John Rashleigh Shaw v Yarranova P/L & Newquay Stage 2 P/L [2006] Adj.L.R. 02/23

Catchwords : Contract – sale by developer of apartment in proposed multi-storey residential development – "off the plan" – whether covered by *Domestic Building Contracts Act* 1995 – whether "domestic building contract" - "major domestic building contract" – "domestic building work" – "builder" – ss. 3(1), 5(1), 8, 9, 29, 42, Parts 2 and 3 – *Building Act* 1993 – ss. 137E(a), 170.

Statutory Interpretation – considering meaning of words in statutory context at first instance.

Precedent – *stare decisis* – decision of single judge of same superior court – when not followed – Supreme Court of Victoria.

JUDGMENT : HIS HONOUR BELL J : Supreme Court of Victoria at Melbourne, Common Law Division. 23rd February 2006

INTRODUCTION

1 By a contract of sale dated 12 April 2000 John Shaw bought an apartment in the Boyd Tower in the Docklands from Yarranova Pty Ltd, a developer. Yarranova later assigned its interests in the contract to NewQuay Stage 2 Pty Ltd. Thereafter, NewQuay stood in the shoes of Yarranova.

2 Mr Shaw bought the apartment "off the plan". Therefore, in the contract of sale, the apartment was depicted in a plan for a building project that Yarranova was developing, not in a plan for an actual building. Whether the building would be built depended, for example, on whether the project attracted enough buyers to be commercially viable.

3 The project did attract enough buyers so it went ahead. By a contract dated 15 December 2000, NewQuay engaged Bovis Lend Lease Pty Limited, a registered builder, to design and construct the building, which it did over the next year or so.

4 In July 2002, NewQuay called on Mr Shaw to complete the contract of sale by paying the balance of the purchase price. Mr Shaw refused to do so because, he alleged, the apartment had not been constructed in accordance with the plans and specifications in the contract of sale and it had. NewQuay disputed these allegations and insisted on completion.

5 When Mr Shaw would not complete, NewQuay served a notice of default and rescission on him. This happened in September 2003. Mr Shaw still refused to complete. In consequence, so submit Yarranova and NewQuay, the contract of sale is at an end and Mr Shaw has forfeited his deposit. According to the companies, Mr Shaw has lost the apartment and his money.

6 Mr Shaw's position is that the companies were bound by the provisions of the *Domestic Building Contracts Act* 1995. Section 42 prohibits a builder from demanding final payment under a "major domestic building contract" until the works have been completed in accordance with the plans and specifications in the contract. Since the contract of sale between Mr Shaw and Yarranova was a "major domestic building contract", and NewQuay stood in the shoes of Yarranova, Mr Shaw considers that NewQuay could not demand final payment until it complied with the plans and specifications and made good the alleged defects.

7 Yarranova and NewQuay have a simple reply to Mr Shaw's position. They say the contract by which Mr Shaw bought the apartment from Yarranova was not a "major domestic building contract". It was a contract between a purchaser (Mr Shaw) and a developer (Yarranova), which is a contract of a different type. Therefore, the provisions of the *Domestic Building Contracts Act* did not apply, whether or not Mr Shaw's allegations were correct.

8 If the companies are right about this, the consequences for Mr Shaw's case appear to be fatal. Counsel for Mr Shaw and the companies agree, correctly it seems to me, that unless the *Domestic Building Contracts Act* prevented the companies from doing so, the companies were entitled to call upon Mr Shaw to complete the contract. He had to take action in relation to the alleged defects later. Since Mr Shaw did not complete the contract, they were entitled to bring the contract to an end and take his deposit.

9 There are many significant issues in this case but they only arise if the protection of the *Domestic Building Contracts Act* applies to the contract by which Mr Shaw bought the apartment. With the consent of the parties, I therefore ordered this question to be tried as a preliminary issue. More precisely, I defined the question as follows:

Questions:

On the proper construction of the provisions of the *Domestic Building Contracts Act* 1995 ("the Act") and in the events which have happened:

(1) Is the contract of sale dated 12 April 2000 made between the plaintiff and the first defendant a major domestic building contract within the meaning of the Act?

(2) If yes to Question 1, does s.42 apply to that contract of sale

10 The full terms of the order, including the essential facts (which have been agreed between the parties), are set out in the appendix.

IS THE CONTRACT OF SALE A "MAJOR DOMESTIC BUILDING CONTRACT"?

(1) The definitions in the Act

11 The question is couched in terms of a "major domestic building contract" because the provisions of s. 42 apply only to contracts of this nature.

12 Section 3 defines a "major domestic building contract" to mean a domestic building contract in which the contract price for the carrying out of the work is more than $5,000. Since the contract of sale between Mr Shaw and Yarranova was one in which the contract price exceeded this amount, the question really is whether the contract was a "domestic building contract".

13 Section 3 defines a "domestic building contract" to mean – *"a contract to carry out, or to arrange or manage the carrying out of, domestic building work other than a contract between a builder and a subcontractor..."*

14 Section 3 defines "domestic building work" to mean – *"any work referred to in section 5 that is not excluded from the operation of this Act by section 6..."*

15 Section 5 is a long provision. It is unnecessary to set it out. In summary, s. 5(1) provides that the *Domestic Building Contracts Act* applies to specified work, being the erection or construction of a home (par (a)), the renovation of a home (par (b)), landscaping and construction work associated with the renovation of a home (par (c)), demolition of a home (par (d)), work

associated with the construction or erection of a building on land zoned for residential purposes (par (e)), site work (par (f)), the preparation of plans or specifications for the carrying out of work of the abovementioned kind (par (g)) and prescribed work (par (h)).

16 At the time when the contract of sale between Mr Shaw and Yarranova was entered into, s. 6 did not exclude the work covered by that contract from the scope of s. 5.

17 To answer the preliminary question, it is convenient to divide the issues into two categories, although they are really opposite sides of the same coin. I will first determine whether the contract was a contract "to carry out, or to arrange or manage the carrying out of" work of the specified kind, which arises under the definition of "domestic building contract" in s. 3. I will then determine whether the work in the contract was work of the kind specified in s. 5, which arises under the definition of "domestic building work" in s. 3.

