IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
TECHNOLOGY, ENGINEERING & CONSTRUCTION LIST

Not Restricted

S ECI 2021 02658

MELINA KATHY PIASTRINO & ANOR — Plaintiffs

v

SEASCAPE CONSTRUCTIONS PTY LTD & ANOR — Defendants

JUDGE:	DELANY J
WHERE HELD:	Melbourne
DATE OF HEARING:	27 January and 2 February 2022
DATE OF JUDGMENT:	26 April 2022
CASE MAY BE CITED AS:	*Piastrino v Seascape Constructions Pty Ltd*
MEDIUM NEUTRAL CITATION:	[2022] VSC 202

ADMINISTRATIVE LAW – Building and construction – Judicial review – Adjudication under Part 3 Division 2 of the *Building Industry Security of Payment Act 2002* (Vic) – Application for certiorari – Whether contract is excluded from *Building Industry Security of Payment Act 2002* (Vic) by s 7(2)(b) of the Act – Whether contract a 'domestic building contract' for carrying out of 'domestic building work' for purposes of *Domestic Building Contracts Act 1995* (Vic) – Whether owners in the 'business of building residences' – Single contract for construction of four apartments a hair salon and a car stacker – No compliance by builder with s 12 of *Domestic Building Contracts Act 1995* (Vic) – Dominant character of work domestic building work – Contract not excluded from application of *Building Industry Security of Payment Act 2002* (Vic) – *Building Industry Security of Payment Act 2002* (Vic) s 7 applied – *Domestic Building Contracts Act 1995* (Vic) ss 5, 6, 12 applied – *Ian Street Developer v Arrow International* (2018) 54 VR 721 applied – *Winslow Constructions Pty Ltd v Mt Holden Estates* (2004) 10 VR 435, *H Buildings v Owners Corporation* [2017] VSC 802, *Bayside Design & Construct Pty Ltd v Kanbur* [2020] VCC 691 referred to.

STATUTORY CONSTRUCTION – *Building Industry Security of Payment Act 2002* (Vic) s 7(2)(b) – Definitions incorporated from *Domestic Building Contracts Act 1995* (Vic) – Effect of *Planning and Environment Act 1987* (Vic) and Victorian Planning Provisions on application of s 5(1)(e)(i) of the *Domestic Building Contracts Act* 1995 (Vic) – Whether work to a commercial part of mixed-use development is 'associated work' for purpose of s 5 of the

Domestic Building Contracts Act 1995 (Vic) – Whether contract for mixed-use development is 'domestic building contract' for carrying out domestic building work if domestic building work and other work not separately identified as required by s 12 of the Act – *Kelly v The Queen* (2004) 218 CLR 216 applied – *Stephens v Cameron* [2021] VSCA 208, *Kane Constructions Pty Ltd v Sopov* [2005] VSC 237, *Burbank Australia Pty Ltd v Owners Corporation PS447493* [2015] VSC 160, *Shell Refining (Australia) Pty Limited v A J Mayr Engineering Pty Limited* [2006] NSWSC 94, *Watpac Constructions Pty Ltd v Collins & Graham Mechanical Pty Ltd* [2020] VSC 414, *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Pty Ltd* (1985) 157 CLR 309, *Deal v Father Pius Kodakkathanath* (2016) 258 CLR 281 referred to.

STATUTORY CONSTRUCTION – *Building Industry Security of Payment Act 2002 (Vic)* s 7(2)(b) – 'the business of building residences' – *Director of Housing v Structx Pty Ltd t/as Bizibuilders* [2011] VSC 410, *Promax Building Developments Pty Ltd v PCarol & Co Pty Ltd* [2017] VCC 495, *Saath Pty Ltd v Seascape Constructions Pty Ltd* [2021] VSC 358, *Golets v Southbourne Homes* [2017] VSC 705, *Brajkovich v Federal Commissioner of Taxation* (1989) 89 ALR 408 referred to – *Ian Street Developer v Arrow International* (2018) 54 VR 721 applied.

WORDS AND PHRASES – 'domestic building work' – 'domestic building contract' – 'associated work' – 'in the business of building residences'.

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs	Mr R Andrew with Mr L Hogan	Kiatos & Co Solicitors
For the Defendants	Mr B Reid	Ward & Co

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HIS HONOUR:

Introduction

1 On 28 July 2021 the plaintiffs, Melina and Giuseppe Piastrino, instituted this proceeding by originating motion against the first defendant, Seascape Constructions Pty Ltd ('Seascape') and the second defendant, John McMullan.

2 The substantive order which the plaintiffs seek is that the adjudication determination made by Mr McMullan as adjudicator dated 30 June 2021 ('the Adjudication Determination'), pursuant to s 23 of the *Building and Construction Industry Security of Payment Act 2002* (Vic) ('the SOP Act'), be quashed.

3 The Adjudication Determination concerned a building contract between Mrs and Mr Piastrino and Seascape dated 18 October 2017 (the 'Contract'), pursuant to which four apartments, modifications to a hair salon and the installation of a car stacker were to be constructed at 151 Victoria Avenue, Albert Park (the 'Property'), which Mrs and Mr Piastrino owned.

4 Mr McMullan has not taken an active part in the proceeding. He has notified the Court and the parties that he will abide by the outcome.

