

Court of Appeal, Supreme Court New South Wales before Hodgson JA; Basten JA; Bell JA. 18<sup>th</sup> June 2008

**Judgment : HODGSON JA:**

1 I agree with Bell JA.

**BASTEN JA:**

2 I agree with Bell JA that the appeal in this matter should be dismissed with costs. Her Honour has set out the background to the appeal.

3 The outcome of the appeal turns upon the operation of s 7(2)(b) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) ("the Security of Payment Act") which provides as follows:

**"7 Application of Act**

(1) Subject to this section, this Act applies to any construction contract ....

(2) This Act does not apply to:

...

(b) 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."

4 There was no dispute that the parties had entered into a construction contract, being a contract by which the respondent undertook to carry out construction work, as defined in s 5 of the Security of Payment Act. The contract, which was dated 1 May 2006, involved the construction on land owned by the appellants of 10 residential units. It was common ground that the appellants intended to reside in one of the units.

5 There was some disagreement between the parties as to whether the word "premises" in s 7(2)(b) referred to the building or the land on which the building had been, or was being constructed. On either view, the unit in which the appellants proposed to reside was within the premises and part of them. The construction contract involved the construction of all of the units, including that in which the appellants intended to reside.

6 Further, it was common ground that the contract involved the carrying out of "residential building work", within the meaning of the *Home Building Act 1989* (NSW). Residential building work is defined in s 3 of the *Home Building Act* to include "the construction of a dwelling". The term "dwelling" is also a defined term in s 3(1):

"**dwelling** means a building or portion of a building that is designed, constructed or adapted for use as a dwelling (such as a detached or semi-detached house, transportable house, terrace or town house, duplex, villa-home, strata or company title home unit or residential flat). It includes any swimming pool or spa constructed for use in conjunction with a dwelling and such additional structures and improvements as are declared by the regulations to form part of a dwelling. It does not include buildings or portions of buildings declared by the regulations to be excluded from this definition."

7 Although residential building work is defined with respect to "a dwelling" in the singular, it is clear that a dwelling may be a portion of a building, so that where a building contains more than one dwelling, work in respect of each will constitute residential building work. So much is expressly recognised by a number of provisions of the Act, including ss 3A and 96; see also *Atlen Pty Ltd v Builders Insurers' Guarantee Corporation* [2005] NSWCA 105; *Consolidated Constructions Pty Ltd v The Satellite Group (Harold Park) Pty Ltd* [2000] NSWSC 1235 at [20]-[24] (Windeyer J) and *HIH Casualty and General Insurance Ltd v Jones* [2000] NSWSC 359 (James J).

8 The construction contract in question was either one to which the Act applied or it was not. There is no suggestion in the language of s 7(2)(b) that the Act applies in respect of some part of the contract, but not another part. The contract provided for the carrying out of work on the whole of the building which was to contain the unit the appellants would reside in, but it was not restricted to that unit. The question of construction was whether the exception in s 7(2)(b) operated in the case of a contract for carrying out work, where the work was restricted to "such part of" the premises as constituted the dwelling within which the appellants proposed to reside, or whether it was sufficient that some part of the contract works involved that part of the premises. As explained by Bell JA at [44] below, cl 7(2)(b) in the Bill originally introduced into the Parliament was amended with the apparent intention of limiting the exclusion so that it did not apply in the latter case, being that involved in the present appeal. That is clear from the Minister's second reading speech of 8 September 1999, set out below at [45].

9 The issue of principle raised by this appeal is whether it is appropriate to construe a specific provision by reference to a statement of its intended operation, contained within the second reading speech of the Minister in respect of the Bill.

**Principles of statutory interpretation**

10 As explained by Spigelman CJ in *Harrison v Melhem* [2008] NSWCA 67 at [16]: "The task of the court is to interpret the words used by Parliament. It is not to divine the intent of the Parliament. ... The courts must determine what Parliament meant by the words it used. The courts do not determine what Parliament intended to say."

11 However, "if ... the courts can identify the target of Parliamentary legislation their proper function is to see it is hit: not merely to record that it has been missed": see Lord Diplock, "**The Courts as Legislators**", *The Lawyer and Justice* (1978) at p 274, quoted by McHugh JA in *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 424D. This admonition has its limits: there is no doubt that "[t]he words of a Minister must not be substituted for the text of the law": *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518 (Mason CJ, Wilson and Dawson JJ).