(2) Was the contract of sale "to carry out, or to arrange or manage the carrying out of", domestic building work?

(a) The contract of sale

18 The contract of sale between Mr Shaw and Yarranova had to deal with the situation that arises when someone buys an apartment "off the plan". The land in such contracts is typically described in prospective terms, as in the present case:

"Lot(s) 1002, CPT464 and ST166 on proposed Plan of Subdivision PS438893N being part of the land comprised in Certificate of Title Volume 10269 Folio 532."

19 As it happened, in the present case, enough apartments were sold and the project was considered commercially viable. The building was constructed and the abovementioned lot number came into existence on a registered plan of subdivision, as intended. The lot number corresponds to apartment 1002, which is the one at issue.

20 To protect Yarranova's interests in case the development project did not proceed, cll. 26.1 and 26.2 of the contract of sale gave Yarranova a discretion to go ahead with the contract or not. If it did not go ahead, it could rescind the contract and return the deposit moneys to Mr Shaw. It is easy to see why these were necessary conditions in the case of such a large and expensive development.

21 The contract recorded Yarranova's intention to proceed with the project and complete certain works. These were defined in cl. 1.45 to mean the works described in the plans and specifications. The plans and specifications were defined in cl. 1.31 to mean the plans in schedule A and the specifications in schedule B. These were in terms sufficient to enable Mr Shaw as the buyer to appreciate what he would obtain if he entered into the contract and Yarranova to appreciate what it would have to construct if the project went ahead. But the plans and specifications were not in the detailed form to be expected in a construction contract for a large multi-storey residential building.

22 The contract imposed positive obligations on Yarranova of a kind that the developer of such a project might be expected to accept. For example, Yarranova had to procure the certification and registration of the plan of subdivision (cl. 13.2). Also, critically, Yarranova had to enter into a major domestic building contract with a builder for the works (cl. 18.1).

23 However, the contract did not create an obligation on the part of Yarranova itself to construct the apartment or, more accurately, the building containing the apartment, even if the project were to go ahead. If the project did go ahead, the contract required Yarranova to engage a builder to perform that task (cl. 18.1).

24 Some parts of the contract of sale create the appearance that Yarranova was to have wider responsibilities, ones that extended into carrying out the building works itself. For example, cl. 17.1 gave Yarranova the power to approve minor variations to the works. Further, as already noted, cl. 26.1 recorded Yarranova's intention to proceed with and complete the works. These provisions did not alter the fundamental nature of the contract and the obligations that Yarranova assumed under it. If the project went ahead, Yarranova's core obligation was to cause the apartment building to be constructed, not to construct it.

(b) The design and construct contract

25 As already noted, the apartment building was constructed by Bovis under a design and construct contract with NewQuay.

26 The design and construct contract was patently a major domestic building contract under the *Domestic Building Contracts Act* and the parties were correct to so agree. It was a contract for the carrying out of domestic building works for a price exceeding $5,000, indeed for the carrying out of such works on a major scale. The work involved was domestic building work because it came within the definition of such work in s. 5(1), in particular, the erection or construction of a home (par (a)).

27 The central obligation cast upon Bovis as the contractor under this contract was succinctly cast in cl. 3.1 in the following terms: *"The Contractor agrees to execute and complete the work under the Contract and, in doing so, to complete the design of and to construct the Works in accordance with the Contract."*

28 The works were described in cl. 2.1 by reference to the portion of the total works to which the contract related. The Boyd Tower was on one such portion.

29 The design and construct contract dovetailed with the contract of sale because, for example, cl. 4.3(d)(ii) of the former required the building to be designed and constructed so that, when completed, it complied with the latter.

30 The design and construct contract conferred upon NewQuay (as the principal) significant powers of supervision of the work of Bovis (as the builder). It made provision for the appointment of a superintendent (see the definition in cl. 2.1) and a project manager (see cl. 6.4), both for the purposes of representing NewQuay in particular aspects of the performance of the contract. Bovis was required to carry out the superintendent's instructions (cl. 6.2). The project manager's role was to represent NewQuay generally (cl. 6.4). But the predicate of these powers was that Bovis had been engaged to construct the building because it possessed the necessary expertise to carry out that task[1] and, indeed, the necessary registration as a builder under the *Building Act* 1993.[2]

(c) What does "to carry out, or to arrange or manage the carrying out of, domestic building work" mean?

31 Having described the terms of the contract of sale and the design and construct contract, I can now turn to the meaning of the above words in the definition of "domestic building contract" in s. 3(1) of the *Domestic Building Contracts Act*.

32 A contract "to carry out" domestic building work is a contract that requires the contractor to perform the building works, that is, and in essence, construct the building. The design and construct contract between Yarranova and Bovis was a contract of this kind. I have already noted that cl. 7.1 of this contract required Bovis to design and construct the building.

33 The contract of sale between Mr Shaw and Yarranova was not such a contract. This contract expressly contemplated that the building would be constructed pursuant to another contract into which Yarranova would enter with a builder (see cl. 18.1).

34 Counsel for Mr Shaw submitted that the contract of sale was a contract by which Yarranova agreed with Mr Shaw "to arrange or manage the carrying out of" the work of constructing the apartment. It was submitted that "arrange" and "manage" are wide words deliberately chosen by the legislature to encompass a broad range of building activities. It was submitted that, in the contract of sale, Yarranova accepted the obligation to arrange or manage the construction of the apartment, and it intended to do so[3]. With some force, it was submitted that this conclusion was demanded by the provisions, for example, that required Yarranova to enter into a building contract for the construction of the building (cl. 18.1) and that recorded Yarranova's intention to proceed with and complete the works (cl. 26.1)[4].

35 "Arrange or manage" are certainly wide words. But the meaning of the words in law must be ascertained by considering the context in which they appear and the purposes of the *Domestic Building Contracts Act* and any related legislation. This approach is adopted to ascertain the meaning of words in a statute in the first instance and not merely at some later stage when ambiguity may be thought to arise.[5] In ***Winslow Constructors Pty Ltd v Mt Holden Estates Pty Ltd***[6] the Court of Appeal ascertained the meaning of "associated work" in s. 5(1)(a)(i) of the *Domestic Building Contracts Act* in this manner. This decision was applied by Warren CJ in ***Kane Constructions Pty Ltd v Sopov***[7] where her Honour considered that the provisions of the *Domestic Building Contracts Act* at issue in the case before her did not apply to developers.

