

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL AND EQUITY DIVISION
COMMERCIAL LIST

No. S CI 03457 of 2012

THE REPUBLIC OF TURKEY

Plaintiff

v

MACKIE PTY LTD (ACN 097 603 846)

First Defendant

and

PHILLIP DAVENPORT

Second Defendant

<u>JUDGE:</u>	VICKERY J
<u>WHERE HELD:</u>	MELBOURNE
<u>DATE OF HEARING:</u>	2 JULY 2012
<u>DATE OF JUDGMENT:</u>	3 JULY 2012
<u>CASE MAY BE CITED AS:</u>	REPUBLIC OF TURKEY v MACKIE & ANOR
<u>MEDIUM NEUTRAL CITATION:</u>	[2012] VSC 309

BUILDING CONTRACTS - *Building and Construction Industry Security of Payment Act 2002 (Vic)* - Adjudication conducted under Part 3 Division 2 of the Act - Whether Adjudicator had jurisdiction - Decision open to review by way of *certiorari* - Whether finding by adjudicator that payment claim valid reviewable - Removal of conditions not permitted under the *Domestic Building Contracts Act 1995 (Vic)* - Whether construction of a Consular Residence is a 'Domestic Building Contract' - Application of s 7(2)(b) of the *Building and Construction Industry Security of Payments Act 2002 (Vic)* - *Director of Housing of the State of Victoria v Structx Pty Ltd* [2011] VSC 410 applied.

STATUTORY INTERPRETATION - Definition of 'Domestic Building Contract' as defined in section 3 of the *Domestic Building Contracts Act 1995 (Vic)* - Definition as defined in section 5 of the *Domestic Building Contracts Act 1995 (Vic)* - Is a 'Domestic Building Contract' as defined in the *Domestic Building Contracts Act 1995 (Vic)* such that by section 7 of the *Building and Construction Industry Security of Payments Act 2002 (Vic)* the Contract was excluded from that Act - Relevance of the *Vienna Convention on Diplomatic Relations*, (entered into force on 24 April 1964) Article 30(1) to construction of the *Domestic Building Contracts Act 1995 (Vic)* considered in the circumstances.

APPEARANCES:

Counsel

Solicitors

For the Plaintiff

Mr T. J. Margetts SC with
Mr R. Andrew

BMA Lawyers

For the First Defendant

Mr P. Bingham

Moray Agnew Lawyers

For the Second Defendant

No appearance

No appearance

HIS HONOUR:

INTRODUCTION

1 This proceeding relates to an adjudication determination made under the *Building and Construction Industry Security of Payment Act 2002* (Vic) (“the BCISP Act”).

2 The plaintiff is the Republic of Turkey. The Consulate-General of the Republic of Turkey in Melbourne (“the Consulate-General”) commenced its services on or about 12 October 1973. Since 1992, the Consulate-General has been operating at Level 8, 24-26 Albert Road, South Melbourne in conjunction with various other diplomatic attachés.

3 Since approximately 1998, the Republic of Turkey has owned a house on the land situated at 671 Toorak Road, Toorak in the State of Victoria (“671 Toorak Road”). This site has been used exclusively as the residence of the Consul-General. In approximately 2008/2009, the Republic of Turkey decided to rebuild the consular residence in a more commodious style using marble imported from Turkey amongst other things. The new consular residence is called “Marble House”. The residence was intended to be used, and is currently being used, as the private residence of the Consul-General and his family.

BACKGROUND

4 During 2009, the architects for the Republic of Turkey, Tectura Pty Ltd (“Tectura”), called for tenders from a number of builders for the new construction including the First Defendant, Mackie Pty Ltd (“Mackie”).

5 By a written contract dated 18 December 2009 (“the Contract”), the Consul-General for and on behalf of the Republic of Turkey engaged Mackie to carry out the rebuilding of the new consular residence at 671 Toorak Road. The Contract was in the standard form AS2124-1992 and included drawings of the proposed works. The rebuilding of the premises involved the construction of a very large building. It included a basement area, a ground floor and two floors above that. The building included six bedrooms, two car parks, a reception room of some proportion and

dining rooms including a dining room with the capacity to seat 25 persons. Kitchens were included to serve both the dining rooms and the reception room.

