



The Builders' Lawyer Weekly is prepared by this law firm, The Builders Lawyer ('TBL') as a service to the building and construction industry. This newsletter is not a substitute for legal advice and you should not act on any information herein without checking it with us first: 1800 688 529 or with your own legal advisors. Please let us know if you do not wish to receive this bulletin.

Case Comment: *Acclaim Building Management v Loewenthal*

The incredible advantage of the Building and Construction Industry Security of Payment Act ('the Building Payment Act') means most contractors want to work under it. Residential builders – who face the perils of the Consumer Trader & Tenancy Tribunal (CTTT) if the claim or debt is less than \$500,000 – always ask – does the Building Payment Act apply to our work? Can we get our delayed last payment twelve times quicker by taking the client through adjudication?

The answer to that question is that it all depends on the owner's intention at the time the parties enter into the residential building contract. Where the contract is between a builder and a company as owner, or between an individual who doesn't intend to live in the residence thus created, the builder may use the security of payments system.

Loewenthal is an important case which established that it was the owner's intention at the time he or she entered

into the building contract that was critical in working out whether the benefit of the Building Payment Act could be accessed by the builder.

It did not matter whether the home-owner wanted to live in the dwelling immediately on completion or at the time he or she retired. If, at the time of entering the contract the owner intended to occupy the residence at any time in the future then any dispute will need to be decided in court or in the CTTT. The cheapness and speed of the adjudication process will be denied and the time taken to resolve the problem will be increased by at least 10 times if not 20.

So, the ordinary builder before signing the contract ought to have the owner sign a letter of intent as to whether he or she intends to ever live in the residence. If the owner says that he or she does not intend to live in the home, then the builder can be assured of cheap, fast and effective dispute resolution, and

might well re-price the job on that basis.

Please remember that since you as the builder do not intend to live in the house, all of your sub-contractors can always use the Building Payment Act to obtain rapid payment of any amount which they may claim is owing to them. You may wish to add a special condition to your contract with the owner to take account of the difference in your access to payment.

No time bars for an intention to live in the dwelling

Loewenthal always intended to reside in the premises and that was clear to both parties from the start although the owner was not sure when that residence would begin and also intended to let the dwelling for rent before moving into the home. The Plaintiff tried to argue that the defendant's payment schedule was defective because the home-owner had not raised this issue in the letter which he asserted (and the judge accepted) formed his payment schedule. Under Section

Con't Page Two -->

The Week's Noted Judgments

SUPREME COURT OF SOUTH AUSTRALIA:	Alstom Power Ltd v Yokogawa Australia Pty Ltd & Ors	<i>Unconscionability, bonds and construction contracts s. 51AA TPA</i>
CONSUMER TRADER AND TENANCY TRIBUNAL: Home Building Division	White v Suncorp Metway Insurance Ltd & Redera Constructions Pty Ltd Owners Corporation SP 58382 v Fair Trading Administration Corporation & Office of Fair Trading (Home Building)	<i>Indemnity claims against HOW insurances</i> <i>Date of Contract: HOW indemnity</i>

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Court Directions Hearings Last Week Sydney

SUPREME COURT TECHNOLOGY & CONSTRUCTION LIST

Friday, 6 October 2006
JUSTICE BERGIN COURT 10C,
QUEENS SQUARE
1 055024/06 Tolsat Pty Limited T/
as Everson's Food Processors V

Precision Stainless Systems Pty Limited
2 055070/03 Kell & Rigby Pty Ltd
V Reddam House Ltd
3 055049/04 Barclay Mowlem Construction Limited V Tesrol Walsh Bay Pty Limited
4 055080/04 Tesrol Walsh Bay Pty Limited V Barclay Mowlem Construction Pty Ltd
5 055033/05 S.kidman & Co Ltd

V Recycled Plastic Technologies Pty Ltd
6 055039/05 Belmadar Constructions Pty Ltd v G & A Constructions Pty Ltd
7 055062/05 Cpc Energy Pty Limited v Bellevarde Constructions Pty Limited & 1 Ors
8 055068/05 The Independant Liquor Group (Suppliers) Co-operative Limited v Vaughan Con-

structions Pty Ltd
9 055095/05 Maurice Tarabay v Fifty Property Investments Pty Ltd
10 055003/06 Owners Corporation Strata Plan 12045 v Robert George Melhem & 2 Ors
11 055006/06 The Owners - Strata Plan No 56587 v Vero Insurance Ltd & 1 Ors
12 055011/06 Owners Corpora-

tion Of Strata Plan 67832 & 28 Ors v Dcrn Services Pty Ltd & 1 Ors
13 055038/06 Torresan Engineering Pty Ltd ACN 000 920 472 V Walker Group Constructions ACN 59097303716
14 055053/06 Phyllis Jeanette Dvornik By Her Next Friend Rosalind Margot Fisher v Robert George Melhem & 1 Ors