5 The proceeding concerns whether the Contract falls within the exception from the scope of operation of the SOP Act provided for in s 7(2)(b) of that Act. The exception in s 7(2)(b) concerns domestic building contracts for the carrying out of domestic building work in accordance with definitions contained in the *Domestic Building Contracts Act 1995* (Vic) ('the DBC Act'). The parties agree that the Contract is a contract to which the DBC Act applies. However, Seascape does not agree that the Contract is exempt as a result.

6 The consequence of a finding that the exception applies is that Mr McMullan would not have had jurisdiction to make the Adjudication Determination, and Mrs and Mr Piastrino's application for certiorari should be allowed.

7 The Contract is for the construction of a mixed-use development. Whether such a

contract falls within the s 7(2)(b) exception has not previously been considered by this Court. A detailed consideration of the ambit and operation of the exception in s 7(2)(b) of the SOP Act is required.

8 If the s 7(2)(b) exception otherwise applies to the Contract, a second issue which arises is whether Mrs and Mr Piastrino were 'in the business of building residences'. If they were, and if the Contract was entered into in the course of or in connection with such a business, then the SOP Act continues to have application to the Contract and the Adjudicator had jurisdiction to make the Adjudication Determination.

9 Sections 7(1) and 7(2)(b) of the SOP Act provide:

> **7 Application of Act**
>
> (1) Subject to this section, this Act applies to any construction contract, whether written or oral, or partly written and partly oral, and so applies even if the contract is expressed to be governed by the law of a jurisdiction other than Victoria.
>
> (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; or

10 The exception in s 7(2)(b) contains a number of discrete limbs which must be satisfied before a contract is exempt:

(a) the contract must be a construction contract;

(b) it must be a domestic building contract within the meaning of the DBC Act;

(c) it must be between a builder and a building owner (within the meaning of the DBC Act);

(d) it must be for the carrying out of domestic building work (within the meaning of the DBC Act); and

(e) it must *not* be a contract:

(i) between a building owner who is in the business of building residences; and

(ii) where the contract is entered into the course of, or in connection with, that business.

11 Sub-paragraphs (a) and (c) are satisfied and are not in contest.

12 The parties contend that three questions which concern the remaining limbs of the s 7(2)(b) exclusion require determination:

(a) First, whether the exception has application to a mixed-use development such as the work the subject of the Contract. This question primarily concerns whether the Contract can be characterised as a contract 'for the carrying out of domestic building work'.

(b) Second, whether Mrs and Mr Piastrino were in 'the business of building residences'.

(c) Third, assuming an answer in the affirmative to the second question, whether the Contract was a 'contract entered into in the course of or in connection with that business'.

First Question: Mixed-Use Developments and Domestic Building Work

13 The first question is broadly framed. In answer to that question, I have determined that the exception in s 7(2)(b) of the SOP Act does not have application to all mixed-use developments. The exception has application to certain mixed-use developments only, depending on the somewhat complex application of s 7(2)(b) of the SOP Act and the definitions contained in the DBC Act that are incorporated into s 7(2)(b).

14 The exception in s 7(2)(b) applies only to 'domestic building work', as that term is defined in the DBC Act.[1] Due to the manner in which that term is defined, there are two gateways available to establish that a mixed-use development, which incorporates both domestic and non-domestic elements, constitutes 'domestic building work' that qualifies for the s 7(2)(b) exclusion.

15 The first gateway: by reason of s 5(1)(e) of the DBC Act, domestic building work is defined to include construction of a building and associated work where the building is constructed on land zoned for residential purposes for which a building permit is required. Such a building may be one which has a mixed use.

16 The second gateway: the exception in s 7(2)(b) of the SOP Act applies to a mixed-use development where, pursuant to s 5(1)(a) of the DBC Act, the building work (the subject of the contract) is appropriately characterised as the erection or construction of a home, including any 'associated work'. That is the case irrespective of the zone that applies to the land on which the mixed-use development is located.

17 Both 'gateways' may be available to bring the work the subject of the construction contract within the s 7(2)(b) exception except where, by reason of s 6 of the DBC Act, building work otherwise falling within s 5(1)(a) or (e) of the DBC Act is excluded from the definition of 'domestic building work'. Such exclusions include work in relation to a building, or part of a building, intended to be used only for business purposes.[2]

18 Where a construction contract distinguishes between domestic building work and other work, as required by s 12 of the DBC Act, it will only be the domestic building work component of the contract which is exempt under s 7(2)(b) of the SOP Act. Where a construction contract is a single contract that does not distinguish between domestic building work and other work (and as such fails to comply with s 12 of the DBC Act), if the dominant character of the work the subject of the contract is

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1 See sub-paragraph 10(d), above.

2 *Domestic Building Contracts Act 1995* (Vic), s 6.

domestic building work, the exemption in s 7(2)(b) will apply to the contract as a whole.

19 On the facts of this case, the Property on which the work the subject of the Contract was agreed to be performed is not land zoned for residential purposes. It is zoned for commercial purposes. As a result, the s 5(1)(e) DBC Act gateway is not open.