6 On or about 16 December 2009, the relevant building surveyor issued a Building Permit for the construction of the new consular residence at 671 Toorak Road with nine conditions. Condition 6 provided that before construction commenced Mackie was to provide a copy of a Home Owners Warranty Insurance. Further, the Building Permit described the consular residence as a "home" within the definition of Class 1A of the *Building Code of Australia*. After a tender evaluation Mackie was awarded the contract.

7 On 18 December 2009, the Republic of Turkey granted Mackie access to the site at 671 Toorak Road to commence the Construction Works. The Statement of Commencement of Works which was executed by the parties provided:

The site for Redevelopment of the Melbourne Consulate Residence located at the address of 671 Toorak Road, Toorak, Melbourne, of the Republic of Turkey has been provided to Mackie Pty Ltd on 18 December 2009 to commence construction works.

8 Discussions then took place concerning the Housing Owners Warranty required under the *Domestic Building Contracts Act 1995 (Vic)* ("the *Domestic Building Contracts Act*").

9 On 8 February 2010, the Republic of Turkey, by letter from the Consul-General, advised Tectura relevantly as follows:

I advise that according to the regulations in the Vienna Convention, the Turkish Consulate-General Residence at 671 Toorak Road, Toorak, is a designated Diplomatic Mission and held as Sovereign Territory of the Republic of Turkey and therefore receives Diplomatic Immunity from our host country, Australia.

We advise therefore that we do not require the provision of a Home Owners Warranty Insurance for this project given that there are already adequate protections provided to us in the building contract.

Could you please therefore advise the Building Surveyor Kukulka Consultants and the Building Contractor Mackie Pty Ltd of our determination not to require a Home Owners Warranty Insurance for this project such that the

relevant building permit conditions can be amended at the earliest possible time.

This letter was passed onto the relevant building surveyor.

10 On 9 February 2010, Tectura sent a letter to Mackie advising amongst other things that as the residence at 671 Toorak Road was a designated diplomatic mission with diplomatic immunity from the host country, Australia, the Consul-General had agreed to waive the requirements for the Home Owners Warranty Insurance given that there were already adequate protections provided in the AS2124 Building Contract.

11 Following negotiations between the Republic of Turkey and Mackie, on 11 February 2010 the Building Permit was amended to remove the condition requiring the provision of a Home Owners Warranty Insurance. This appears not to have been permitted under the *Domestic Building Contracts Act* which does not allow for the contracting out of this provision pursuant to s 132. Section 132(1) provides:

- (1) Subject to any contrary intention set out in this Act-
 - (a) any term in a domestic building contract that is contrary to this Act, or that purports to annul, vary or exclude any provision of this Act, is void; and
 - (b) any term of any other agreement that seeks to exclude, modify or restrict any right conferred by this Act in relation to a domestic building contract is void.¹

12 That section of course would apply only to a Domestic Building Contract as defined in the *Domestic Building Contracts Act*.

13 The date for Practical Completion under the Contract was 1 March 2011. Works were apparently delayed and Practical Completion was not achieved until 8 February 2012. There are various disputes between the parties relating to delays, variations and progress payments which are not yet resolved.

¹ *Domestic Building Contracts Act 1995* (Vic) s 132.

