, this clearly is the case.

28 The Plaintiff submitted that the Act nevertheless does not apply by reason of the exception provided by s 7(2)(b) of the Act and its application to the facts of this case. Section 7(2)(b) provides:

> **7.** ***Application of Act***
>
> ...
>
> (2) This Act does not apply to —
>
> ...
>
> (b) a construction contract which is a domestic building contract within the meaning of the *Domestic Building Contracts Act 1995* between a builder and a building owner (within the meaning of that Act) for the carrying out of domestic building work (within the meaning of that Act), **other than a contract where the building owner is in the business of building residences and the contract is entered into in the course of, or in connection with, that business.** [Emphasis added]

29 It may be seen that s 7(2)(b) operates to exclude 'a construction contract which is a domestic building contract' from the purview of the Act. This rule does not apply, however, where the contract is one '*where the building owner is in the business of building residences and the contract is entered into in the course of, or in connection with, that business*'.

Section 7(2)(b): 'in the business of building residences'

30 The question as to whether a person is 'in the business of building residences' for the purposes of s 7(2)(b) of the Act has been the subject of previous judicial consideration.

31 In *Director of Housing v Structx Pty Ltd* ('*Structx*'), this Court held that:[9]

> The expression "in the business of building residences ..." connotes the construction of dwelling houses as a commercial enterprise on the basis of a going concern, that is, an enterprise engaged in for the purpose of profit on a continuous and repetitive basis.
>
> Reference is made to *Hope v Bathurst City Council*. The appellant before the High Court, was the owner and occupier of certain land known as "Hassall Park", situated at Kelso near Bathurst. He appealed under s 118(7) of the *Local Government Act 1919* (NSW), as amended, against the decision of the respondent Bathurst City Council that his land, the subject of a rate notice for the year 1978, was not rural land, with the consequence that he was not entitled to the benefit of the lower general rate made in respect of rural land. The expression "rural land" was relevantly defined in s 118(1) of the *Local Government Act* as:
>
> > a parcel of ratable land which is valued as one assessment and exceeds 8,000 square metres in area, and which is wholly or mainly used for the time being by the occupier for carrying on one or more of the *businesses or industries* of grazing, dairying, pig-farming, poultry farming, viticulture, orcharding, bee-keeping horticulture, vegetable growing, the growing of crops of any kind or forestry.
>
> As identified by Mason J, this definition threw up as an issue for determination by the primary judge, the question whether the appellant's land was wholly or mainly used by him for carrying on the business or industry of grazing.
>
> Mason J, with whom the other members of the Court agreed said:
>
> > I accept, then, that "business" in the sub-section has the ordinary or popular meaning which it would be given in the expression "carrying on the business of grazing". It denotes grazing activities undertaken as a commercial enterprise in the nature of a going concern, that is, activities engaged in for the purpose of profit on a continuous and repetitive basis.

32 As may be seen from the above, the approach adopted for the purposes of the 'in the business of building residences ...' exception in s 7(2)(b), was to consider whether the party concerned was 'in the business of building residences in the course of an enterprise engaged in for the purpose of profit on a continuous and repetitive basis.' For this purpose I accepted that the expression '*in the business of* building residences ....', as it is used in s 7(2)(b) of the Act, was materially indistinguishable from the

9 [2011] VSC 410 [28]–[31].

phrase '*carrying on the business of* ... 'grazing' as considered in *Hope v Bathurst City Council*,[10] and I applied the considerations referred to by Mason J in that case.

33 However, it must be accepted that what constitutes being 'in the business of building residences' for the purposes of s 7(2)(b) of the Act is in each case an issue of fact to be determined on a case by case basis.

34 The 'indicia' applied to the facts in *Structx* must be seen as an aid or guide to the application of the statutory exception, rather than be seen as a prescriptive, comprehensive and exclusive test superimposed on the statutory definition of the exception.