36 The scheme of the *Domestic Building Contracts Act* and its companion legislation is designed to deal, among other things, with the commercial setting in which apartments are sold "off the plan". In this setting, at the time of the initial sale, the apartment may be part of a building project that the seller, as a developer, hopes to undertake. Before the project can go ahead, it may be necessary for enough apartments to be forward-sold to make the project commercially viable. In many cases, the finance necessary to bring the project to fruition will not be supplied until the sales "off the plan" have reached a critical number. At a certain point, it may become clear that the project is, indeed, viable. At this point, the developer, who, to sell the apartments, need not be a registered builder, may engage a registered builder to construct the building, or perhaps confirm an arrangement already made with such a builder.

37 The relevant legislation regulates and facilitates these activities in the following way, starting with the companion legislation.

38 The *Subdivision Act* sets out the procedure for the subdivision and consolidation of land. It is the subdivisional work that will ultimately lead to the creation of property described in a certificate of title that can be bought and sold once the apartment building is built. The operation of the *Subdivision Act* was explained by Hansen AJA in *Winslow Constructors*[8].

39 The *Sale of Land Act* 1962 prohibits the sale of a lot in a plan of subdivision prior to registration unless certain conditions are satisfied (s. 9AA). Accordingly, if the conditions are satisfied, a seller may, as in the present case, sell such lots. These provisions operate to permit, if the conditions are satisfied, the sale of prospective apartments.

40 Section 137E of the *Building Act* 1993 specifies the conditions that must be satisfied before a person can sell land on which a home is being or is to be constructed where the home is to be finished before completion of the contract. Only the conditions in s. 137E(a) need be mentioned The conditions are:

- the home is being constructed under a "major domestic building contract" (which, under s. 3(1) of the *Building Act,* is a reference to this expression in the *Domestic Building Contracts Act)*;
- the contract of sale is itself a major domestic building contract; or
- the contract of sale provides that the home is to be constructed under a major domestic building contract.

41 Since the present case concerns a sale of an apartment by a developer, we can focus on how s. 137E(a) operates in such a case. The section operates to give a developer three options for going forward with a project:

- option one: the land can be sold after commencement of the construction of a home as long as the home is being constructed under a major domestic building contract. This might apply, for example, where the developer is not a registered builder but has already entered into such a contract for the construction of the home with a registered builder and construction is underway;
- option two: the land can be sold prior to the commencement of construction of a home under a combined contract to sell the land and construct the home which is itself a major domestic building contract. This might apply, for example, where the developer is also a registered builder and is both the seller and the builder of the home under such a contract; or
- option three: the land can be sold prior to the commencement of the construction of the home where the contract of sale is not a major domestic building contract but it provides that the home is to be constructed under such a contract. This might apply, for example, where the developer is not a registered builder and but intends to enter into such a contract with a registered builder for the construction of the home.

42 Sales "off the plan" in large multi-storey residential developments will often be made by the method given in the third option. This is how Yarranova sold the apartment to Mr Shaw. This is why cl. 18.1 of the contract of sale required Yarranova to enter into a major domestic building contract with a builder for the works.

43 I turn now to the *Domestic Building Contracts Act*.

44 There are important provisions in s. 8 of that Act that imply warranties about work carried out under a major domestic building contract into the contract itself. In summary, these are that the work will be carried out in a proper and workmanlike manner and in accordance with the plans and specifications (par (a)), the materials used will be good and suitable for the purpose (par (b)), the work will be carried out in accordance with all legal requirements (par (c)), the work will be carried out with all reasonable care and skill and on time (par (d)) and the home will be suitable for occupation when completed (par (e)).

45 Section 9 extends the benefit of these warranties to any person who is an owner of the building or land concerned for the time being. This is fundamental to the achievement of the protective objectives of the *Domestic Building Contracts Act*. While s. 8

ensures that the original owner will be protected by the warranties, s. 9 ensures that subsequent owners will also be protected. Therefore it is sometimes said that the warranties run with the land.

46 Section 137E(a) of the *Building Act* and ss. 8 and 9 of the *Domestic Building Contracts Act* operate hand-in-glove to ensure that, where an apartment is sold "off the plan", and the building is constructed, the buyer, and all subsequent owners, obtain the protection of the warranties. The third option in s. 137E(a) allows a developer to sell an apartment to be built in the future to a buyer as long as the contract of sale provides that it is to be constructed under a major domestic building contract. Section 8 of the *Domestic Building Contracts Act* operates so that the developer, who will be the owner under the contemplated major domestic building contract, will get the benefit of the statutory warranties. Section 9 operates so that a person who buys the apartment from the developer, as the new owner, and all subsequent owners, will get the benefit of the same warranties.

47 That is a sufficient description of the statutory scheme. I will now return to the meaning of "arrange or manage" in the definition of "domestic building contract" in s. 3(1) of the *Domestic Building Contracts Act*.

48 "Arrange or manage" appears in the definition of "domestic building contract" but it also appears in the definition of "builder". To determine the meaning of the expression in the former it is helpful to consider the meaning of the expression in the latter.

49 Section 3(1) defines "builder" to mean a person or partnership which –
"(a) carries out domestic building work; or
(b) manages or arranges the carrying out of domestic building work; or
(c) intends to carry out, or to manage or arrange the carrying out of, domestic building work..."

50 "Building owner" is defined to mean the person for whom domestic building is being, or is about to be, carried out (s. 3(1)).

51 The definition of "builder", understandably, treats the builder as the person who either carries out the work or manages or arranges the carrying of it out. Persons who, as a fact, carry out such work, or manage or arrange the carrying out of such work, are builders, as are persons who intend to do so.

52 The managing or arranging referred to in paragraph (b) of the definition "builder" is a managing or arranging of the building work itself. It is intended to capture within the scope of the definition indirect methods by which a builder organises the carrying out of building work.