- 14 On 1 April 2012 Mackie lodged with Republic of Turkey a Payment Claim ("Payment Claim 18") in the sum of \$1,670,466 under the *BCISP Act*. Then on 23 April 2012 the Republic of Turkey served on Mackie its Payment Schedule in respect of Payment Claim 18 in the sum of \$389,328 which was also delivered pursuant to the *BCISP Act*.
- 15 On 8 May 2012 Mackie made an Adjudication Application to Adjudicate Today under the *BCISP Act*.² The Second Defendant in the proceeding, Mr Philip Davenport ("Mr Davenport"), accepted the nomination from Adjudicate Today as the adjudicator. Mr Davenport did not appear at the hearing of this Application but has agreed to be bound by the result.
- 16 By facsimile dated 15 June 2012, Adjudicate Today provided the parties with Mr Davenport's Adjudication Determination which was dated 18 May 2012. This was made in favour of Mackie in the sum of \$1,158,597 inclusive of GST. The Republic of Turkey then sought judicial review of the Adjudication Determination on the grounds set out in the Originating Process filed in the proceeding.

THE CASE OF THE REPUBLIC OF TURKEY

- 17 In summary, the Republic of Turkey said two things:
- (a) Firstly that it was and is a Foreign State within the meaning of the *Foreign States Immunities Act 1985 (Cth)* ("*Foreign States Immunities Act*") and therefore enjoys immunity from the Courts of Australia which under the terms of that Act includes a tribunal or other body by whatever name called which has functions or powers that are judicial functions or powers, or of a kind similar to judicial functions or powers.³
 - (b) Secondly, in its Original Process that the relevant Contract was a Domestic Building Contract as defined in the *Domestic Building Contracts Act*⁴ and hence

² *Building and Construction Industry Security of Payment Act 2002 (Vic)* s 18.

³ *Foreign States Immunities Act 1985 (Cth)* s 3.

⁴ *Domestic Building Contracts Act 1995 (Vic)* s 3.

the exception under s 7 of the *BCISP Act* excludes the Contract from the ambit of that Act.

18 On the first day of this trial the Republic of Turkey abandoned the State Immunity ground. Accordingly, the only question for this Court is whether the Contract was a Domestic Building Contract as defined in the *Domestic Building Contracts Act*⁵ such that by s 7 of the *BCISP Act* the Contract was excluded from the operation of that Act. Secondly, if that was the case, in any event was the Adjudicator entitled to come to the view that he did, such that certiorari would not lie in any event, even if on a review of the position it was determined as a matter of fact the Adjudicator was in error.

19 By an affidavit of Mr Cengiz, the Consul-General of the Republic of Turkey in Melbourne, the following was said in his affidavit of 27 June 2012 which I accept:

The Consulate-General is a diplomatic mission. The head of the mission is the Consul-General. Since approximately 1998 the Consul-General and his/her family has resided, and currently resides, in the Consular Residence at 671 Toorak Road, Toorak, Victoria. The current Consular Residence was constructed by the First Defendant under the building contract which is exhibit AM-4 to the affidavit of Attila Ulas Mete sworn on 19 June 2012.

20 It is then said and I accept:

Neither the Republic of Turkey nor the Consulate-General/the Consul-General are in the business of building residences. The Consular Residence is used as and intended to be used solely as the private residence of the Consul-General and his family, and for the holding of consular functions such as Turkish cultural events, diplomatic cocktail parties and receptions, and the like. It is not and never has been used by either the Republic of Turkey or the Consul-General as a business premises. The actual Consulate-General offices are separately located at Level 8, 24-26 Albert Road, South Melbourne.

THE CASE OF THE MACKIE

21 Mr Ralph Mackie, the Director of Mackie, swore an affidavit dated 29 June 2012. Of principal relevance Mr Mackie said, amongst other things that having been referred to the letter from the Republic of Turkey's architect dated 9 February 2010 he took it that the effect of this letter was that because the building was a designated diplomatic

⁵ *Domestic Building Contracts Act 1995* (Vic) s 3.

mission with diplomatic immunity the *Domestic Building Contracts Act*⁶ and the relevant applicable warranties and the requirement for Home Owners Warranty Insurance did not apply.

22 Mr Mackie observed specifically that the letter stated that the indemnity insurance required as a condition for the registration as a commercial builder sufficed and that those requirements were no more and no less onerous than any other building work on a commercial building in Melbourne. The letter, he observed, stated that the Republic of Turkey was prepared to waive the requirement for the Home Owners Warranty Insurance and that the building contract AS2124 applied.

