

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1297/2018

CATCHWORDS

Domestic Building Contracts Act 1995 section 68, order for sale in the absence of domestic building warranty insurance, homes built other than as an owner-builder, significance of section headings, meaning of section 137B of the Building Act 1993.

APPLICANTS	Joybay Pty Ltd and Sailoman Pty Ltd
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Hearing
DATE OF HEARING	4 October 2018
DATE OF ORDER	12 October 2018
CITATION	Joybay Pty Ltd (Building and Property) [2018] VCAT 1588

ORDERS

- 1 The applicants' application for an order under section 68 of the *Domestic Building Contracts Act 1995* is dismissed.
- 2 **I direct the Principal Registrar to send copies of these orders to the applicants by email.**

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicants

Mr A Schlicht of Counsel instructed by Mr S. Nixon, solicitor

REASONS

- 1 The applicants have made an application under section 68 of the *Domestic Building Contracts Act 1995* to enable them to sell a number of apartments without domestic building warranty insurance.
- 2 All the apartments are in a three-level building at 520 – 528 Victoria Street North Melbourne. The first applicant owns apartments 16 to 24 on level 2, and the second applicant owns apartment 4 on level 1.
- 3 According to the affidavits of Mr Mark Mercuri, director of the first applicant, and Mr Simon Nixon, director of the second applicant, the building in which the apartments are located was purchased by Errol Property Group Pty Ltd, EPG, in or about 1996. EPG obtained planning and building permits for retail shops and a car park on the ground floor, office units on level 1 and a gymnasium on level 2. EPG is now deregistered.
- 4 EPG attempted to overcome funding difficulties by selling level 2 to the first applicant, who became the registered proprietor of that floor, with the exception of common areas, on 17 October 2007. Level 2 was at that time a shell with a concrete floor and external walls and roof.
- 5 In circumstances which are not made clear in the affidavits, the fit out of levels 1 and 2 changed so that apartments were included.
- 6 The work to the apartments was undertaken by a builder, Mr George Haintz, who held an unlimited domestic builder's licence. However it is Mr Mercuri's evidence that he was unaware that Mr Haintz had not taken out domestic warranty insurance in respect of the apartments. It is also not made clear how the Relevant Building Surveyor, Mr Liddy, could have permitted the change to include domestic work without ensuring that the relevant domestic building warranty insurance was obtained.
- 7 EPG had continued development work on the ground floor, car park, level 1 and common areas but defaulted under its loan to Suncorp-Metway Limited and a receiver and manager was appointed in about July 2011.
- 8 On 25 June 2013, Mr Haintz was made bankrupt.
- 9 On 14 March 2014, the second applicant took an assignment of the mortgage and security documents from Suncorp-Metway.
- 10 The second applicant engaged the architect Mr Pirotta, to assess incomplete work and draw plans to bring construction on level 1 into compliance. Both applicants engaged Akritidis Group Building Consultants to review the works and oversee the remaining works.
- 11 On 11 April 2016, Akritidis applied to the Relevant Building Surveyor seeking occupancy permits for the apartments. On 19 April 2016, according to Mr Mercuri's evidence, the Relevant Building Surveyor "formally refused the application on the basis that domestic warranty insurance had not been provided for the dwelling components."

12 The applicants appealed to the Building Appeals Board (“BAB”). On 9 June 2016 the BAB directed the Relevant Building Surveyor to issue occupancy permits for each lot. Determination II(b) was:

each occupancy permit is to be subject to the condition that the owner of the lot may not sell a lot within 6 ½ years of the issue of the occupancy permit without having domestic building insurance;¹

13 Mr Mercuri attempted to obtain domestic building warranty insurance on behalf of the first applicant but was unsuccessful, in circumstances which are not surprising, given that Mr Haintz, who had undertaken nearly all the domestic building work, was bankrupt and that his last involvement with the work was approximately five years previously.

14 On 29 August 2018 the applicants applied to the Tribunal seeking orders under s68.

Section 68 of the DBC Act

15 Section 68 provides:

68 Exemptions from owner-builder restrictions on sale

- (1) A person may apply to VCAT to have a building exempted from the operation of section 137B of the **Building Act 1993**.
- (2) VCAT may exempt a building from the operation of section 137B of the **Building Act 1993** if it is satisfied that—
 - (a) there are exceptional circumstances; or
 - (b) full compliance with section 137B is impossible or would cause undue hardship.
- (3) In granting an exemption VCAT may impose any conditions it considers appropriate.