- 12 Prior to 1984, general law principles of statutory construction permitted limited use of extrinsic material. There was a general exclusionary rule, subject to limited exceptions. As explained by Gibbs CJ in *Wacando v The Commonwealth* (1981) 148 CLR 1 at 17:  
*"If it be thought that the words of the Colonial Boundaries Act are ambiguous, it becomes permissible to ascertain the mischief and defect for which the existing law did not provide, and for that purpose it is permissible to have regard to the facts which must be taken to have been within the knowledge of the Imperial Parliament when the Act was passed: Merchant Service Guild of Australasia v Archibald Currie & Co Pty Ltd (1908) 5 CLR 737 at 745."*
- 13 The principle was expressed by Mason J in *Wacando* at 25:  
*"In construing s 1 it is permissible to have regard to the mischief to which the Act was directed. Generally speaking, reference cannot be made to what is said in Parliament for the purpose of interpreting a statute. But in my opinion there are grounds for making an exception for the case where a bill is introduced to remedy a mischief. Then, to have regard to the purpose for which the legislation was enacted as stated by the Minister in charge of the bill would conform to the rule that extrinsic material is admissible to show the mischief which the statute is designed to remedy."*
- 14 There was doubt in some quarters as to whether the identification of the "mischief" was to be understood generally as referring to the purpose of the legislation, or had some more limited operation. Further, there was some variation in practice as to the use of extrinsic material, prior to statutory provision for the use of such material: see, generally, Pearce DC and Geddes RS, *Statutory Interpretation in Australia* (6th ed, 2006) at [3.3]-[3.7]. In South Australia, which has maintained the general law principle, reference may be made to Hansard to ascertain both the mischief and the underlying purpose of the legislation, which have been treated as "interchangeable concepts": see *Owen v South Australia* (1996) 66 SASR 251 at 255-6 (Cox J, Prior J agreeing).
- 15 This general law approach has been confirmed in *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 (Brennan CJ, Dawson, Toohey and Gummow JJ):  
*"It is well settled that at common law, apart from any reliance upon s 15AB of the Acts Interpretation Act 1901 (Cth), the court may have regard to reports of law reform bodies to ascertain the mischief which a statute is intended to cure. Moreover, the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy. Instances of general words in a statute being so constrained by their context are numerous. In particular, as McHugh JA pointed out in *Isherwood v Butler Pollnow Pty Ltd* (1986) 6 NSWLR 363 at 388, if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance. Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent."*
- 16 The exclusionary rule was abandoned in England in *Pepper v Hart* [1993] AC 593. Lord Browne-Wilkinson stated at 634, in an opinion with which Lord Keith of Kinkel, Lord Bridge of Harwich, Lord Griffiths, Lord Ackner and Lord Oliver of Aylmerton agreed:  
*"In my judgment, ... reference to Parliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity. Even in such cases references in court to Parliamentary material should only be permitted where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words. In the case of statements made in Parliament, as at present advised I cannot foresee that any statement other than the statement of the Minister or other promoter of the Bill is likely to meet these criteria."*
- 17 In submissions which were largely accepted by their Lordships (Lord Mackay of Clashfern LC dissenting), Anthony Lester QC contended that (p 600):  
*"(2) The history of a statute, including the Parliamentary debates, may be relevant (i) to confirm the meaning of a provision as conveyed by the text, its context and purpose; (ii) to determine the meaning where the provision is ambiguous or obscure; or (iii) to determine the meaning where the ordinary meaning is manifestly absurd or unreasonable."*
- 18 The submission noted above bears a strong resemblance to the language of s 15AB of the *Acts Interpretation Act 1901* (Cth) and s 34 of the *Interpretation Act 1987* (NSW). The latter provides:  
**"34 Use of extrinsic material in the interpretation of Acts and statutory rules"**  
*(1) In the interpretation of a provision of an Act ..., if any material not forming part of the Act ... is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:*  
*(a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision (taking into account its context in the Act ... and the purpose or object underlying the Act ...), or*  
*(b) to determine the meaning of the provision:*  
*(i) if the provision is ambiguous or obscure, or*  
*(ii) if the ordinary meaning conveyed by the text of the provision (taking into account its context in the Act ... and the purpose or object underlying the Act ...) leads to a result that is manifestly absurd or is unreasonable."*