23 Mr Mackie further stated that the building surveyor indicated that he would amend the Building Permit to remove the requirement for Home Owners Warranty Insurance. The Building Permit also referred to Mackie as the builder and referred to the number of Mr Mackie's commercial building registration, CBU3975 and not to his domestic building registration.

24 Mr Mackie said that he therefore understood the Republic of Turkey accepted the building was a commercial building and not one to which the *Domestic Building Contracts Act* applied, and in any event that it was entitled to and did waive the application of the *Domestic Building Contracts Act* and that it was therefore not applicable to the Republic of Turkey. Mr Mackie said that he assumed and thereafter acted on the basis that the *Domestic Building Contracts Act* did not apply and that the *BCISP Act* did apply.

25 In a second affidavit from Mr Mackie dated 29 June 2012, Mr Mackie referred to the hardship being faced by his company as a result of a decision reversing or quashing the determination of the Adjudicator. He says that as a result of the Republic of Turkey not paying Mackie the adjudicated amount or any part of that, Mackie was suffering hardship and respectfully requested the Court order that the Republic of

⁶ *Domestic Building Contracts Act 1995* (Vic).

Turkey immediately pay to his company the adjudicated amount and the Adjudicator's fees without delay.

26 In particular, Mr Mackie referred to the hardship as follows: first he says that the company had paid all of its subcontractors for the work the subject of Payment Claim 18 in respect of the project and yet has not been paid by the Republic of Turkey for that work. That, he said, put considerable strain on Mackie's cash flow. Second, he says that Mackie has an annual turnover in the current year of approximately \$21m. The unpaid adjudicated amount represents 4 per cent of that turnover. He said that it is difficult for Mackie to operate its business when such a significant proportion of its turnover has not been paid.

27 Mackie also placed reliance in its in submissions on evidence that at a farewell function for the outgoing Consul-General held on 10 December 2011 with more than 120 guests attending, the assembled company were told that the new facility could be used for a reasonable fee as a reception centre for such things as weddings and other business related functions.

APPLICATION OF SECTION 7(2)(b) OF THE BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENTS ACT 2002 (VIC)

28 In this proceeding, the primary question concerns the application of s 7(2)(b) of the *BCISP Act*. Section 7(2)(b) of that Act provides as follows:

(2) This Act does not apply to-

...

(b) a construction contract which is a domestic building contract within the meaning of the *Domestic Building Contracts Act 1995* between a builder and a building owner (within the meaning of that Act), for the carrying out of domestic building work (within the meaning of that Act), other than a contract where the building owner is in the business of building residences and the contract is entered into in the course of, or in connection with, that business.⁷

⁷ *Building and Construction Industry Security of Payment Act 2002 (Vic) s 7(2)(b)*.

29 There is no issue that the Republic of Turkey as the builder owner was in the business of building residences - it clearly was not. The only question is whether the Contract was a Domestic Building Contract within the meaning of the *Domestic Building Contracts Act*. In assessing this question, the facts must be considered objectively. The subjective views and opinions of the parties to the building contract are not relevant.

30 The provisions of the *Domestic Building Contracts Act* which are pertinent are firstly the definitional sections contained in s 3. "Domestic Building Contract" is defined 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 sub-contractor.⁸

"Domestic Building Work" is defined to mean

any work referred to in section 5 that is not excluded from the operation of this Act by section.⁹

"Home" is defined to mean

residential premises and includes any part of a commercial or industrial premises that is used as a residential premises ...¹⁰

There are then listed a number of matters which are not relevant to the current proceeding.