20 However, the Contract is one for the erection or construction of a home (four apartments) and associated work (including the car stacker). For the reasons discussed below, I have found that the gateway in s 5(1)(a) of the DBC Act is open. The Contract is a domestic building contract for the carrying out of domestic building work falling within s 5(1)(a) of the DBC Act.[3]

21 Sections 6 and 12 of the DBC Act must also be considered. The Contract includes work to the hair salon, work to part of a building intended to be used only for business purposes, work which is excluded from the definition of 'domestic building work' by s 6 of the DBC Act. The Contract does not separately identify the work to the hair salon as required by s 12. However, although the Contract includes work to the hair salon, the dominant character of the work the subject of the Contract is domestic building work. It follows that the Contract is a domestic building contract between a builder and a building owner for the carrying out of domestic building work.

Second Question: the Business of Building Residences

22 Turning to the second question: in order to qualify for the exception in s 7(2)(b), it is also necessary that Mrs and Mr Piastrino establish that, at the time they entered into the Contract, they were not building owners 'in the business of building residences'. I am satisfied that Mrs and Mr Piastrino were not in the business of building residences prior to the entry by them into the Contract. However, I consider that by

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3 That the Contract is a 'domestic building contract' within the meaning of the DBC Act follows from the finding regarding domestic building work. 'Domestic building contract' is defined relevantly as a 'contract to carry out, or to arrange or manage the carrying out of, domestic building work': DBC Act, s 3.

their entry into the Contract, Mrs and Mr Piastrino embarked upon and were thereafter engaged in the 'business of building residences'.

Third Question: Contract in the Course of a Business of Building Residences

23 As to the third question, it follows from my answer to the second question that the Contract is a contract entered into by Mrs and Mr Piastrino in the course of or in connection with the business of building residences.

24 Although the Contract is a domestic building contract for the carrying out of domestic building work, it was entered into by Mrs and Mr Piastrino in the course a business of building residences. As a result, not all of the requirements of the s 7(2)(b) SOP Act exception are satisfied. That being the case, Mr McMullan had jurisdiction to make the Adjudication Determination.

25 For the reasons that follow, the application to quash the Adjudication Determination is refused.

The Evidence

26 Mr and Mrs Piastrino relied on the following affidavits:

(a) affidavits of Mrs Piastrino dated 28 July 2021 and 22 September 2021;

(b) affidavits of Mr Piastrino dated 28 July 2021 and 22 September 2021;

(c) an affidavit of Derrick Ki-Jinn Toh, solicitor, dated 22 September 2021.

27 Seascape relied on the following affidavits:

(a) an affidavit of Benjamin Kendall dated 8 September 2021 (Mr Kendall was the project manager appointed to the Project in 2017);

(b) an affidavit of Nat Rattana dated 8 September 2021 (Mr Rattana was a site manager appointed by Seascape to the Project in October 2020); and

(c) an affidavit of David Sagor, a director of Seascape, dated 8 September 2021.

28 All witnesses who gave evidence on affidavit were cross-examined.

Some Agreed Facts

29 The following facts were not in contest:

(a) Seascape is a building company.

(b) From around 2010, Mrs and Mr Piastrino have been the owners of the Property.

(c) The Property was purchased by Mrs Piastrino's father in 1957. At that time, it was a shop front on Victoria Avenue, Albert Park and a small home behind. Mrs Piastrino and her family lived at the Property from when she was born until around 1970 when the family moved to live in Hampton. For about 12-13 years before the family moved to Hampton, Mrs Piastrino's mother ran a European-style grocery and delicatessen at the shop.

(d) The Property was transferred to Mrs and Mr Piastrino by Mrs Piastrino's now deceased father in 2010.

(e) In 2017, pursuant to the Contract, Seascape agreed to carry out construction works at the Property for the undissected lump sum of $1,782,000 (including GST).[4]

(f) On 26 May 2021, Seascape issued Mrs and Mr Piastrino with a payment claim for the completion of the Fixing Stage in the sum of $241,995.60 ('Fixing Stage Claim'). The Fixing Stage Claim was endorsed as a 'payment claim' under the SOP Act.

(g) On 26 May 2021, Mrs and Mr Piastrino issued a payment schedule under the SOP Act denying liability for the Fixing Stage Claim.

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4 The Contract did not distinguish at item 9.3 between the cost of the work to construct the residential apartments, work to construct the car-stacker and work to the hairdressing salon: Court Book ('CB'), 122.

(h) On 11 June 2021, Seascape made an adjudication application in accordance with s 18(1)(b) of the SOP Act.

(i) Mrs & Mr Piastrino filed submissions in the adjudication. In those submissions, they raised the jurisdictional issue of whether the SOP Act applied to the Contract.

(j) Mr McMullan issued the Adjudication Determination dated 30 June 2021. He determined that he had jurisdiction to make the determination under the SOP Act. He found Mrs and Mr Piastrino liable to Seascape for $256,415.60, being the full amount of the Fixing Stage Claim plus his costs of $14,520.00.