35 In some cases, where at first glance these indicia might appear to operate to render the exception applicable, the particular facts of the case may point in the opposite direction, with the result that the exception is inapplicable, and vice versa.

36 Ultimately, the only 'test' to be applied to determine whether or not the exception applies is that prescribed by the Act. Application of the exception is to be adjudged by reference to its own language, when applied to the facts of each case. The facts relevant to this issue will vary from case to case. These relevant facts may be referred to as the 'salient features'.

37 It cases where the phrase 'carrying on a business' has been considered, it was recognised that a single joint venture may be sufficient to fall within the concept, in spite of the apparent absence of the element of a going concern conducted on a continuous and repetitive basis. In *United Dominions Corp Ltd v Brian Pty Ltd*, Dawson J observed:[11]

> A single adventure under our law may or may not, depending upon its scope, amount to the carrying on of a business: *Smith v Anderson* (1880) 15 Ch D 247 at 277–8; *Re Griffin; Ex parte Board of Trade* (1890) 60 LJQB 235 at 237; *Ballantyne v Raphael* (1889) 15 VLR 538. Whilst the phrase "carrying on a business" contains an element of continuity or repetition in contrast with an isolated transaction which is not to be repeated, the decision of this court in *Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales (Finance) Pty Ltd* (1974)

10 (1980) 144 CLR 1.
11 157 CLR 1, 15.

> 131 CLR 321; 3 ALR 409, suggests that the emphasis which will be placed upon continuity may not be heavy.

38 A recent example of the application of the s 7(2)(b) exception is provided by the decision of the Victorian County Court in *Promax Building Developments Pty Ltd v PCarol & Co Pty Ltd* ('*Promax*').[12] The case involved a party ('PCarol') who was the trustee of a discretionary trading trust. Between 2009 and 2011, PCarol undertook building work for three units in Reservoir. It then purchased property in Bellfield in 2013, which it rented out between 2013 and 2015. In January 2016, PCarol, as owner, and the plaintiff ('Promax'), as contractor, entered into a domestic building contract for the construction of 12 apartments on the Bellfield property, which was subject to finance.

39 By notice dated 20 March 2017, Promax purported to terminate the contract as funding had not been obtained. Promax subsequently issued a payment claim under the Act. PCarol did not serve a payment schedule in reply. Promax commenced proceedings in the County Court pursuant to the Act seeking judgment for the amount of the payment claim. In result, the Court held that PCarol was, for the purposes of s 7(2)(b) of the Act, 'in the business of building residences'.

40 In reaching this conclusion, Judge Anderson focused on the purpose of the trust and its activities:[13]

> In my view, the determination of the question of whether a "building owner is in the business of building residences" does not depend on the scale of the business, the success of the business, the number of projects undertaken either in the past or at any one time, or as contemplated for the future.
>
> PCarol entered into the building contract with Promax in pursuit of the purpose of the Trust, which was essentially the purchase and redevelopment of land for residences. I am satisfied that PCarol was in December 2016, and thereafter until the termination of the building contract, "in the business of building residences".

41 Accordingly, as his Honour identified that the purpose of the trust was to make investments in the property market and its sole activity had been the purchase and

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12 [2017] VCC 495.

13 *Promax* [2017] VCC 495 [27]–[28].

development of two properties, being the Reservoir property and the Bellfield property, PCarol was held to be 'in the business of building residences'.

42 As to the evidentiary onus which operates under s 7(2)(b) of the Act, in the first instance, in the event of controversy over the issue, the evidentiary onus falls on the party who asserts that the relevant construction contract is a domestic building contract within the meaning of the *Domestic Building Contracts Act 1995* (Vic) between a builder and a building owner for the carrying out of domestic building work. Once that is established, or, as was done in this case, conceded, the evidentiary onus to establish that the operation of s 7(2)(b) of the Act does not apply because the building owner is not in the business of building residences and the contract was not entered into in the course of, or in connection with, that business, lies with the party which so asserts — in this case the Plaintiff.