53 Under the *Domestic Building Contracts Act*, a person may, as a fact, engage in the activities described in the definition of "builder" and thereby, for the purposes of the Act, be a builder. The consequences may be very serious. A person coming within the scope of the definition must perform many obligations on pain of significant financial penalty in case of breach (see generally Parts 2 and 3). The person cannot enter into a major domestic building contract without registration as a builder under the *Building Act* (s. 29(a) of the *Domestic Building Contracts Act*). Under the *Building Act*, registration requires possession of an appropriate building qualification or equivalent experience (s. 170(1)). Developers may not have these qualifications or experience.

54 The expression "to carry out, or to arrange or manage the carrying out of, domestic building work" in the definition of "domestic building contract" has a meaning consistent with the same words in the definition of "builder". The carrying out, or managing or arranging, of which the definition of "builder" speaks is that of a builder. The carrying out, or arranging or managing, of which the definition of "domestic building contract" speaks, is that of a builder. A person who, under a contract, is to carry out, or to arrange or manage the carrying out of, the relevant work will, by engaging in these activities, be a builder.

55 Put simply, in many, perhaps very many, cases of selling apartments "off the plan" there will be three main parties and two main contracts. The three parties will be the buyer, the developer and the builder. The contracts will be the contract of sale between the buyer and the developer and the contract to design and construct the apartment building between the developer and the builder. The present case conformed to this pattern.

56 No doubt there will be cases where the contractual arrangements do not conform to this simple pattern. For example, the developer may be a registered builder and, in the contract of sale of the apartment, accept obligations both to sell and construct the apartment. The legislature has seen this to be a common enough occurrence for it to be included as an option in s. 137E(a) of the *Building Act* (it is option two). But, under this option, the contract of sale must itself be a major domestic building contract. This means it has to satisfy the definition of that term in the *Domestic Building Contracts Act*. If it does, the developer has to be a registered builder and comply with the many mandatory obligations to which I have referred.

57 Whether a contract is a "domestic building contract" depends upon the character of the contract, not upon the qualifications of the builder. A contract to carry out, or to arrange or manage the carrying out of, domestic building work between an owner or buyer on the one hand and an unregistered builder on the other is nonetheless a contract of this kind. In such a case, the builder may have contravened the *Domestic Building Contracts Act* by entering into the contract without being registered as a builder. If so, the buyer or owner would still get the benefit of the legislative protections, including those specified in s. 42.[9] This, in essence, is what counsel for Mr Shaw submits has occurred in the present case.

58 Counsel for Mr Shaw submits that I should interpret the contract of sale between Yarranova and Mr Shaw as imposing upon Yarranova the obligation to arrange or manage the carrying out of domestic building work. Counsel therefore invites me to conclude that it is a contract "to" do so. This submission must be rejected because it gives a meaning to the words "to arrange or manage" that is too wide and because Yarranova's obligations under the contract are of a different character.

59 As I have already noted, "to arrange or manage" in the definition of "domestic building contract" refers to the building work. The definition contemplates either that the builder will carry out the work or arrange or manage this activity. The focus in each case is upon the work – essentially, the practical activities involved in the work of constructing a building. The activities are specified in s. 5 and I will come to them later. A contract under which a person carries out these activities comes within the definition. So does a contract under which a person arranges or manages these activities as carried out by others. To meet the statutory definition, the contract must be to carry out, or to arrange or manage the carrying out by others of, the activities that constitute the building work.

60 No doubt each contract has to be interpreted according to its terms and understood in its own setting. So interpreted and understood, the terms of the contract of sale that confer obligations upon Yarranova do not meet the description in the

definition. Far from obliging Yarranova to carry out the practical activities involved in the work of constructing the building, the contract expressly recognised that these activities would be undertaken by somebody else, a registered builder. Clause 18 required Yarranova to enter into a major domestic building contract with such a builder for the works. This term was required both by reason of the nature of Yarranova's role as a non-builder developer in the instant commercial setting and by reason of the condition attaching to the third option for going forward given in s. 137E(a) of the *Building Act*.

61 Clause 18 is not a clause for Yarranova to arrange or manage the carrying out of the practical activities involved in the work of constructing a building. It is a clause that required Yarranova to enter into a major domestic building contract with a registered builder for the works, that is, a contract for a registered builder[10], not Yarranova, to carry out, or to arrange or manage the carrying out of, these activities. What Yarranova had to do was commission a registered builder to construct the apartment building and in various ways facilitate the construction of the building by that builder. This did not make it a builder for the purposes of the *Domestic Building Contracts Act* and did not make the contract of sale a domestic building contract as defined in that Act.

62 Clause 26.1 does not alter the nature of Yarranova's obligations under the contract. The clause deals with Yarranova's role as a developer, particularly its necessary discretions. The references to Yarranova proceeding with and completing the work is a reference to its intention to proceed with and complete the development as a project.

63 Acceptance of the construction advanced by counsel for Mr Shaw would produce absurd results:

- Inclusion in the contract of sale of the very term required by the third option stipulated in s. 137E(a) of the *Building Act* would convert the contract of sale into a major domestic building contract when this option is based upon the preservation of the difference between these two types of contract.
- If the fact that a contract has a term that an apartment will be constructed under a major domestic building contract means that the contract is itself a domestic building contract, developers could not lawfully enter into such contracts unless they were also registered builders. Similarly, when a developer entered into the major domestic building contract with the builder, this would itself constitute the management or arrangement of domestic building work. By doing this act, the developer would thereby be a "builder" as defined (see s. 3(1)(b)). But the developer, like Yarranova, might not be a registered builder, and so would be prohibited from entering into such a contract (s. 29(a)).
- If the contract of sale is be treated as a domestic building contract (and therefore a major domestic building contract) and the developer is to be treated as a builder, the strict regulatory provisions of Parts 2 and 3 of the *Domestic Building Contracts Act* would apply to the contract and the developer. The nature of these provisions is such that they were plainly not intended to apply in this manner.

64 For these reasons I am of the view that the contract of sale between Mr Shaw and Yarranova was not a contract "to carry out, or to arrange or manage the carrying out of" domestic building work within the definition of "domestic building contract" in s. 3(1) of the *Domestic Building Contracts Act*.