The Adjudication Determination

30 The Adjudication Determination included the following findings:

> 80. … I determine that the exception relating to the respondent being "in the business of building residences" applies in this case.
>
> …
>
> 97. Firstly, on the material before me, at the time of entering into the Contract, Mr & Mrs Piastrino did, in fact, intend to lease the four residential units to tenants in order to generate rental income and make a profit, evidenced by placing the advertising sign on the property in 2019, and by their email dated 1 June 2020 advising that the decision not to lease out the apartments had resulted from discussions with family members. In my view, that rental-earning purpose is consistent with this project, assessed at the time the construction contract was entered into, being engaged in by Mr & Mrs Piastrino for the purpose of profit.
>
> 98. Secondly, on the material before me, Mr & Mrs Piastrino's purpose in relation to the project was to remove the old family home and replace it with four rent-earning apartments, and a commercial salon (albeit that, at the time of entering into the Contract, Mr & Mrs Piastrino did not intend to charge their son rent in respect of the commercial salon). …
>
> 99. Thirdly, on the material before me, the proposed project was reasonably substantial, comprising a three storey development, multiple residential tenancies and one commercial tenancy, at a construction cost of approx $1.8 million. I take the legal authorities to be to the effect that a single venture may be sufficient to fall within the concept, in spite of the apparent absence of the element of a going concern conducted on a continuous and repetitive basis, depending upon its scope, amount to the carrying on of a business. In my view,

> this particular venture, comprising the construction and subsequent leasing of 4 residential tenancies and one commercial tenancy, was of a sufficient scope to amount to the carrying on of a business within the meaning of Section 7(2)(b). The project, in my view, is more consistent with a professional property development project, for profit, than a domestic building project of the nature that might be expected to fall outside the Building and Construction Industry Security of Payment Act 2002 (Vic);
>
> 100. I conclude, therefore, on balance, in this instance, that the respondent was in the business of building residences within the meaning of Section 7(2)(b) of the Act, and that the Contract was a construction contract in respect of which the Act applies.[5]

Some Additional Facts

31 Both Mrs and Mr Piastrino began their working lives when aged 16. Mrs Piastrino began her working career as a hairdresser in about 1975. Since that time she has either worked as a hairdresser or been a stay-at-home parent.

32 Mr Piastrino began working in a factory in 1975. In 1977 he studied spray painting at night school. He worked as a spray painter from around 1977 until 1998. At that time he switched to hairdressing and worked with his wife in a small salon at their family home from 1998 until around 2005. Mr Piastrino worked as an entertainer as a young man. In 2005 he returned to live music work which he described as his main source of income. Since 2005 he has worked professionally as a tribute artist performing the music of Elvis and Roy Orbison to live audiences.

33 At no time have either Mrs or Mr Piastrino worked in the building industry.

34 Mrs and Mr Piastrino married in 1977. They have two children: Chantelle, born in 1980 and Michael, born in 1983. Neither Michael nor Chantelle gave evidence in the proceeding.

35 Each of Michael and Chantelle have two children of their own and have their own homes. Michael and his family live in Berwick. Chantelle and her family live in Endeavour Hills.

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5 CB, 826, 837-838.

36 From around 2006, Michael conducted a hairdressing salon from the shop at the front of the Property. When construction works relating to the salon were completed, and around the time a certificate of occupancy was issued for the shop on 13 December 2019, Michael recommenced his hairdressing business in the salon at the front of the Property.

37 Throughout most of their married life Mrs and Mr Piastrino have lived in Endeavour Hills. At various times they have owned a number of residential properties in Endeavour Hills. Some of those residential properties have been owned by their family trust, the corporate trustee of which is Emanuel Nominees Pty Ltd ('the Family Trust'). Others have been owned by them personally. The ownership of those properties and works performed at some of them were contended by Seascape to be relevant to whether or not Mr and Mrs Piastrino were in 'the business of building residences'.

38 In 1983, Mrs and Mr Piastrino purchased a residential property at 9 Warburton Court, Endeavour Hills. They lived at 9 Warburton Court until moving to their current home at 4 Landsborough Court, Endeavour Hills in 1990. When they moved, the family retained Warburton Court as an investment property. It is currently owned by the Family Trust, and since around 1990 has been tenanted. In 2013, Mr Piastrino engaged a cabinet maker to put in a new kitchen at Warburton Court. He also engaged an electrician to install a new oven. When advertising for new tenants in 2013 the Property was described as 'fully renovated'. I find the extent of the renovation was overstated in the advertisement; the work carried out in around 2013 was far more limited than a 'full renovation'.

39 In 1987, Mrs and Mr Piastrino purchased 4 Landsborough Court, Endeavour Hills in joint names. At that time, the land was vacant. Mrs Piastrino's uncle was 'in the building game' and he and Mrs Piastrino's father built the house. When the house was finished, the family moved in, and Mrs and Mr Piastrino have lived there since.

40 In 1995 the Family Trust purchased a residential property at 57 Grove End Road,

Endeavour Hills. That property has always been tenanted. Cross-examined about a 2015 advertisement for the sale of Grove End Road which described it as 'fully renovated', Mr Piastrino accepted the advertisement was true. Mrs Piastrino did not agree. When she was cross-examined, Mrs Piastrino said the agent's description in the advertisement was incorrect. I agree with Mrs Piastrino. I accept that after about ten years of being tenanted, a second-hand kitchen was installed, the house was painted and cleaned up, and new shower glass was installed in the bathroom. That work was done to make the property more presentable prior to its sale. Despite the flourish in the 2015 sale advertisement, Grove End Road was not 'fully renovated'.

41 In 1998 the Family Trust purchased a residential property at 7 Nyora Close, Endeavour Hills. That property was tenanted. It was sold in 2017.