16 The section refers to section 137B of the *Building Act 1993* which relevantly provides:

137B Offence for owner-builder to sell building without report or insurance

- (1) This section does not apply to—
 - (a) the construction of a building (other than a home) by—
 - (i) a registered building practitioner; or
 - (ii) an architect registered under the Architects Act 1991; or

¹ I have not been asked to consider, nor considered, the effect of a Tribunal order which is inconsistent with a determination of the BAB.

- (b) except as provided in subsection (5), the construction of a home under a major domestic building contract; or
 - (c) a building that is exempted from the operation of this section by VCAT under the **Domestic Building Contracts Act 1995**; or
 - (d) a building to which section 137E applies.
- (2) A person who constructs a building must not enter into a contract to sell the building under which the purchaser will become entitled to possess the building (or to receive the rent and profits from the building) within the prescribed period unless—
- (a) in the case of a person other than a registered building practitioner—
- ...
- (b) the person is covered by the required insurance (if any); and
 - (c) the person has given the purchaser a certificate evidencing the existence of that insurance; and
 - (d) in the case of a contract for the sale of a home, the contract sets out the warranties implied into the contract by section 137C.

100 penalty units.

- (3) A contract entered into in contravention of subsection (2) is not void by reason only of the contravention but is voidable at the option of the purchaser at any time before completion of the contract.
- (4) A person who enters into a major domestic building contract with a builder for the construction of more than 4 homes may, with the consent of the builder, apply in writing to the Director of Consumer Affairs Victoria within the meaning of the **Australian Consumer Law and Fair Trading Act 2012** to exempt the builder from the requirement to be covered by the required insurance in respect of that building work.
- (5) If, on an application under subsection (4), the Director of Consumer Affairs Victoria, in writing, exempts a builder from the requirement to be covered by insurance in respect of building work—
 - (a) the builder is not required to be covered by the required insurance in respect of that building work; and

- (b) this section (except subsection (2)(a)) applies to the sale of a home constructed under that major domestic building contract. [Underlining added]

- 17 The applicants agreed that the contract with Mr Haintz was, or should have been, a domestic building contract. They also agree that s137B(4) and (5) are not relevant to their application to the Tribunal.

Does s68 of the DBC Act apply?

- 18 The applicants submitted that s68 can apply to buildings built other than by an owner-builder.

Significance of headings in legislation

- 19 The headings of s 68 of the DBC Act and s 137B of the Building Act both referred to owner-builders. Mr Schlicht submitted that in accordance with the decision of the High Court of Australia in *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd*, 18 ALR 639 at 644 it is inappropriate that:

... the unambiguous words of s52 [of the Trade Practices Act] should be given some unnaturally confined meaning because of the heading...

- 20 I accept Mr Schlicht's submission, where the words in the relevant section are unambiguous. However, I am not satisfied that they unambiguously mean what the applicants submit. I do not take the headings into consideration in interpreting the sections.

Section 68 – application by “a person”

- 21 Mr Schlicht submitted that as s68 allows “a person” to make application, Parliament has not limited the person who can apply to an owner-builder, and therefore has not limited the relevant contracts to owner-builder contracts. He said that under s137B(1)(c) of the Building Act it is contemplated that a building can be exempted from the operation of the DBC Act by the Tribunal.
- 22 I am not satisfied that this subsection assists the applicants, as the section provides that this is a circumstance where s137B does not apply, therefore it would be unnecessary to seek exemption from it under s 68.

Section 137B(1)(b)

- 23 Having regard to this subsection, s137B does not apply to the construction of a home under a major domestic building contract, which the applicants agreed occurred or should have occurred, unless in accordance with subsection (5). The applicants also agreed that subsection 137B(5) did not apply.

Conclusion

- 24 I am satisfied that s68 of the DBC Act only applies to exempt a building from the operation of s137B of the Building Act. I am not satisfied that the applicants' properties are of a type contemplated by that section.
- 25 I therefore dismiss the applicants' application for an order under s68 of the DBC Act.

SENIOR MEMBER M. LOTHIAN