(d) Previous decision of a single judge of the Supreme Court of Victoria

65 The meaning of the critical words in the definitions in s. 3(1) of the *Domestic Building Contracts Act* has been considered previously by a single judge of this Court. In ***Mirvac (Docklands) Pty Ltd v Peter Evan Philp***[11], Byrne J decided that the contract between the parties in that case, which was similar in terms to the contract of sale between the parties in the present case, was a "domestic building contract". Counsel for Mr Shaw strongly urges me to follow this decision. Counsel for the companies equally strongly urges me to distinguish the decision or decide to it was incorrect.

66 In the absence of a binding decision of the Court of Appeal or the High Court, it is the duty of a trial judge personally to determine the case before him or her. Where the case involves a question of statutory construction, the *"fundamental responsibility of a court... is to give effect to the legislative intention as it is expressed in the statute*".[12] This responsibility is not performed where the judge fails to determine the matter personally, preferring instead simply to follow an earlier decision on point of another member of the court.

67 On the other hand, where there is such a decision on point, the judge does not start writing on a blank page. Proper regard must be given to the previous judgment. Considerations of comity require the previous decision to be followed unless the judge attains a higher than usual standard of conviction that his or her contrary conclusion is correct. The interests of justice are not served where different judges come to different conclusions on the same question according to reasoning that appears to be entirely subjective.

68 I take the rule to be well expressed by Burchett J in ***La Macchia v Minister for Primary Industries and Energy***[13]

"The doctrine of stare decisis does not, of course, compel the conclusion that a judge must always follow a decision of another judge of the same court. Even a decision of a single justice of the High Court exercising original jurisdiction, while 'deserving of the closest and respectful consideration', does not make that demand upon a judge of this court: ***Businessworld Computers Pty Ltd v Australian Telecommunications Commission*** *(1988) 82 ALR 499 at 504. But the practice in England, and I think also in Australia, is that 'a judge of first instance will as a matter of judicial comity usually follow the decision of another judge of first instance [scil of coordinate jurisdiction] unless he is convinced that the judgment was wrong': Halsbury, 4th ed, vol 26, para 580. The word 'usually' indicates that the approach required is a flexible one, and the authorities illustrate that its application may be influenced, either towards or away from an acceptance of the earlier decision, by circumstances so various as to be difficult to comprehend within a single concise formulation of principle. (For example, it has been suggested that decisions upon the effect of sections of the Income Tax Assessment Act 1936 (Cth) present a special need for consistency:* ***Rabinov v FCT*** *82 ATC 4517 at 4523. Understood as expressing a usual or general rule, the following statement of Rogers J in* ***Hamilton Island Enterprises Pty Ltd v FCT*** *[1982] 1 NSWLR 113 at 119 is consistent with the proposition I have quoted from Halsbury:*

'In my view it is of cardinal importance in the proper administration of justice that single judges of State Supreme Courts exercising federal jurisdiction should strive for uniformity in the interpretation of Commonwealth legislation. Unless I were of the view that the decision of another judge of coordinate authority was clearly wrong I would follow his decision.'"

69 I will apply this rule when considering the decision of Byrne J. Because of his Honour's experience both in building and in commercial matters generally, I would not lightly decline to follow his decision.

70 The facts of ***Mirvac v Philp*** were very similar to the facts of the present case. Mr Philp bought an apartment off the plan in a high-rise building to be constructed in the Docklands. The plans and specifications specified in the contract were very general. The contract of sale contemplated that the building would be constructed by a builder under a major domestic building contract.

71 Mr Philp wanted to get out of the contract. If the contract was a domestic building contract, s. 11(3) of the Act allowed him to do so if the builder had demanded more money than the percentages of the price specified in s. 11(1). Mirvac had made such a demand. Because he believed that the contract was a domestic building contract, Mr Philp exercised the right to avoid the contract created by s. 11(3). An important issue in the case was whether the contract was, or was not, a major domestic building contract.

72 Like the contract of sale in the present case, the contract in ***Mirvac v Philp*** made clear that Docklands (as his Honour described Mirvac) did not have to go ahead with the project and, if it did, the building would be constructed by somebody else (see special conditions 6.1 and 6.2 at par [25] of the judgment). However, Byrne J concluded that, under the contract, Docklands was to arrange and manage the carrying out of the work.

73 The basis of this conclusion was that, under the contract, Docklands could select the builder, carry out associated work, order variations and alterations and direct the builder on the many details necessary to transform the concept identified in the contract into a physical building (see pars [28]-[29].) Further, Docklands could extend the registration and construction period for specified causes ([30]). Finally, as is set out in the following passage, special condition 6.2 gave Docklands arranging and managing responsibilities (par [31], footnotes excluded):

> *"I return at this point to special condition 6.2. The terminology adopted in the drafting is that Docklands represents and the purchaser acknowledges a number of matters in parts (a), (b) and (d) with respect to the construction work. The use of the word 'representation' in the context of these matters to be performed in the future strongly suggests that the word is to carry a promissory connotation. And what is the purchaser acknowledging in response to this? Is he merely noting the representation or is he accepting the promissory statement? To my mind it is an acceptance, so that what is here contained is a series of warranties made by Docklands which impose upon it contractual obligations. The obligations which Docklands here assumes affect the identity of the builder, the form of the building contract, the provision of statutory insurance, the requirement that the work conform generally to the plans and specifications, that the work will be completed by settlement date and that defects and shrinkages will be attended to by the builder. These may be properly described as aspects of either the arranging for the carrying out of the building work or for managing it."*

74 I agree with his Honour that the question whether a contract is a major domestic building contract has to be addressed as at the date on which the contract of sale was entered into (par [27]).

75 Counsel for Yarranova and NewQuay invited me to distinguish the decision in *Mirvac v Philp* upon the ground that the terms of the contract of sale in the present case were different to those in that case. I cannot discern any material difference between the terms of the two contracts. In both cases the developer proceeded according to the third option given in s. 137E(a) of the *Building Act*. The incidents of the contracts in both cases broadly reflect that election.

76 According to my understanding of the expression "to arrange or manage" in the definition of "domestic building contract", which I have explained above, a contract of the kind between Mr Philp and Docklands was not a domestic building contract. The provisions of the contract that convinced Byrne J to hold otherwise are necessary or convenient features of a contract to sell an apartment "off the plan" when the contract contains terms of the kind required by the third option stipulated in s. 137E(a), namely a term that the building will be constructed under a major domestic building contract. Where this option is adopted, it is understandable that there will be machinery provisions to facilitate the implementation of this necessary contractual term.