42 In 2002 the Family Trust purchased a holiday house at Phillip Island. It was sold in 2013.

43 In 2008 the Family Trust purchased a residential property at 6 Hunter Rise, Endeavour Hills. That property was also tenanted. Mr Piastrino gave evidence that the kitchen bench was replaced after tenants had burnt it. A tiler worked to replace tiles in the splashback. There was a partition wall built out of bricks. The partition wall was not a structural wall; it was removed. The shower and basin were replaced by Mr Piastrino with help from his son and son-in-law. Bathroom tiles were removed and the bathroom was painted.

44 The building work carried out on the residential properties that were tenanted, including the work carried out at 6 Hunter Rise, was work performed without a building permit. I find that the work carried out to those properties was in the nature of maintenance, as was Mr Piastrino's evidence, or, if not maintenance as such, work to 'freshen up' or 'renew' a previously tenanted residential property either to be re-leased or sold. All of the work was non-structural 'repair, renewal or maintenance' to part of an existing building. As such, none of the work was work

for which a building permit was required.[6]

45 Mrs Piastrino gave evidence that the properties at Phillip Island and Grove End Road were sold to fund the Contract works at the Property. Further, that at the time the Contract was entered into in 2017, it was intended to sell 4 Landsborough Court to fund the balance of the construction costs. I accept that evidence. It is consistent with evidence given by Mr Toh, who recalled that when he met with Mrs and Mr Piastrino before they signed the Contract that they were intent on 'self-funding' the redevelopment of the Property.

46 As events later transpired, Mr and Mrs Piastrino did not sell their family home at 4 Landsborough Court.[7] In 2017 the property at 7 Nyora Close owned by the Family Trust was sold. In 2021 the property at 6 Hunter Rise, also owned by the Family Trust, was sold. Mrs Piastrino gave evidence that it was necessary to sell 6 Hunter Rise due to Seascape being late with the Contract works and due to problems encountered on the redevelopment project.

47 The building permit for works at the Property was issued on 24 January 2018. The building permit records that the planning permit for the redevelopment of the Property issued some years earlier, on 2 May 2013.

48 The project to redevelop the Property has not been completed by Seascape. The building works commenced, at the earliest, on 26 September 2018 or by 13 November 2018. The Contract has been terminated and the parties are involved in a dispute at VCAT.

The Legislation

The SOP Act

49 The main purpose of the SOP Act is stated in s 1:

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6 Such work being work for which no building permit is required; see footnote 86 below.

7 There was evidence that Mr and Mrs Piastrino took out a bank loan for $600,000 with a view to selling their home and purchasing a smaller home, but the loan was never drawn down and applied for that purpose.

> The main purpose of this Act is to provide for entitlements to progress payments for persons who carry out construction work or who supply related goods and services under construction contracts.
>
> …

50 Consistent with its main purpose, the objects of the SOP Act in s 3 include:

> (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 that payment in accordance with this Act.

51 Except as provided for in ss 7(2)-(6) the SOP Act applies to all construction contracts in Victoria. Section 3 of the SOP Act defines a 'construction contract':

> **Construction Contract** means a contract or other arrangement under which one party undertakes to carry out construction work,[8] or to supply related goods and services, for another party.

52 Section 7(2)(b) provides that the SOP Act does not apply to a construction contract that is a 'domestic building contract for the carrying out of domestic building work'. What constitutes a 'domestic building contract' and what constitutes 'domestic building work' are not defined in the SOP Act. Instead, the definitions of those expressions are expressly imported into s 7(2)(b) from the DBC Act.

53 Sections 7(2)(b) and 7(2)(ba) were both inserted in the SOP Act in 2006.[9] Section 7(2)(ba) is in the following terms:

> (2) This Act does not apply to—
>
> (ba) a construction contract for the carrying out of any work of a kind referred to in section 6 of the Domestic Building Contracts Act 1995 relating to a residence other than—
>
> (i) a contract where the person for whom the work is, or is to be, carried out is a person who is in the business of building residences and the contract is entered into in

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8 'Construction work' is defined in s 5 of the *Building Industry Security of Payment Act 2002* (Vic) ('SOP Act').

9 *Building and Construction Industry Security of Payment (Amendment) Act 2006* (Vic), s 8.

the course of, or in connection with, that business; or

(ii) a contract where the work carried out, or to be carried out, under the contract is, or is part of or is incidental to work to be carried out under another construction contract; or

54 Sections 7(3)-(6) contain exceptions to the scope of operation of s 7(1) of the SOP Act, to the extent specified. By way of example, s 7(3) states:

> (3) This Act does not apply to a construction contract to the extent to which it contains—
>
> (a) provisions under which a party undertakes to carry out construction work,[10] or supply related goods and services, as an employee of the party for whom the work is to be carried out or the related goods and services are to be supplied; or
>
> (b) provisions under which a party undertakes to carry out construction work, or to supply related goods and services, as a condition of a loan agreement with a recognised financial institution; or
>
> (c) provisions under which a party undertakes—
>
> (i) to lend money or to repay money lent; or
>
> (ii) to guarantee payment of money owing or repayment of money lent; or
>
> (iii) to provide an indemnity with respect to construction work carried out, or related goods and services supplied, under the construction contract.

55 As appears from ss 1 and 3, the main purpose and objects of the SOP Act are to provide a statutory right for builders to recover progress payments due under a construction contract. That objective is sought to be facilitated by establishing a procedure by which disputed claims are referred to an adjudicator for interim determination.

