

Construction Alert

Security of Payment Update: The Residential Building Work Exclusion

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Justice McDougall in *Oppedisano v Micos Aluminium Systems*¹ has recently considered in detail the residential building work exclusion under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**SOP Act**).

The SOP Act applies to an applicable “construction contract” (as defined) and establishes a regime for the recovery of payments for “construction work” and “related goods and services” by a “claimant” from a “respondent”.

Section 7(2)(b) provides that the SOP Act does not apply to “a construction contract for the carrying out of residential building work (within the meaning of the *Home Building Act 1989*) on such part of any premises as the party for whom the work is carried out resides in or proposes to reside in”.

The *Home Building Act 1989* (NSW) (**Building Act**) defines “residential building work” to include construction, alteration, adding to or repairing of a “dwelling”. A “dwelling” is defined as a building or portion of a building which is designed, constructed or adapted to be a dwelling.

Security of payment regimes exist in all Australian jurisdictions. With the exception of Tasmania, Western Australia and the Northern Territory each jurisdiction excludes some residential building work where the work is performed under a contract with a private owner-occupant.

Oppedisano v Micos

Mr Oppedisano owned and had lived on the property for about 27 years. Micos performed glazing works pursuant to a construction contract with Mr Oppedisano as part of a redevelopment of the property.

Micos served a payment claim under the SOP Act on Mr Oppedisano claiming \$50,000. Mr Oppedisano responded with a payment schedule setting out various reasons for not paying the claim however he did not raise

the s 7(2)(b) exclusion. Micos referred the dispute to an adjudicator who determined that Mr Oppedisano was liable to pay the claim. Micos registered the adjudication determination as a judgment of the Local Court.

Mr Oppedisano subsequently brought proceedings to challenge the adjudication determination on the basis that the SOP Act did not apply because of the s 7(2)(b) residential building work exclusion.

The Works

Mr Oppedisano had constructed 4 self contained units on his property. Each unit had a separate letter box, intercom and driveway. There was no evidence of there being any common or communal facilities between the units.

The units were built to separately house Mr Oppedisano, his mother and other family members. There was no evidence however of any common household or family life.

The Decision

Justice McDougall accepted that the glazing was “residential building work” under the SOP and Building Acts. The question for His Honour was whether Mr Oppedisano’s occupancy of one of the units enlivened the s 7(2)(b) exclusion.

Justice McDougall referred to the decision in *Shorten v David Hurst Constructions Pty Ltd* (**Shorten**).² In *Shorten* the contract was for the construction of 10 separate units and the respondent proposed to live in one. The Court held that the exclusion did not apply as the contract related to the premises as a whole rather than the part of the premises that the respondent proposed to live in.

Justice McDougall explained that the s 7(2)(b) exclusion applies where the construction contract is for “the carrying

¹ [2012] NSWSC 53.

² (2008) 72 NSWLR.

out of residential building work **only** on that part of any premises in which the respondent resides, or proposes to reside" [emphasis added].

His Honour said that for the exclusion to apply it would be necessary to show that the construction contract relates to the whole of the premises which the respondent resides in or proposes to reside in.

It follows that a contractor cannot avoid the s 7(2)(b) exclusion by making separate progress claims under the contract (one for the excluded work, and another for the work the subject of the SOP Act). Either the entire contract is excluded or none of it is excluded.³

State & Territory Differences

The equivalent provisions in Queensland⁴ (and similarly in the ACT)⁵ provide that the residential building work exclusion applies "to the extent that the contract relates to a building or part of a building where the resident owner resides or intends to reside".

It is suggested that in Queensland and the ACT (contrary to the findings in *Shorten* and *Oppedisano v Micos*) a construction contract will only be excluded to the extent that it relates to excluded residential building work. The remainder of the contract would otherwise be subject to the security of payment regime.

In practice in Queensland and the ACT, if a contractor is aware that some work under a construction contract is excluded from the relevant act, any payment claim or adjudication application should exclude that portion of the work which is excluded.

Making a Challenge under the Residential Building Work Exclusion

Justice McDougall was critical of Mr Oppedisano's failure to raise the 7(2)(b) exclusion until after the adjudication determination. His Honour observed that Mr Oppedisano had in fact acted in accordance with the SOP Act by arguing the merits of the payment claim in his payment schedule.

His Honour said that even if the contract was excluded under s 7(2)(b) it was within the Court's discretion to refuse an order for relief. Justice McDougall indicated that in he would have been "strongly inclined" to exercise this discretion because Mr Oppedisano knew the relevant facts but did not raise them in his payment schedule.

Practical Issues

Justice McDougall's decision in *Oppedisano v Micos* is timely reminder for both principals and contractors involved in residential building work for an owner-occupant.

Principals must ensure that any assertion that the relevant security of payment regime does not apply by virtue of the residential building work exclusion is raised in the payment schedule (if not beforehand).

Contractors need to carefully consider the drafting of construction contracts in order to preserve (where possible) their rights under the relevant security of payment regime.

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³ See Philip Davenport *Adjudication in the Building Industry* (The Federation Press, 3rd ed, 2010,) 35.

⁴ *Building and Construction Industry Payments Act 2004* (Qld) s 3(2)(b).

⁵ *Building and Construction Industry (Security of Payment) Act 2009* (ACT) s 9(2)(b).

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