15 055056/06 Building Insurers' Guarantee Corporation v Tapago Pty Limited
16 055062/06 Kell & Rigby Pty Limited v Campbelltown Investments Pty Limited
17 055066/06 Minka Holdings Pty Limited v Abm Interiors Pty Limited

**DISTRICT COURT
BUILDING/ENGINEERING LIST**

Directions Hearing Date : 05/10/2006
1. 3416/06 Norman Brien & Narelle Brien -v- Av Jennings Limited (ACN 004 327 771)
2. 6247/02 Coffey Geosciences

Pty Ltd -v- Roger Harding (Bjm)
3. 4448/04 Eastern Suburbs Bricklaying Service Pty Ltd -v- The Owners Corporation-strata Plan No. 63191
4. 2602/05 Christopher Walker -v- Richard Pitt
5. 2852/05 National Buildplan Group Pty Ltd -v- Raycall Pty Limited T/as Ausscott Systems
6. 3453/05 Cosara Developments (Australia) Pty Ltd -v- Stephen Duncan Michael Sara
7. 3657/05 David John Holdstock & Amanda Victoria Holdstock -v- Craig Paris Presland
8. 4975/05 Owners Of Strata Plan 15629 -v- Chase(No.2)property Investments Pty Limited
9. 5736/05 Vero Insurance Limited, Robert Murgatroyd And Helen Murgatroyd -v- Action-tech Engineering & Drafting Services Pty Ltd
10. 28/06 Precision Piling Pty Limited -v- P & B Number 2 Pty Limited (ACN 102 411 709)
11. 580/06 Atten Pty Limited ACN 002 341 826 -v- Peter Biordi
12. 719/06 Building Insurers' Guarantee Corp -v- Tuglow (Nsw) Pty Ltd
13. 894/06 Tilley Air Conditioning

Pty Limited -v- Traminer Pty Ltd
14. 1022/06 The Trustees Of The Benedictine Abbey, Jamberoo -v- Colbron Constructions Pty Ltd
15. 2022/06 S & Y Painting & Decorating Pty Limited -v- Rcm Constructions Pty Limited

The information in these lists is compiled from information issued by the court registries and should be checked for confirmation.

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Con't From Page One:

20 (2B) of the Building Payment Act a respondent to a payment claim cannot include in a later Adjudication Response any reasons for withholding payment unless he or she has already given those reasons in the payment schedule.

This judge thought that this argument was bad. Judge Johnstone reasoned that if the Plaintiff had no right to issue a payment claim because residential work was excluded from the Act if the owner intended to reside in the home, then it was not necessary for the defendant's payment schedule to be in the form set out in the Act. In other words, if the construction work in question was excluded from the operation of the Act, then there could be no valid payment claim, and thus no need for any payment schedule valid or otherwise.

What construction work is excluded from the operation of the Act?

In addition to residential work where the owner intends to occupy the premises at some time in the future, there are other important exemptions:

A. most work connecting with the extraction of natural gas, or

Coming Events

- ACOSS <Building Better Boards> 28th & 29th October 2006
- ANCOLD <Dams: The Challenges of the 21st Century> 20-21 November 2006
- ECTP <The future of underground construction in Europe> 21 & 22 November 2006 at Versailles, France
- IBPSA <Investigating the roles and challenges of building performance simulation in achieving a sustainable built environment> 20-21 November 2006

mining including surface mining – although it is arguable that the building of mining plant – other than underground works, or works actually concerned with the extraction of minerals such as conveyor belts, could still allow a claim under the Act;

B. work done under a contract which provides for payment other than by the value of the construction work done, and

C. construction contracts where the contract forms part of a loan agreement, or a guarantee or indemnity. Some old “tripartite” agreements between owner-builder-bank might fall into this category.

D. construction work done outside New South Wales, although on the Victorian and Queensland borders, (off-site fabrication in New South Wales for erections in either of those other States will most likely come under the Building Payments Act).

It is well to be careful as to your rights since there are substantial differences between different states, and because resort to Courts or Tribunals is much slower than the Building Payments

Act.

Interpreting the meaning of the key section in dispute in *Loewenthal* Section 7(2)(b) will nevertheless present difficulties when the residential construction comprises more than one town house or unit since it might be very implausible for an owner to say he intended to live in more than one of them. But this is likely to be a question of fact rather than law. The uncertainty will be removed if builders ensure that their principals declare their intentions at the time of contract signing.

If, after the contract is signed, the owners change their mind and change their intentions to not live in the premises – until the market picks up for example, – the Building Payment Act will apply. Companies, not being human beings, ‘natural persons’ cannot form an intention to reside in the premises. The security of payment scheme will always apply to residential building work undertaken for companies in this State.

If you are interested in further detail you might find our website helpful, www.tbl.nu, or failing that ask us on 02-9212 1552

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