Submissions of the Builder

43 In purported reliance on the principles from *Structx* and *Promax*, the Builder submits that the relevant 'test' is as follows:

(a) is there an enterprise constructing dwelling houses? and

(b) is that enterprise's purpose to make a profit, irrespective of if it so does? and

(c) is that enterprise engaging in the construction of dwelling houses on a continuous and repetitive basis?

44 Here, the enterprise of Dr Golets was submitted to be that of a developer.

45 It was put by the Builder that the Plaintiff purchased property at 33 Winifred Street, Oak Park (the 'Oak Park Property') and the Hawthorn Property and redeveloped them both, with the intention that one of each of the homes on both properties would be sold off to make money to cover the construction costs of each project, that is, make a profit from the construction of the dwelling house.

46 It was submitted that the engagement in the construction of dwelling houses on the part of Dr Golets has been continuous and repetitive.

47 Following the approach taken in *Promax*, it was submitted that the scale, the success, the number of projects and the future project contemplation is not determinative of the question before the Court.

48 Considering the evidence, it was submitted that Dr Golets was indeed 'in the business of building residences', and that the Adjudicator had the required jurisdiction to make the Adjudication Determination.

49 For these reasons it was submitted that Ground 1 must fail.

Submissions of the Plaintiff

50 It was submitted on behalf of Dr Golets that, by reference to the applicable law, he was *not* 'in the business of building residences ...' within the meaning of s 7(2)(b) of the Act, and the Act had no application to him or the Construction Contract.

51 It was submitted on behalf of Dr Golets that the evidence disclosed the following matters of relevance:

(a) The First Defendant (Southbourne Homes) is a building company;

(b) Dr Golets and his wife, Victoria Golets, whom is employed as a pharmacist, have purchased and/or rented a number of homes since 2000;

(c) In terms of building residences, the evidence is that:

(i) during 2008–2009, the Plaintiff engaged Northbourne Homes Pty Ltd (a company related to Southbourne Homes, but since placed into liquidation) to construct 3 units at the Oak Park Property. This build was undertaken with a family friend, Mr Gilmore, a pharmacist, the intention being that the Plaintiff and his wife would live in one unit, and Mr Gilmore would live in another unit. The third unit would be sold to help cover the cost of purchasing the land and constructing the

units. Construction was completed in July 2009 and Dr Golets, his wife and their daughter moved into one of the units. The following year they moved to Kew to be closer to their daughter's school.

(ii) Approximately 5 years later in November 2014, Dr Golets contracted with Southbourne Homes to construct two units on the Hawthorn Property. The intention was that the Plaintiff and his family would live in one of the units and sell the other unit to 'help pay off the debt'.

(d) There is no evidence that the Plaintiff has ever been involved in building any other residences or other buildings;

(e) On 18 November 2014, Dr Golets contracted with Southbourne Homes to construct 2 units on the Hawthorn Property within the construction period of 459 days (the 'Hawthorn Project'). This property was originally purchased in June 2008 as a rental investment. A noted above, Dr Golets and his wife needed a larger home and decided to construct two units so that one would be their primary residence and the the other could be sold to help pay off the debt. Dr Golet's affidavit evidence is that this was the only way he could afford to live in an area like Hawthorn, close to the children's schools.

52 For these reasons it was submitted that Ground 1 succeeds.

Conclusions and orders

53 In this case I have determined that the Plaintiff has made out Ground 1.

54 The following salient features are relevant:

(a) Dr Golets is a medical practitioner by occupation and his wife is a pharmacist. I infer from this that they are engaged in these professions.

(b) There is no evidence to support the First Defendant's submission that the purpose of the Hawthorn Project was intended to make a 'profit' in the

commonly accepted sense of the concept. In *Brandt v WG Tatham Pty Ltd*,[14] Ferguson J held that:

> In ordinary parlance profit means financial gain, that is to say money received over and above the money expended. In the *Oxford Dictionary* the following meanings are given: "pecuniary gain in any transaction; the amount by which value acquired exceeds value expended; the excess of returns over outlay of capital."