56 In *Shell Refining (Australia) Pty Limited v A J Mayr Engineering Pty Limited*,[11] Bergin J said of the corresponding New South Wales legislation:[12]

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10 As defined in s 3.
11 [2006] NSWSC 94.
12 Ibid, [13]-[14], [16]-[17] (citations omitted).

13. The object and scheme of the Act has been the subject of numerous decisions. In *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport & Anor* Hodgson JA said:

> The Act discloses a legislative intention to give an entitlement to progress payments, and to provide a mechanism to ensure that disputes concerning the amount of such payments are resolved with the minimum of delay. The payments themselves are only payments on account of a liability that will be finally determined otherwise: s 3(4) and s 32. The procedure contemplates a minimum of opportunity for Court involvement: s 3(3) and s 25(4).

14. In *Multiplex Constructions Pty Ltd v Luikens & Anor* Palmer J described the scheme of the Act as requiring the respondent to "pay now argue later". It also appears that the motivation for the introduction of the scheme of the Act stemmed in part from an understanding that cash flow is considered the "lifeblood of the construction industry".

…

16. In *Pacific General Securities v Soliman & Sons Pty Ltd*, Brereton J said:

> 82. I therefore respectfully agreed with the view tentatively expressed by Hodgson JA in *Hargreaves*: the adjudicator's duty is to come to a view as to what is properly payable, on what the adjudicator considers to be the true construction of the contract and the Act and the true merits of the claim, and while the adjudicator may very readily find in favour of the claimant on the merits of a claim in the absence of a payment schedule or adjudication response, or if no relevant material is advanced by the respondent, the absence of such material does not entitle the adjudicator simply to award the amount of the claim without addressing its merits, which as a minimum will involve determining whether the construction work identified in the payment claim has been carried out, and what is its value.

17. A determination under the Act may be the subject of judicial review in limited circumstances, including where it is proved that an adjudicator has failed to comply with the basic and essential requirements prescribed in the Act.

57 In *Watpac Constructions Pty Ltd v Collins & Graham Mechanical Pty Ltd*,[13] Riordan J identified the task for the Court when, as here, the challenge to the validity of an

[13] [2020] VSC 414 ('*Watpac*').

adjudication determination concerns jurisdiction:[14]

> 39. ... If the question of jurisdiction is a matter of law, the question of law is decided by the Court like any other question of law. However, if jurisdiction depends on a matter of fact, the Court applies the following principles:
>
> (a) The Court determines the question of fact for itself on the evidence placed before it.
>
> (b) The burden of establishing the facts which show an absence of jurisdiction always rests on the party applying for relief.
>
> (c) The standard of proof is high, requiring 'clear proof leading unmistakably to [the] conclusion' that there was an excess of jurisdiction. The Court will hesitate before interfering if the tribunal has investigated the facts upon which the jurisdiction depends and the finding is not manifestly wrong.

58 I approach the determination of the disputed questions in accordance with those principles.

The DBC Act

59 Section 1 of the DBC Act, parts of which are expressly incorporated into s 7(2)(b) and 7(2)(ba) of the SOP Act, identifies the main purposes of the DBC Act:

> (a) to regulate contracts for the carrying out of domestic building work; and
>
> (b) to provide for the resolution of domestic building disputes and other matters by the Victorian Civil and Administrative Tribunal; and
>
> (c) to require builders carrying out domestic building work to be covered by insurance in relation to that work.

60 Relevant definitions in s 3 of the DBC Act include:

> ***builder*** means a person who, or a 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;
>
> ***building*** includes any structure, temporary building or temporary structure

[14] Ibid, [39] (citations omitted).

and also includes any part of a building or structure;

building owner means the person for whom domestic building work is being, or is about to be, carried out;[15]

…

domestic building contract means 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;

…

domestic building work means any work referred to in section 5 that is not excluded from the operation of this Act by section 6;

…

home means any residential premises and includes any part of a commercial or industrial premises that is used as a residential premises but does not include—

(a) a caravan within the meaning of the Residential Tenancies Act 1997 or any vehicle used as a residence; or

(b) any residence that is not intended for permanent habitation; or

(c) a rooming house within the meaning of the Residential Tenancies Act 1997;

(d) a motel, residential club, residential hotel or residential part of licensed premises under the Liquor Control Reform Act 199; or

(e) a nursing home, hospital or accommodation associated with a hospital; or

(f) any residence that the regulations state is not a home for the purposes of this definition …[16]

61 'Domestic building work' is defined in s 3 of the DBC Act to mean any work referred to in s 5 of the DBC Act that is not excluded from the operation of the Act by s 6. Sections 5 and 6 are in the following terms:

5 Building work to which this Act applies

(1) This Act applies to the following work—

(a) the erection or construction of a home, including—

15 This definition is expressly incorporated into s 7(2)(b) of the SOP Act.

16 The *Domestic Building Contracts Regulations 2017* (Vic) do not provide for any 'residence' that is not a home.

(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 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;

(b) the renovation, alteration, extension, improvement or repair of a home;

(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;

(f) any site work (including work required to gain access, or to remove impediments to access, to a site) related to work referred to in paragraphs (a) to (e);

(g) the preparation of plans or specifications for the carrying out of work referred to in paragraphs (a) to (f);

(h) any work that the regulations state is building work for the purposes of this Act.