- 19 It is apparent that this provision (like its counterparts in other parts of Australia) has adopted as “the ordinary meaning” the language of the text taking into account its statutory context and the underlying purpose or object of the statute. This approach is consistent with s 33 which provides:  
“**33 Regard to be had to purposes or objects of Acts and statutory rules**  
*In the interpretation of a provision of an Act ..., a construction that would promote the purpose or object underlying the Act ... (whether or not that purpose or object is expressly stated in the Act ...) shall be preferred to a construction that would not promote that purpose or object.*”
- 20 Taken together, these provisions avoid semantic distinctions between the mischief or the purpose or the intention of the legislature and the meaning of the language used. Language is used in a context which extends beyond the instrument in which it is to be found. Extrinsic material may be considered if it can illuminate the meaning of the statutory language.
- 21 Accepting that the Court is required to adopt a purposive construction (by s 33) and is permitted (in the terms of s 34) to look at extrinsic material in certain circumstances, it remains to consider the principled application of these provisions in particular circumstances. It is in this area that levels of scepticism (approaching cynicism) have been expressed as to the benefits to be obtained from extrinsic materials, including second reading speeches: see, eg, *Harrison v Melhem* at [12] (Spigelman CJ) and [172] (Mason P). Indeed, in *Harrison v Melhem*, this Court (Spigelman CJ and Mason P, Beazley and Giles JJA agreeing with Mason P) expressed doubts about “the correctness of Pepper to the extent that it goes beyond allowing resort to ministerial statements to discern the context of the Bill in question and the mischief to which it is addressed”: at [167] (Mason P). The President continued at [172]:  
“I do not consider the Interpretation Act 1987 or the common law of statutory interpretation in Australia to permit resort to a minister’s speech to guide the meaning of legislation beyond identifying its purpose (*Nominal Defendant v GLG Australia Pty Ltd* ([2006] HCA 11; 228 CLR 529) at 538[22] per Gleeson CJ, Gummow, Hayne and Heydon JJ). However broadly the notion of ‘purpose’ or even ‘intent’ is itself pressed, it does not, in my view, require or even permit a court to give any weight to a statement directly addressing the intended meaning of the provision that is in the course of being enacted. It certainly does not do so where, as here, the plain meaning of the enacted text is at variance with the meaning that the minister is giving or appear[s] to be giving to it.”
- 22 One may readily concede a number of broad propositions which properly influence the courts in their approach to extrinsic material. For example, as explained by the Chief Justice in *Harrison*, “[i]n the Australian system of the separation of powers, it is the courts which determine what the legislative intention when enacting a particular provision was”. To give inappropriate weight to the comments of the minister in a second reading speech may give the appearance that the court is deferring to the executive in that regard. In other circumstances, the court may consider that the minister has misunderstood the pre-existing general law principle: see, in relation to privative clauses, the comments in *Plaintiff S157/2002 v The Commonwealth* [2003] HCA 2; 211 CLR 476 at [55], [60] and [67].
- 23 There are other arguments, involving both matters of principle and practical considerations which lead to a degree of wariness in placing weight upon statements made in the Parliament as to the meaning of legislation. (Most may be identified in the extensive summary of submissions in *Pepper v Hart* [1993] AC at 597-612). For example, it has been argued that the rule of law requires that citizens be able to order their affairs in reliance upon the terms of relevant statutes, without the need to investigate possible shades of meaning to be divined from Parliamentary debates and other extrinsic materials. At a practical level, there is a risk that such inquiries will increase the cost of litigation. As will be noted shortly, these factors are identified in the statutory scheme for consideration of extrinsic material.
- 24 Whatever the scope of the Court’s disapproval of *Pepper v Hart*, it did not extend to any implied limitation on the operation of s 34 of the *Interpretation Act*, which was otherwise held to be inapplicable: at [12] (Spigelman CJ) and at [157] (viii) (Mason P).
- 25 Section 34 of the *Interpretation Act* is not engaged unless the Court initially forms an opinion that extrinsic material is “capable of assisting in the ascertainment of the meaning of” a provision. To form that opinion, the Court must have access to the relevant extrinsic material. If satisfied that it is capable of assisting, then its consideration is only excluded where the provision is neither ambiguous nor obscure, where its ordinary meaning does not lead to a result which is manifestly absurd or unreasonable and where the material does not confirm the ordinary meaning. In other words, where the ordinary meaning is tolerably clear and does not lead to absurd or unreasonable results, then the extrinsic material cannot be considered under s 34 if it is inconsistent with that ordinary meaning.
- 26 Nevertheless, the court may decline to consider extrinsic material or give it limited weight because of a factor identified in s 34(3), which provides:  
“(3) *In determining whether consideration shall be given to any material, or in considering the weight to be given to any material, regard shall be had, in addition to any other relevant matters, to:*  
(a) *the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision (taking into account its context in the Act ... and the purpose or object underlying the Act ...), and*  
(b) *the need to avoid prolonging legal or other proceedings without compensating advantage.*”