31 Turning then to s 5 of the *Domestic Building Contracts Act*, the section relevantly provides a number of provisions where the Act applies. In this case the Republic of Turkey relied upon four of the provisions of s 5(1), namely s 5(1)(a), (c), (d) and (e). Setting those out, s 5(1) relevantly provides:

- (1) This Act applies to the following work-
 - (a) the erection or construction of a home, including-
 - (i) any associated work including, but not limited to, landscaping, paving and the erection or construction of any building or fixture associated with the home (such as

⁸ *Domestic Building Contracts Act 1995 (Vic) s 3.*

⁹ *Domestic Building Contracts Act 1995 (Vic) s 3.*

¹⁰ *Domestic Building Contracts Act 1995 (Vic) s 3.*

retaining structures, driveways, fencing, garages, carports, workshops, swimming pools or spas); and

- (ii) the provision of lighting, heating, ventilation, air conditioning, water supply, sewerage or drainage to the home or the property on which the home is, or is to be.¹¹

Sub-paragraphs (c), (d) and (e) then provide:

- (c) any work such as landscaping, paving or the erection or construction of retaining structures, driveways, fencing, garages, workshops, swimming pools or spas that is to be carried out in conjunction with the renovation, alteration, extension, improvement or repair of a home;
- (d) the demolition or removal of a home;
- (e) any work associated with the construction or erection of a building-
 - (i) on land that is zoned for residential purposes under a planning scheme under the *Planning and Environment Act 1987*; and
 - (ii) in respect of which a building permit is required under the *Building Act 1993*.¹²

32 As to the latter provision, that is s 5(1)(e), I am not satisfied in this case that this can apply, first because the work done in this case was not associated with the construction or erection of a building. It was the actual construction or erection of a building. second there was no evidence before the Court that the land on which the building was erected was and is zoned for residential purposes under the relevant planning scheme.

33 However, I am satisfied that s 5(1)(a), (c) and (d) do apply. "Home", as has already been noted, is defined in s 3 of the *Domestic Building Contracts Act* to mean any residential premises and includes any part of commercial or industrial premises that is used as industrial premises. In my opinion the word, "any" as used in the definition introduces a capacious concept rather than a restrictive one. Mackie, which appeared by its counsel, Mr Bingham, submitted that the character of the building in question took it outside the character of a home under the *Domestic Building Contracts Act*. It was, as he put it, a public building used and to be used for public purposes by the

¹¹ *Domestic Building Contracts Act 1995* (Vic) s5(1)(a).

¹² *Domestic Building Contracts Act 1995* (Vic) s 5(1)(c)-(e).

Republic of Turkey as part of its diplomatic mission. It was used, it was submitted, and was to be used in significant part for consular functions and its design and scale and construction would suggest that this was the case.

34 It was put also that the building was to be occupied by the Consul-General for the period of his office in Melbourne, Australia and was therefore not his permanent residence but was something that was apparent to his office rather than his personal life. Reliance was also placed on the letter from the Republic of Turkey's architect, Tectura, dated 9 February 2010 which has already been referred to, where it was said that the residence at 671 Toorak Road was a designated diplomatic mission with diplomatic immunity from the host country, Australia and it was by this reason that the Consul agreed to waive the requirement for the relevant warranty of insurance.

CONCLUSION

35 I am satisfied that the building was in fact a home within the definition contained in s 3 of the *Domestic Building Contracts Act*. In this regard, reference is made to the *Vienna Convention on Diplomatic Relations 1961* ("the Convention") where by Article 30(1) the following is provided:

[T]he private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission.¹³

36 In Article 30(1) of the Convention a distinction is made between the private residential residence of a diplomatic agent and the premises of the diplomatic mission.

37 I am satisfied in this case that the business of the diplomatic mission of the Republic of Turkey was conducted at the South Melbourne premises of the Consulate-General at 24-26 Albert Road, South Melbourne and this continues to be the case. On the other hand, the subject property at 671 Toorak Road was proposed to be used and has been used as the private residence of the Consular-General.

¹³ *Vienna Convention on Diplomatic Relations*, done on 18 April 1961, 500 UNTS 95, art 30(1) (entered into force on 24 April 1964).