(2) A reference to a home in subsection (1) includes a reference to any part of a home

6 Building work to which this Act does not apply

(1) This Act does not apply to the following work—

(b) any work in relation to a farm building or proposed farm building;

(c) any work in relation to a building intended to be used

only for business purposes; …

(2) This Act or a provision of this Act does not apply to any work that the regulations state is not building work to which this Act or that provision (as the case requires) applies.

62 As contemplated by s 6(2), regs 7, 8 and 9 of the *Domestic Building Contracts Regulations 2017* ('the Regulations') specify three categories of building work to which the DBC Act does not apply:

> **7 Building work to which Act does not apply—work to be carried out under a contract for one type of work only**
>
> For the purposes of section 6(2) of the Act, any of the following types of work is not building work to which the Act applies if the work is to be carried out under a contract for only that type of work—
>
> (a) attaching external fixtures (including awnings, security screens, insect screens and balustrades);
>
> (b) electrical work;
>
> (c) glazing;
>
> …
>
> **8 Building work to which the Act does not apply—certain buildings and premises**
>
> For the purposes of section 6(2) of the Act, work carried out in relation to any of the following is not building work to which the Act applies—
>
> (a) the official residence of the Governor of Victoria;
>
> (b) premises that are used or intended to be used at a school, university or other educational or training institution as accommodation for students or staff;
>
> (c) premises that are used or intended to be used as—
>
> (i) a community service …
>
> (d) premises that are used or intended to be used as—
>
> (i) a prison …
>
> (e) premises that are used or intended to be used as—
>
> (i) a residential institution within the meaning of the Disability Act 2006 …
>
> (f) premises that are used or intended to be used to provide accommodation within the Parliamentary reserve …

(g) a movable unit within the meaning of the Housing Act 1983…

9 Building work to which the Act does not apply—subdivisions

For the purposes of section 6(2) of the Act, work is not building work to which the Act applies if it is work for the design, construction, extension, repair, replacement, maintenance, demolition or removal of all or any of the following works in relation to a subdivision of land—

(a) the provision of roads, access ways…, within the subdivision;

(b) works for sewerage, drainage, water supply to connect the subdivision to the system serving properties outside the subdivision, excluding works to connect any particular property to the system for the subdivision;

(c) engineering works, fencing works, landscaping works or retaining structures required for the subdivision …

(d) works required for the issuing of any certificate of environmental audit … for the subdivision.

63 Section 12 of the DBC Act provides:

12 Contract for more than one sort of work must identify the domestic building work

(1) This section applies to a contract that entitles a builder to be paid both—

(a) for carrying out domestic building work; and

(b) for carrying out other work or for any other reason.

(2) The builder must not enter into such a contract unless the contract clearly identifies and distinguishes—

(a) the domestic building work from the other work or reason; and

(b) the amount of money the builder is to receive under the contract as a result of carrying out the domestic building work from the amount of money the builder is to receive under the contract as a result of carrying out the other work or for the other reason.

Penalty: 20 penalty units.

Principles of Construction: s 7(2)(b) of the SOP Act

64 When construing s 7(2)(b) of the SOP Act, it is important to begin with the language of the section itself. Seascape drew attention to the need to give work to do to all of

the words used in s 7(2)(b), including words defined in the DBC Act. Mrs and Mr Piastrino cautioned against reading words into the text that are not present. Both propositions are correct as canons of statutory construction.[17]

65 Section 7(2)(b) is to be read as a whole, with the words used being given their ordinary and grammatical meaning in light of the context and purpose of the section.[18] In *Federal Commissioner of Taxation v Consolidated Media Holdings*,[19] French CJ, Hayne, Crennan, Bell and Gageler JJ outlined the approach to be adopted:

> 39. "This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text".[20] So must the task of statutory construction end. The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is their examination an end in itself. [21]

66 The text of s 7(2)(b) requires terms defined in the DBC Act to be read as if part of the section itself. The exception in s 7(2)(b) is in favour of 'a construction contract which is a domestic building contract within the meaning of the DBC Act … for the carrying out of domestic building work (within the meaning of that Act)'.

67 In such circumstances, the usual approach to construction is that described by McHugh J in *Kelly v The Queen*:

> [T]he better – I think the only proper – course is to read the words of the definition into the substantive enactment and then construe the substantive

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17 Perry Herzfeld and Thomas Prince, *Interpretation* (Thomson Reuters, 2nd Ed, 2020) [1.140], [1.150]; see also *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55; (2012) 250 CLR 503 ('*Consolidated Media Holdings*'), [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ); *Momcilovic v The Queen* [2011] HCA 34; (2011) 245 CLR 1, [39] (French CJ).

18 *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355, [69] (McHugh, Gummow, Kirby and Hayne JJ); *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; (2009) 239 CLR 27, [4] (French CJ), [47] (Hayne, Heydon, Crennan and Kiefel JJ); *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55; (2012) 250 CLR 503, [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ); *R v A2* [2019] HCA 35; (2019) 269 CLR 507, [32]-[37] (Kiefel CJ and Keane J); *SZTAL v Minister for Immigration and Border Protection* [2017] 262 CLR 362; (2017) 262 CLR 362, [14]; see also *State of Victoria v Thompson* [2019] VSCA 237; (2019) 58 VR 583 (Beach, Osborn JJA and Kennedy AJA) [27]-[28].