- 27 The statement of principle set out by Mason P in *Harrison* (see [21] above) appears to accept that access may be had to extrinsic material to determine legislative purpose, but not if it directly addresses linguistic meaning. Thus, in the present case, reference might be had to the minister's statement in order to determine the purpose which lay behind the introduction of the additional words, but might be inadmissible as an aid to understanding the meaning of the words. In *Marshall v Director-General, Department of Transport* [2001] HCA 37; 205 CLR 603 at [62], in a passage quoted with approval by the Court in *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* [2008] HCA 5; 82 ALJR 489 at [31], McHugh J stated that the duty of courts "when construing legislation is to give effect to the purpose of the legislation", identifying "[t]he primary guide to understanding that purpose" as "the natural and ordinary meaning" of the statutory language. It would seem that linguistic meaning and purpose are inextricably interwoven: accordingly a distinction of the kind identified in *Harrison*, if intended, is unattractive. It finds no basis in the statutory language of the *Interpretation Act*, nor, in my view, in High Court authority. However, in the present case, it is sufficient to say that the extrinsic material may be of assistance in understanding the purpose of the provision.

#### Application of principles

- 28 In this case, one of two approaches is available. On one view, s 7(2)(b) is ambiguous because it has two available meanings, an ambiguity which is not resolved by reading the provision in its statutory context and having regard to the purpose and objects of the Act. The extrinsic material is capable of assisting in resolving that ambiguity. Alternatively, if it has an ordinary meaning, that meaning is confirmed by the extrinsic material. Accordingly, on either approach, the second reading speech may be considered. Neither the factors identified in s 34(3), nor other factors militate against such a course in the present circumstances.
- 29 It is tolerably clear from the terms of s 7(2)(b) that its primary purpose is to exclude from the operation of the Security of Payment Act construction contracts for the carrying out of residential building work on premises in which the contracting party is or proposes to be resident. If a construction contract relates to a larger development, including dwellings other than the one in which a party proposes to reside, Parliament needed to decide whether the Act should apply to such a construction contract in accordance with its general operation. The question was: should the exclusion operate in relation to a contract limited to premises in which the other party sought to reside, or should the proposed residence of a party in one of a number of dwellings on the premises be sufficient to attract the exclusion? It is reasonably clear that the Parliament opted for the former (broader) application of the Act. It limited the exclusion to a construction contract for carrying out work "on such part of" the premises in which the party proposed to reside. (Grammatically, reference to "that part" might have been more felicitous, but the meaning would not be affected.) A construction contract to carry out work on the whole of the premises in circumstances where the party does not propose to reside in the whole of the premises is not within the exclusion.
- 30 The construction contended for by the appellant would have been achieved by excluding a construction contract for the carrying out of work on premises if the party for whom the work is to be carried out resides in or proposes to reside in any part of the premises: the departure from the language adopted in s 7(2)(b) is readily apparent.
- 31 The extract from the second reading speech to which reference has been made confirms that the ordinary meaning of the words, read in their statutory context and having regard to the object and purposes of the Act.