I adopt this description of the term 'profit' as applicable to the facts of this case. The evidence of the Plaintiff is that the sale of the second unit in the Hawthorn Property was intended to help pay off the debt which had been generated. True it is that by these means the Plaintiff was assisted in securing the asset in the remaining first unit which he and his family intended to occupy. However, if a profit was to be made upon the realisation of the remaining first unit by sale, there is no evidence as to when this was to occur or likely to occur, or the likely extent of any profit, or indeed, whether a profit would be achieved at all.

(c) There is no evidence of any enterprise on a continuous and repetitive basis. Other than the Hawthorn Project, the only other project where the Plaintiff undertook construction of any dwelling houses was in 2008–2009 when, as mentioned previously, the Plaintiff and an acquaintance, Mr Gilmore, arranged for 3 units to be built at the Oak Park Property (the 'Oak Park Project'). This Oak Park Project was undertaken with the intention that the Plaintiff and his wife would live in one unit, and Mr Gilmore would live in another unit. The third unit would be sold to help cover the cost of purchasing the land and constructing the units. Again, there is no evidence of any profit being realised.

In this context, the works undertaken in respect of the Oak Park Project in 2008–2009 and the Hawthorn Project some five years later in 2014, do not

[14] [1965] NSWR 126, 127.

constitute a construction activity conducted on a continuous and repetitive basis.

(d) There was no vehicle established to structure the construction of dwellings at the Hawthorn property which had as its purpose a commercial enterprise to generate profit for those engaged in it or who had an interest in it.

(e) The primary purpose of the Hawthorn Project was to secure a dwelling house to be occupied by Dr Golets and his family. The sale of the one unit was part of his financial plan to achieve this end.

55 Standing back and considering these salient features as a whole, I do not consider that Dr Golets, in undertaking the construction of the Hawthorn Project, was 'in the business of building residences ...' within the meaning of s 7(2)(b) of the Act.

56 As to the reasoning of the Adjudicator, I find on the evidence before me that Dr Golets could not be described as a 'commercial developer'. His building activities conducted in 2008–2009 for the Oak Park Project and in 2014 for the Hawthorn Project, when considered in the context described in the evidence before the Court, could not properly be described as being activities where he 'a number of times, bought land and built residences, on a commercial basis'. Further, I do not consider these activities were conducted on a 'continuous and repetitive' basis as found by the Adjudicator.

57 In this case I am well satisfied that the Plaintiff has discharged his evidentiary onus under s 7(2)(b) of the Act, in establishing that he, as the building owner, was at all material times *not* 'in the business of building residences' and the Construction Contract entered into for the Hawthorn Project, was not entered into in the course of, or in connection with, any business.

58 The Adjudicator fell into jurisdictional error in determining that the Plaintiff *was* 'in the business of building residences' at the time of constructing the Hawthorn Project.

59 In accordance with the overarching purpose of the *Civil Procedure Act 2010* (Vic) to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute,[15] and in particular the desirability of resolving proceedings commenced under the *Building and Construction Industry Security of Payment Act 2002* (Vic) in an expeditious manner, I have determined not to proceed with a determination of the other five grounds maintained by the Plaintiff in this application, the resolution of which would involve detailed analysis.

60 I will make the following orders:

1. The Adjudication Determination made by the Second Defendant on 16 July 2017 be quashed and declared to be void.

2. It is declared that, at the time of constructing the Hawthorn Project at 6 Wright Street, Hawthorn, the Plaintiff was not in the business of building residences within the meaning of s 7(2)(b) of the *Building and Construction Industry Security of Payment Act 2002* (Vic), and the Construction Contract entered into for the Hawthorn Project was not entered into in the course of, or in connection with, any business.

61 I will hear the parties on costs.

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15 *Civil Procedure Act 2010* (Vic) s 7(1).