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The Supreme Court of Victoria holds that the *Domestic Building Contracts Act 1995* applies to multi-apartment residential developments

The Supreme Court of Victoria recently decided in *Burbank Australia Pty Ltd v Owners Corporation PS 447493*¹, an appeal from the Victorian Civil and Administrative Tribunal (VCAT), that the *Domestic Building Contracts Act 1995* (DBC Act) applies to multi-apartment developments.

While this decision provides greater certainty to those involved in such residential developments, the decision has not finally resolved the question of whether or not the DBC Act also applies to mixed-use developments having a residential component.

Background

Burbank (the appellant) was the builder of a 67-apartment development in Maribyrnong for a developer. The respondent (Owners Corporation) became the owner of the common areas

of the development. Owners Corporation initiated proceedings against Burbank in VCAT on the basis that Burbank had breached the implied warranties contained in section 8 of the DBC Act. The section 8 warranties form part of every domestic building contract and, pursuant to section 9 of the DBC Act, they “run with the land” to benefit the owner from time to time. Absent the DBC Act applying to the construction contract between Burbank and the developer, the Owners Corporation would have no claim against Burbank under the DBC Act.

Burbank made an application to strike out the proceeding pursuant to section 75 of the *Victorian Civil and Administrative Tribunal Act 1998* (VCAT Act) as an unjustified proceeding. VCAT dismissed that application and Burbank appealed on a number of grounds, including on the basis that the DBC Act didn’t apply to a multi-apartment development.



¹ [2015] VSC 160.



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Decision

Does the DBC Act apply to multi-apartment developments?

In considering the primary question of whether the DBC Act applies to multi-apartment developments, McDonald J relied on the principles of statutory interpretation. (Both parties had submitted that there was no direct or analogous authority on this question.) In particular, McDonald J referred to the following passage from a recent decision of the Court of Appeal² in which the Court observed that statutory interpretation involves consideration of the legislative context and history, but that:

“... if the words are clear and unambiguous, and can be intelligibly applied to the subject-matter, the provision must be given its ordinary and grammatical meaning, even if the result may seem inconvenient or unjust.”

Consistent with this approach, McDonald J considered the legislative context of the DBC Act and a number of cases which have dealt with similar issues, and based his decision on an interpretation of the relevant provisions of the DBC Act as he found the language used in those provisions to be unambiguous. Ultimately, His Honour held that the DBC Act does apply to multi-apartment developments on the following grounds:

- a. such developments come within the definition of ‘home’ in section 3 of the DBC Act and are, therefore, subject to the DBC Act by virtue of section 5(1)(a); and/or
- b. such developments are built on land zoned for residential

² *Treasurer of Victoria v Tabcorp Holdings Ltd* [2014] VSCA 143.

purposes and must require a building permit under the *Building Act* 1993 and are, therefore, subject to the DBC Act by virtue of section 5(1)(e).

McDonald J was fortified in his decision by the Victorian Parliament’s introduction of an exemption for builders carrying out multi-storey residential developments from the operation of section 136(2) of the *Building Act* 1993³ (which provision prohibits a builder from carrying out domestic building work under a major domestic building contract unless the builder is covered by the required warranty insurance). His Honour interpreted the exemption from that provision as being premised on such a development being subject to the operation of the DBC Act, with the attendant warranties in favour of the owner from time to time of homes within such developments.

McDonald J considered the Second Reading Speech for the Domestic Building Contracts and Tribunal Bill 1995 and found that nothing there warranted a departure from his interpretation of the DBC Act. In addition, His Honour considered the purposes and objects of the DBC Act and held that his interpretation did not undermine such purposes or objects, as he could find no basis in the scheme of the DBC Act for excluding the owner of an apartment from the benefits conferred by the Act.

Does the DBC Act apply to developers?

As an alternative argument, Burbank submitted that the DBC Act has no application to developers. McDonald J dismissed

³ That exemption is now contained in regulation 1808 of the *Building Regulations* 2006.

that argument shortly, holding that the application of the DBC Act is to be determined by reference to the nature of the work undertaken, not the identity of the person having the work undertaken.

This aspect of the decision tends to sweep away previous judicial suggestions that the (statutorily undefined) class of “developer” need not concern itself with the requirements or implications of the DBC Act.

Impact

The immediate impact of this decision is to confirm that the DBC Act, including the warranties contained in section 8 of that Act, apply to multi-apartment developments, regardless of the size of the development or the identity of the parties involved in their construction. This is important for builders, developers and purchasers of such developments as there are numerous requirements and protections contained in the DBC Act affecting the risk allocation between the different parties. The previous prudent practice by residential developers in “off the plan” sales of:

- (i) ensuring contracts of sale of the apartments provide that the apartment is to be constructed under a separate major domestic building contract; and/or
- (ii) ensuring there exists a compliant major domestic building contract under the DBC Act,

is confirmed by this decision.



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Secondly, while the decision clarifies the operation of the DBC Act in relation to purely residential developments, there remains some uncertainty as to its application to mixed-use developments. Nevertheless, the prudent approach in mixed-use developments is to assume that the DBC Act applies, and to act accordingly to seek to avoid unintended outcomes.

Authors: Catherine Bell and Julian Grant

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For more information please contact:

Catherine Bell, Partner and
Head of Construction
Phone (direct) **+61 3 9608 2209**
Mobile **+61 410 451 634**
Email c.bell@cornwalls.com.au