#### Communication of purpose

- 32 A further issue was litigated below, on the basis that the exclusion in s 7(2)(b) might apply to the present contract. The respondent argued that, even if otherwise available, the exclusion would not apply unless the purpose of the appellants had been communicated to the respondent at or before it entered into the construction contract. That in turn raised a factual issue which was the subject of evidence.
- 33 As the appellants have failed in their appeal, on the basis that the exclusion in s 7(2)(b) is not available, this additional issue does not arise. Because the trial judge took a similar view as to the operation of the section, he did not resolve the factual dispute. The basis of the respondent's additional contention was a comment in a judgment of the District Court that the exclusion was intended to operate where there was "a mutual understanding" between the parties in relation to the purpose of one to reside in the premises: *Acclaim Building Management Pty Ltd v Loewenthal* [2006] NSWDC 29 at [48] (Johnstone DCJ). That language was used in the course of a brief discussion as to when the relevant purpose should exist. His Honour held that it could only be at the time of the formation of the contract. Although his Honour relied on the fact that the purpose had been communicated before the contract was entered into (at [56]) that did not involve an issue which his Honour was required to resolve. Accordingly the implied reference to communication was obiter. It is by no means self-evident that the exclusion in s 7(2)(b) operates only in respect of a state of affairs or a purpose which has been communicated to the other party. Whether the issue will have practical consequences except on rare occasions is unclear, but its resolution must in any event await a case in which the point is squarely raised for determination.

#### Conclusion

- 34 The appeal should be dismissed with costs.

#### BELL JA:

- 35 This appeal concerns the construction of section 7(2)(b) of the *Building and Construction Industry Security of Payment Act 1999* (NSW). Subsection (2)(b) excludes certain construction contracts from the operation of the Act. The sole question litigated on the respondent's motion for summary judgment before Nicholas J was whether the

construction contract between it and the appellants was one to which subsection (2)(b) applies. His Honour held that it was not and he gave summary judgment in the amount of \$272,649.77 with interest.

36 The objects of the Security of Payments Act are set out in s 3:

“(1) The object of this Act is to ensure that any person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.

(2) The means by which this Act ensures that a person is entitled to receive a progress payment is by granting a statutory entitlement to such a payment regardless of whether the relevant construction contract makes provision for progress payments.

(3) The means by which this Act ensures that a person is able to recover a progress payment is by establishing a procedure that involves:

(a) the making of a payment claim by the person claiming payment, and

(b) the provision of a payment schedule by the person by whom the payment is payable,

(c) the referral of any disputed claim to an adjudicator for determination and

(d) the payment of the progress payment so determined.

...”

37 The procedure for recovering progress payments is contained in Division 1 of Part 3. A person who claims to be entitled to a progress payment may serve a payment claim on the person who is liable to make the payment under the construction contract (s 13). A person on whom a payment claim is served may reply to the claim by providing a payment schedule to the claimant (s 14). If the respondent to a payment claim does not provide a payment schedule to the claimant within 10 business days after the payment claim is served he or she becomes liable to pay the claimed amount on the due date for the progress payment (s 14(4)).

38 Section 7(2)(b) provides:

“(2) This Act does not apply to:

...

(b) 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, or ..”

39 The respondent is a builder. The appellants, a husband and wife, entered into a contract by which the respondent agreed to build a complex of 10 residential units with common facilities, including a gymnasium, meeting room and gardens, on certain premises owned by the appellants in Wagga. The contract sum was \$4,250,533.64. The written form of the contract, incorporating the Australian Standard General Conditions of Contract, was executed on 1 May 2006. The project was described as the construction of the “Serenity Luxury Apartments”. It was the appellants’ intention to live in one of the units.

40 It was not in issue that the contract was a construction contract for the carrying out of “residential building work” within the Home Building Act 1989. It was conceded that on 21 October 2007 the respondent served a payment claim in the amount of \$272,649.77 on the appellants and that the appellants had not provided a payment schedule within 10 business days after service of the claim.

41 The appellants’ contention before Nicholas J was that subsection (2)(b) applied to exclude the contract from the operation of the Act because it was a construction contract for the carrying out of residential building work, including on such part of premises in which they proposed to reside.

42 The respondent submitted that the exclusion did not apply to a contract for the construction of a complex of residential units, one of which was proposed to be the developer’s residence. The respondent took the Court to the legislative history, which it submitted provided support for its construction of the scope of the provision.