77 With respect, the provisions of the contract relied upon by Byrne J did not require the activities constituting the building work to be managed and arranged. They, like the corresponding provisions in the present case, required Docklands to ensure that the building would be constructed under a major domestic building contract with the result that those activities would be carried out, or managed or arranged, by a registered builder. Further, for the reasons given below, Docklands' responsibilities under the contract, like Yarranova's responsibilities under the contract of sale with Mr Shaw, were not domestic building work under s. 5(1) of the *Domestic Building Contracts Act*

78 For these reasons, I must respectfully disagree with these aspects of the decision of Byrne J in ***Mirvac v Philp***. I note that I have had the benefit of the considerable advantage of the subsequent decision of the Court of Appeal in *Winslow Constructors*.

79 After the decision in ***Mirvac v Philp*** was made, the *Domestic Building Contract (Amendments) Act* 2004 was passed. This Act amended the *Domestic Building Contracts Act* to make clear that, in circumstances such as those before Byrne J and me, a contract for the sale of land is not, and is not to be taken to form part of, a domestic building contract. The amendment was expressed not to apply to contracts the subject of proceedings commenced in a court before 16 March 2004. Because Mr Shaw's proceedings were commenced before that date, the contract at issue in the present case is not covered by the amendments.

80 In the Second Reading Speech of the Attorney-General on 12 May 2005, the Bill for the amending Act was described as "declaratory in nature".

81 When determining the meaning of the definition of "domestic building contract", I have not found it necessary to consider the terms of the amending Act or the Second Reading Speech of the Attorney-General. However, I have considered whether my interpretation of the definition is inconsistent with the Act as amended and with the observations of the Attorney-General. It is not.

(3) Was the developer's work under the contract of sale "domestic building work"?

82 Counsel for Mr Shaw submitted strongly that the work in the contract of sale was work of the kind specified in s. 5(1) of the *Domestic Building Contracts Act*, that is, "domestic building work" as defined in s. 3(1) by reference to s. 5(1). It followed, so it was submitted, that the contract was a domestic building contract. This kind of contract is defined in s. 3(1) to be a contract to carry out, or to arrange or manage the carrying out of, work of the kind so specified.

83 I have already summarised the contents of s. 5(1). The important thing to note is that the kinds of work described in s. 5(1) are overwhelmingly concerned with the practical activities involved in the work of building. Counsel for Mr Shaw fastened on s. 5(1)(e) but, properly understood, it does not relevantly add to the nature of the work described.[14]

84 Paragraph 5(1)(e) is expressed to include "any work associated with the construction or erection of a building" on land zoned for residential purposes under a planning scheme, and for which a building permit is required, under certain specified legislation.

85 Counsel for the parties made competing submissions to me about whether the land concerned was zoned for residential purposes under a planning scheme. I do not need to resolve this question. It was agreed that a building permit was required for the relevant works. This does not affect matters either.

86 The language of s. 5(1)(e), understood in the context of s. 5(1) and the *Domestic Building Contracts Act* as a whole, supplies powerful reasons for thinking that this paragraph was intended to do no more than extend the definition of "domestic building work" to non-residential buildings of whatever description[15] of the kind specified. So understood, Yarranova's work under its contract of sale with Mr Shaw would fall outside s. 5(1)(e) on this ground alone (the apartment was not a non-residential building). However, the meaning of par (e) was not extensively addressed in the submissions made to me in this case. In *Winslow Constructors*, Hansen AJA saw force in the construction that I prefer.[16] But Callaway and Buchanan JJA left the point open[17], noting that Byrne J appeared to have decided in *Fletcher Construction Australia Limited v Southside Tower Developments Pty Ltd*[18] that a residential building came within s.5(1)(e). I will not decide this point as I think that s. 5(1)(e) does not apply for other reasons.

87 Counsel for Mr Shaw submitted that the expression "any work associated with the construction or erection of a building" naturally picked up work of the kind that Yarranova was required to do. He gave examples by reference to the contract of sale and I list them below:

- Clause 13.2 required Yarranova to procure certification and registration of the plan, subject to a right to rescind.
- Clause 13.6 reserved to Yarranova a right to make alterations to the plan.
- Clause 13.8 reserved to Yarranova the right to join the car park lots with principal and storage lots.
- Clause 17.1 reserved to Yarranova the right to approve minor variations.
- Clause 18.1 required Yarranova to enter into a major domestic building contract.
- Clause 18.5 required Yarranova to ensure the major domestic building contract required the builder to make good defects after occupancy permits were issued.
- Clause 24.2 was a covenant that Mr Shaw not object to Yarranova erecting barriers, taking sole possession, erecting advertising signs and using all rights of way.
- Clause 30.1 was an acknowledgement of work Yarranova had already done in submitting an environmental management plan for approval.
- Clause 32 recited the obligations of Yarranova to the Docklands Authority, including obtaining all relevant approvals for the works, procuring design documents and drawing specifications and their approval, providing a statement in writing demonstrating the critical path of construction of the project and producing a plan of subdivision.
- Clause 35.1 prohibited Mr Shaw from making any objection or complaint in relation to any works undertaken by Yarranova on the land after the Day of Sale.
- Clause 36.1 was an acknowledgement by Mr Shaw that Yarranova could, after the Day of Sale, enter into leases and create easements and covenants to enable certification and registration of the Plan of Subdivision.
- Clause 37.1 was an acknowledgement by Mr Shaw that Yarranova might be required to include additional structural elements in the project not shown in the Plans and Specifications.

88 I agree that, depending upon the meaning given to s. 5(1)(e), work of the kind specified in this list may be included in or excluded from the definition of "*domestic building work*" and "*domestic building contract*" in s. 3(1) of the *Domestic Building Contracts Act*. In my view the work is excluded for the following reasons.