38 There is no evidence that it was or has been used to provide offices for the administrative or technical staff of the diplomatic mission or was used or is to be used other than to provide temporary accommodation for the visiting guests of the Consular-General and for entertainment purposes at the discretion of the Consular-General. The proposal to use the premises for hiring out on occasions to others for functions does not in my opinion take the premises beyond the realm of principally being used as a private residence. There was no evidence of the actual use of the premises for business purposes on a regular basis or at all.

39 Although the property, as the private residence of the Consular-General in Melbourne, does no doubt have special uses and characteristics to serve the Republic of Turkey and its diplomatic mission in Melbourne, these special purposes and characteristics in my opinion do not take it outside the definition of any residential premises under s 3 of the *Domestic Building Contracts Act*. The special uses and characteristics I have described are but one example of “any residential premises” as defined in that Act. For these reasons the exemption in s 7(2)(b) of the *BCISP Act* applies.

40 Further, in my view, the Adjudicator fell into error in determining that he had jurisdiction. Whether s 7(2)(b) of the *BCISP Act* applies, as was the issue before the Adjudicator, is a mixed question of fact and law. I refer in this regard to the case *Director of Housing of the State of Victoria v Structx Pty Ltd (t/a Bizibuilders) & Anor* (“*Structx*”) where s 7(2)(b) of the *BCISP Act* was also considered but in a slightly different context.¹⁴ In that case the question was whether the Director of Housing was in the business of building residences, and therefore whether the proviso to the exception contained in s 7(2)(b) applied.

41 At paragraphs [19]-[21] of *Structx* the Court observed as follows:

In the present case, I do not consider that the exception provided by s 7(2)(b) of the Act was intended to confer on an adjudicator the power to decide jurisdiction founded on questions of law or mixed questions of law and fact,

¹⁴ *Director of Housing of the State of Victoria v Structx Pty Ltd* [2011] VSC 410.

which includes the power to decide the question wrongly, without attracting prerogative relief.

The fundamental jurisdictional question in this case was whether the Director was “in the business of building residences”. A “business” is not defined in the Act. The determination is a mixed question of law and fact. The question of law must be determined on the usual rules which apply to the construction of legislation. An adjudicator is not required by the Act to be legally qualified. The Act does not demonstrate an intention that the determination of such a question be assigned to an adjudicator immune from judicial review by a court with the capacity to grant prerogative relief.

For these reasons, the decision made by the adjudicator under s 7(2)(b) of the Act, that the Director was “in the business of building residences”, is open to judicial review by way of certiorari.¹⁵

42 Similarly in this case, the mixed question of law and fact was whether or not the property at 671 Toorak Road was used or was to be used by the Republic of Turkey as a home as defined in the definitional section of the *Domestic Building Contracts Act*. In my view therefore applying the approach in *Structx* the decision of the Adjudicator to the effect that he had jurisdiction in all the circumstances, is open to review by way of certiorari. That issue goes to an essential and fundamental foundation for the jurisdiction of the Adjudicator.

43 Accordingly, the Adjudication Determination must be quashed and set aside.

44 I take the view that costs normally following the event that the Republic of Turkey has won the case in the final analysis. However, the late non-pursuit of the State Immunity ground by the Republic of Turkey did give rise to costs being incurred by Mackie. I take the view that the Republic of Turkey abandoned the State Immunity ground and ought to be visited with some level of costs penalty in respect of that, particularly given the late abandonment of the issue when obviously the Mackie party had spent some time and incurred some cost in addressing the matter and preparing submissions on the point.

45 In all the circumstances, I will order that the Republic of Turkey be paid two thirds of its taxed costs of the proceeding.

¹⁵ *Director of Housing of the State of Victoria v Structx Pty Ltd* [2011] VSC 410 [19]-[21].

ORDERS

46 I make the following orders:

1. The Adjudication Determination be quashed and set aside.
2. The Defendants pay to the Plaintiff two thirds of its taxed costs of the proceeding.