43 Nicholas J held that the natural and ordinary meaning of the words of subsection (2)(b) confined the exclusion to a construction contract for residential building work on such part of any premises as the party for whom it is carried out resides in or proposes to reside in. He considered that there was nothing in the language of the provision to support the conclusion that a contract for residential building work on premises, in addition to work of the kind specified [residential building work on such part of any premises as the party for whom the work is carried out resides in or proposes to reside in] should fall within its ambit. (Red 24.I-R)

44 Nicholas J set out the legislative history. When the Building and Construction Industry Security of Payment Bill 1999 was introduced into the Legislative Assembly, on 29 June 1999, cl 7(2)(b) was in these terms:

“This Act does not apply to:

...

(b) a construction contract for the carrying out of residential building work (within the meaning of the Home Building Act 1989) on premises in which the party for whom the work is carried out resides or proposes to reside... “

After its introduction, the Bill was amended by the addition of the words, “... on such part of any” as now appears in s 7(2)(b).

- 45 The Minister in his Second Reading Speech at the time of the introduction of the amended Bill to the Legislative Assembly said this:  
 “Since its initial introduction, a minor anomaly has been drawn to my attention regarding the effect of the original bill on home buyers and home owners. The Government deliberately decided to exempt these people from the effects of the proposed legislation as they were not seen as being part of the construction industry. Also, contractors working for home owners and home buyers have access to other security of payment mechanisms established under the Home Building Act. A slight drafting anomaly in clause 7(2)(b) designed to create this exemption can result in a scenario where, say, a developer, building a 50-storey apartment block, by proposing to reside in one of the apartments can be exempted from the effects of the bill. This was never intended as an outcome and the amendment is designed to close this off.” (Hansard, 8 September 1999 at 103)
- 46 Before Nicholas J, and on the hearing of the appeal, the appellants acknowledged that the construction for which they contended did not accord with the intention of the amendment expressed in the Minister’s Second Reading Speech. In their submission, the stated intention had not been translated into the statutory text: *Byrne v Australian Airlines Limited* (1995) 185 CLR 410 at 459 per McHugh and Gummow JJ; *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 per Mason CJ, Wilson and Dawson JJ at 518; see also *Harrison v Melhem* [2008] NSWCA 67 per Spigelman CJ at [12] – [16]; Mason P at [159]-[173].
- 47 Nicholas J approached the question on the basis that statutory construction is ultimately a text-based activity: *Network Ten Pty Limited v TCN Channel Nine Pty Limited* [2004] HCA 14; 218 CLR 273 per Kirby J at 305-306; [87] and [89] (Red 23.Q-S). As noted, his Honour held that the natural and ordinary meaning of the words of subsection (2)(b) do not exclude from the application of the Act a construction contract for residential building work comprising work on such part of any premises as the party for whom it is carried out resides in (or proposes to reside in), and other residential building work. It is apparent that his Honour considered that the history, including the contents of the Minister’s Second Reading Speech confirmed that the meaning of the provision is the ordinary meaning conveyed by the text (s 34(1)(a) of the *Interpretation Act 1987*).
- 48 On the hearing of the appeal the appellants sought, and were granted, leave to file an amended notice of appeal adding as a ground of challenge that his Honour ought to have held that, in circumstances in which the appellants had the intention contemplated by subsection (2)(b), it was irrelevant whether the intention was conveyed to the respondent. It was submitted in the alternative that the primary judge ought to have held that, if it was necessary for the appellants to have conveyed their intention to the respondent, it was not relevant when that intention was conveyed. The parties were given leave to file supplementary written submissions on the issue of intention for the purposes of subsection (2)(b).
- 49 In the appellants’ submission, the exclusion is to be construed as applying to a construction contract for the carrying out of residential building work on such part of any premises as the party for whom the work is carried out resides in or proposes to reside in, notwithstanding that the construction contract is also for the carrying out of other residential building work. This construction was said to avoid visiting the “drastic” consequences that follow the failure to serve a payment schedule within time on individuals, including home owners who contract with builders for modest building work such as the construction of a “granny flat”. In this respect counsel pointed to the judgment of Mason J in *Federal Commissioner of Taxation v Faichney* (1972) 129 CLR 38 at 44, where his Honour observed that a doctor’s surgery was not in a relevant sense part of the doctor’s home.
- 50 *Faichney* was concerned with the distinction between outgoings incurred in carrying on a business for the purpose of producing income and outgoings of a private or domestic nature, for the purposes of s 51(1) of the *Income Tax Assessment Act 1936-1970* (Cth). Revenue cases do not assist in determining the meaning of subsection (2)(b) in the context of this statutory scheme. Accepting the correctness of Nicholas J’s construction of subsection (2)(b), it does not follow that a contract for the construction of a “granny flat” or detached studio or the like would fall outside the exclusion. It is a question of fact whether residential building work is carried out on such part of premises as the party for whom it is carried out resides (or proposes to reside). A “granny flat” may be thought as a matter of ordinary parlance to form part of the premises in which an individual resides.
- 51 Counsel for the appellants pointed to the primary judge’s conclusion:  
 “In other words, in my opinion, it [s 7(2)(b)] does not operate to exclude from the application of the Act a contract which is for some residential building work which fits the description, and is also for some residential building work which does not.” (Red 24.P-R)
- In his submission, his Honour’s construction requires reading the word “only” into the provision, and there is no warrant so to do: *R v Young* [1999] NSWCCA 166; 46 NSWLR 681 per Spigelman CJ at 686, 691, [6] - [37].
- 52 On the appellants’ construction of the provision it may be thought that the words “such part of” are otiose. Counsel sought to meet this argument by the submission that “premises” is to be understood as referring to the whole of the parcel of land on which the works are to be carried out. Counsel pointed to the definition of “premises” in the *Macquarie Dictionary*: “(a) the property forming the subject of a conveyance; (b) a tract of land; (c) a house or building with the grounds, etc., belonging to it.” In counsel’s submission the owner of land residing in a dwelling on it who enters a contract for the construction of a second dwelling on the land (which he or she does not intend to reside in) would not come within the exclusion because it would not be a contract for such part of the premises as he or she resides in or proposes to reside in.