89 To come within s. 5(1)(e), the work has to be "*associated with the construction or erection of a building...*" This test has to be interpreted and applied in a practical and robust manner. Many kinds of work may, potentially, be so associated. Building on a large scale is a complex business. It is not possible to draw a bright line to resolve all situations. What is associated with the construction or erection of a building in one factual setting may be associated with something else in another. It is necessary sensibly to characterise the work to be done under the relevant contract in the context of all of the facts and circumstances. Doing this in the present case leads me to conclude that the work listed by counsel for Mr Shaw was associated with the work of Yarranova as the developer of a building project, not with the construction and erection of the building itself.

90 I have already described the scheme of s. 137E(a) of the *Building Act* and the *Domestic Building Contracts Act* generally. If Yarranova's responsibilities under the contract of sale constituted "domestic building work" by coming within s. 5(1)(e), the scheme, in cases like the one before me, would be brought to its knees. It would be difficult, if not impossible, for a developer to include the necessary machinery and facilitation provisions in a contract of sale without falling within the definition of "builder" in s. 3(1) of the *Domestic Building Contracts Act*. Unless the developer was also a registered builder, and many, such as Yarranova and New Quay, are not, the developer would commit an offence by entering into a major domestic building contract that included such provisions (s. 29(a)). This approach to the interpretation of s. 5(1)(e) would, in cases such as the present, prohibit what the statutory scheme was designed conditionally to permit.

91 A similar problem is encountered if the logic of the submissions of counsel for Mr Shaw is applied to the design and construct contract between NewQuay and Bovis. This contract confers much greater powers of direction upon NewQuay than the ones given to Yarranova by the contract of sale. If the submissions made on behalf of Mr Shaw are correct, by taking and exercising these powers, Yarranova would be managing and arranging the carrying out of building work by Bovis. Therefore

Yarranova would be a "builder" as defined and its entry into the contract would be an offence (s. 29(a)). This construction would not be adopted because it is contrary to the statutory scheme.

92 In ***Winslow Constructors***, the Court of Appeal decided, in the words of Callaway and Buchanan JJA, "s. 5(1)(a)(i) ... does not apply to work performed in contemplation of merely prospective homes on a proposed residential subdivision."[19] The principles of interpretation that underpinned this conclusion, which were identified by Hansen AJA,[20] require s. 5(1)(e) to be likewise interpreted. Work done by a developer under a contract of sale with an owner relating to a proposed multi-storey residential development to facilitate the construction of the building under a separate major domestic building contract between the developer and a registered builder is not work associated with the construction or erection of a building within s. 5(1)(e) of the *Domestic Building Contracts Act*.

CONCLUSION

93 Mr Shaw bought an apartment "off the plan" from Yarranova, which is a developer, not a builder. The contract of sale had a condition that the apartment building would be constructed by a registered builder under a separate major domestic building contract, and it was. Yarranova assigned its interests in the contract to NewQuay, which then stood in Yarranova's shoes.

94 Mr Shaw refused to complete the contract of sale because, he alleged, the apartment was not built in accordance with the plans and specifications in the contract of sale and had defects. In his view, both the contract of sale and the separate construction contract were major domestic building contracts covered by the *Domestic Building Contracts Act*. By reason of the operation of that Act, if the contract of sale was a major domestic building contract, NewQuay could not demand final payment in the circumstances alleged by Mr Shaw.

95 When Mr Shaw refused to complete, NewQuay served a notice of rescission on him. As Mr Shaw continued to refuse, Yarranova and NewQuay treated the contract of sale as at an end and Mr Shaw's deposit as forfeited. They say he lost the apartment and his deposit. On the companies' case, where an apartment is sold by a developer upon the basis that it is to be constructed under a separate major domestic building contract with a registered builder, the contract of sale is not itself a contract of that kind and therefore NewQuay was not prohibited from insisting that Mr Shaw make the final payment. Unless the alleged defects are major, and in this case they were not, the aggrieved buyer has to make the final payment, complete the contract and take action about the alleged defects later.

96 There was a threshold point in the case, which was whether the contract of sale was a "major domestic building contract" under the *Domestic Building Contracts Act*. This was set down for hearing as a preliminary question.

97 The preliminary question will be answered in favour of Yarranova and NewQuay. As the contract of sale was not a "major domestic building contract" under the *Domestic Building Contracts Act*, Mr Shaw had no right to refuse to make the final payment. NewQuay was within its rights when it rescinded the contract and took the deposit. There were steps that Mr Shaw could have taken to have his complaints dealt with, but he had to complete the contract first.

98 The preliminary questions will be answered as follow:

Questions:

On the proper construction of the provisions of the *Domestic Building Contracts Act* 1995 ("the Act") and in the events which have happened:

(1) Is the contract of sale dated 12 April 2000 made between the plaintiff and the first defendant a major domestic building contract within the meaning of the Act?

Answer: No

(2) If yes to Question 1, does s.42 apply to that contract of sale?

Answer: Unnecessary to answer.

Appendix

"PRELIMINARY QUESTION

1. Order, by consent, pursuant to R.S.C. r.47.04(a), that the questions set out below arising in the proceeding be tried as preliminary issues:

Questions:

On the proper construction of the provisions of the *Domestic Building Contracts Act* 1995 ('the Act') and in the events which have happened:

(1) Is the contract of sale dated 12 April 2000 made between the plaintiff and the first defendant a major domestic building contract within the meaning of the Act?

(2) If yes to Question 1, does s.42 apply to that contract of sale?

2. Direct pursuant to R.S.C. r.47.04(a) that the facts relevant to the determination of those questions are to be established upon:
   (a) the admissions set forth in the pleadings;
   (b) the contracts contained in the Defendants Court Book Vol 2;
   (c) the facts agreed as set out hereunder.

AGREED FACTS

For the purpose of deciding the preliminary issues on the matters the matters admitted on the pleadings the following further facts are agreed:

1. The lot to be sold under the Contract of Sale ('Contract') between the plaintiff and first defendant (being Lot 1002, CPT 464 and ST 166 on a proposed plan of subdivision PS 438893N 'Lot 1002') did not exist at the date of the Contract.

2. When registered, the land comprised in the proposed plan of subdivision would be known as NewQuay, Docklands.

3. The apartment to be constructed on Lot 1002 did not exist at the date of the Contract ('the Apartment').

4. The defendants are not registered builders within the meaning of the *Building Act* 1993 (Vic).

5. The defendants did not construct any homes on the land.

6. No contract for the construction of a home on Lot 1002 existed at the date of the Contract.

7. Special condition 18.1 of the Contract provides that:

   'The vendor will enter into a Major Domestic Building Contract with a Builder for the Works.'