- 53 The word “premises” is to be understood in the context of the provision read as whole. I agree with the respondent’s submission that the words “*such part of any premises*” serve to identify the scope of the works that are the subject of the contract. A contract for the construction of 10 residential units, one of which is the proposed residence of the party for whom the work is carried out, is not a contract for the carrying out of residential building work on such part of any premises as the party proposes to reside in. This construction does not require reading the word “only” into the provision.
- 54 An alternative submission advanced by the appellants on the appeal (but not before Nicholas J) was that subsection (2)(b) excludes from the operation of the Security of Payments Act a construction contract to the extent that residential building work is carried out under the contract on that part of the premises in which the party for whom the work is carried out resides or intends to reside. On this construction of the provision, the builder is required to calculate the value of the work done on that part of the project, not being work on such part of the premises as the party resides in or proposes to reside in, in order to prepare a valid payment claim. In the appellants’ submission such an approach is not unworkable; the value of work carried out on common areas could be apportioned pro rata and, in the event of objection, would be subject to adjudication. It is apparent that the scheme for the recovery of progress payments under the Security of Payments Act was not intended to apply to contracts for carrying out residential building work on an individual’s residence or proposed residence. However, it is less apparent that the purpose of the Act is promoted by excluding from the payments scheme that part of the works carried out on a complex of residential units in which the developer proposes to reside. In my opinion, the words of the provision do not admit of excluding from the Act some part of the residential building work done under a construction contract. A construction contract for the carrying out of work is either within the ambit of subsection (2)(b) or it is not.
- 55 In my opinion, Nicholas J was correct in holding that the contract for the construction of the Serenity Luxury Apartments was not a construction contract for the carrying out of residential building work on such part of any premises as the appellants proposed to reside in within subsection (2)(b).
- 56 In written submissions dealing with grounds 4 and 5 of the amended notice of appeal, the respondent contended that subsection (2)(b) requires the person for whom the work is carried out to communicate any intention to reside in the premises to the builder at or before the execution of the construction contract. It was said that to read the provision in any other way would permit an “owner” to determine unilaterally whether the Security of Payments Act applied to a construction contract. On its face, subsection (2)(b) does not require the communication to the builder of any intention to reside in the premises. The question of whether the party for whom the building work is carried out proposes to reside in the premises is a question of fact. However, in light of the construction issue raised by grounds 1 to 3 being determined adversely to the appellants, it is not necessary to determine the further questions raised by their amended Notice of Appeal.
- 57 I propose that the appeal be dismissed with costs.

Mr M Christie / Mr C Carter (Appellants) instructed by Massey Bailey  
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