8. Special condition 26.1 of the Contract provides that:

   'The purchaser hereby acknowledges that the vendor intends to proceed with and complete the Works in response to market demand and that the timing for commencement of the Works will be made by the vendor at its sole, absolute and unfettered discretion.'

9. Performance of the Works was necessary for the purposes of *inter alia* the creation of Lot 1002 and construction of the Apartment.

10. By a design and construct contract dated 15 December 2000 ('design and construct contract'), the second defendant engaged Bovis Lend Lease Pty Limited, a registered builder, to undertake the construction and development of three multi-storey buildings at NewQuay, Docklands, together with the development of residential apartments, retail facilities and associated facilities ('the works').

11. The design and construct contract is a major domestic building contract within the meaning of the *Domestic Building Contracts Act* 1995 (Vic).

12. Each of the multi-storey buildings to be constructed as part of the Works would comprise approximately 100 apartments.

13. The Works required a building permit under the *Building Act* 1993.

14. The Works to be undertaken pursuant to the design and construct contract included those works necessary to achieve the creation of Lot 1002 and the construction of the Apartment.

15. The Works were substantially carried out before the proposed plan of subdivision was registered.

16. The Works were substantially carried out before certificates of title to the lots in the proposed plan of subdivision were issued by the Registrar of Titles.

17. On 28 June 2002, the proposed plan of subdivision was registered.

18. On 28 June 2002, the second defendant was registered as proprietor of Lot 1002.

19. On 15 July 2002, an occupancy permit in relation to that building constructed as part of the Works which contained Lot 1002, was issued by a registered building surveyor which certified that that building was suitable for occupancy within the meaning of the Building regulations.

20. On 16 July 2002, notice of completion of the Works was given by Bovis Lend Lease Pty Limited to the second defendant.

21 On 24 July 2002, the second defendant gave written notification of each of registration of the plan of subdivison, the issue of the occupancy permit and completion of the Works and called for completion of the Contract.

22. The plaintiff has denied that the works necessary to complete construction of the Apartment are complete in that: (1) a window in the master bedroom does not open sufficiently to provide adequate ventilation in accordance with the requirements of the Building Code of Australia; (2) the toilet exhaust system from the Apartment has not been installed in compliance the relevant Australian standard and (3) a handrail installed on the balcony of the Apartment is not in accordance with the specifications to the Contract (being constructed of aluminium instead of mild galvanised steel) ('Alleged Defects').

23. The parties dispute whether the Alleged Defects exist but agree that, if proven, constitute defects in quality and not a defect in title.

24. On 29 September 2003 the second defendant served a notice of default and notice of rescission on the plaintiff ('the Notice').

25. By the Notice, the second defendant stated that the plaintiff had made default under the Contract consisting of his failure to pay the balance of monies due under that contract.

26. The plaintiff did not remedy the default alleged by the Notice within the period specified therein or at all and has declined to complete the Contract on the ground that s.42 of the *Domestic Building Contracts Act* applies to that Contract and that the second defendant cannot demand final payment under the Contract until the works are complete.

27. In the circumstances set forth in paragraph 25, the Contract was validly rescinded unless s.42 of the *Domestic Building Contracts Act* applies to that Contract.

28. The land, the subject of the proposed subdivision was zoned 'Docklands zone' under clause 37.05 of the Melbourne Planning Scheme, being a planning scheme under the Planning and *Environment Act* 1987.

For the purpose of deciding the preliminary issues in the proceeding the authenticity of the following documents is admitted:

1. Contract of sale of real estate dated 12 April 2000 referred to in paragraph 1 of the Admitted Facts, a copy of which is reproduced in (DCB Vol 2).

2. Design and construct contract dated 15 December 2000 referred to in paragraph 9 of the Admitted Facts, a copy of which is reproduced in DCB, Vol 2.

3. Extract Design Management Services Agreement dated 15 December 2000 between NewQuay Stage 2 Pty Ltd and Bovis Lend Lease Pty Ltd including schedule of consultants.

4. Clause 37.05 to Melbourne Planning Scheme, being zoning for Docklands zone.

Footnotes :

[1] This is clear from the contractor's warranties in cl. 4.3.

[2] Bovis' registration as a building practitioner was recited in its description as a party in the contract.

[3] Counsel for Mr Shaw relied upon par (c) of the definition of "builder" in s. 3(1) of the *Domestic Building Contracts Act* which included a person who intended to carry out, or to arrange or manage the carrying out of, domestic building work.

[4] Other examples are given and dealt with in pars [87] – [92] below.

[5] *CIC Insurance Let v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ; *Network Ten Pty Limited v TCN Channel Nine Pty Limited (*2004) 218 CLR 273 at 280-281 per McHugh ACJ, Gummow and Hayne JJ.

[6] (2004) 10 VR 435.

[7] [2005] VSC 237 (30 June 2005) at [892].

[8] (2004) 10 VR 435 at 459-9.

[9] Section 133 of the *Domestic Building Contracts Act* provides that a builder's failure to comply with the Act does not make a contract invalid.

[10] In cl. 1.7 of the contract of sale "builder" is defined to mean a person who is registered as a builder under the *Building Act*.

[11] [2004] VSC 301 (30 August 2004).

[12] *Babaniaris v Lutony Fashions Pty Ltd* (1987) 163 CLR 1 at [13] per Mason J.

[13] (1992) 10 ALR 201 at 204.

[14] Section 5(1)(g) does not add anything either in the present case because it only applies to work already specified in pars (a) – (f).

[15] "Building" is broadly defined in s. 3(1) of the *Domestic Building Contracts Act*.

[16] (2004) 10 VR 435 at [118].

[17] (2004) 10 VR 435 at [3].

[18] No 6668 of 1996, judgement dated 9 October 1996.

[19] (2004) 10 VR 435 at [2].

[20] (2004) 10 VR 435 at [94]-[95].

Mr Craig Harrison for the plaintiff instructed by Rigby Cooke
Mr Anthony Kelly for the defendant instructed by Arnold Bloch Liebler