19 [2012] HCA 55; (2012) 250 CLR 503.

20 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46 [47]; [2009] HCA 41.

21 *Federal Commissioner of Taxation v Consolidated Media Holdings* [2012] HCA 55; (2012) 250 CLR 503, [39].

> enactment – in its extended or confined sense – in its context and bearing in mind its purpose and the mischief that it was designed to overcome. To construe the definition before its text has been inserted into the fabric of the substantive enactment invites error as to the meaning of the substantive enactment.[22]

68 While the definitions from the DBC Act must be read into s 7(2)(b) of the SOP Act, it is not sufficient to construe s 7(2)(b) only by reference to its text and incorporated definitions. As stated by Mason J in *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Pty Ltd*:

> to read the section in isolation from the enactment of which it forms a part is to offend against the cardinal rule of statutory interpretation that requires the words of a statute to be read in their context.[23]

69 In addition to the need to construe s 7(2)(b) in context and as part of the SOP Act as a whole,[24] where two Acts – the SOP Act and the DBC Act – comprise part of an overlapping legislative scheme, they should be construed, if possible, in a way that gives the scheme a harmonious operation.[25]

Earlier Decisions concerning the DBC Act

70 Recently, in *Stephens v Cameron*,[26] the Court of Appeal said of the purpose of the DBC Act and of the expression 'domestic building work':

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22 [2004] HCA 12; (2004) 218 CLR 216, [103] (McHugh J); see also *Cranbrook School v Woollahra MC* [2006] NSWCA 155; (2006) 66 NSWLR 379, [39] (McColl JA; Beazley JA agreeing); *Australian Securities & Investments Commission v Administrative Appeals Tribunal* [2011] FCAFC 114; (2011) 195 FCR 485, [124] (Stone, Jacobson and Collier JJ); *Western Australia v Burke* [2011] WASCA 190; (2011) 42 WAR 124, [148] (Buss JA; Martin CJ and Mazza J agreeing); *Dionisatos v Acrow Formwork & Scaffolding Pty Ltd* [2015] NSWCA 281; (2015) 91 NSWLR 34, [261] (Gleeson JA; Basten and Macfarlan JJA agreeing); *Commissioner of State Revenue (Vic) v EHL Burgess Properties Pty Ltd* [2015] VSCA 269; (2015) 209 LGERA 314, [53] (Tate, Kyrou JJA and Robson AJA); *Farnham v Pruden* [2016] QCA 018; [2017] 1 Qd R 128, [23] (Morrison JA; Margaret McMurdo P and Gotterson JA agreeing); *Privacy Commissioner v Telstra Corp Ltd* [2017] FCAFC 4; (2017) 249 FCR 24, [58] (Kenny and Edelman JJ; Dowsett J agreeing); *Hayman v Cartwright* [2018] WASCA 116; (2018) 53 WAR 137, [54] (Buss P, Mazza and Beech JJA).

23 [1985] HCA 48; (1985) 157 CLR 309, 315.

24 See *Attorney General (NSW) v Melco Resorts and Entertainment Ltd* [2020] NSWCA 40; (2020) 380 ALR 121, [82] (Bathurst CJ, Bell P and Gleeson JA), citing *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation* [1981] HCA 26; (1981) 147 CLR 297, 320 (Mason and Wilson JJ), and *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355, [69] (McHugh, Gummow, Kirby and Hayne JJ).

25 *Shaw v Yarranova Pty Ltd* [2006] VSCA 291; (2006) 15 VR 289, [75]-[77] (Neave and Eames JA, agreeing as to a construction of the DBC Act which enables it to operate rationally alongside the provisions of the Building Act which covers persons undertaking domestic building work); *Maroondah City Council v Fletcher* [2009] VSCA 250; (2009) 29 VR 160, [85] (Warren CJ and Osborn AJA).

26 [2021] VSCA 208 (Kyrou, McLeish and Niall JJA).

> 60. The Act's purpose is revealed in its express purposes and objects, and also in its very structure. The purposes of the Act in s 1 include to regulate contracts for carrying out domestic building work and to require builders carrying out that work to be insured in relation to it. The objects in s 4 include the maintenance of proper standards in the carrying out of domestic building work in a way that is fair to builders and building owners, and enabling building owners to have access to insurance for incomplete or defective domestic building work (under a major domestic building contract). The Act is thus about the carrying on of domestic building work.
>
> 61. The defined expression 'domestic building work' is critical because it delimits the scope of the Act as a whole, consistently with its purposes and objects. So, s 5 sets out the work to which the 'Act applies', and supplies the primary content of the defined term 'domestic building work'. That key concept having been identified, the Act uses other defined terms which themselves deploy the concept of 'domestic building work', including 'builder', 'domestic building contract' and 'major domestic building contract'. It then attaches consequences by reference to that concept and those terms, including by implying warranties into defined contracts and otherwise imposing standard terms into those contracts including, relevantly, the provisions as to progress payments found in s 40.[27]

71 A number of earlier cases have considered what constitutes a 'domestic building contract' within the meaning of the DBC Act. Some of those authorities were summarised in 2017 in *H Buildings v Owners Corporation*.[28] It is unnecessary to repeat those summaries. However, it is helpful to refer to some of the earlier authorities, none of which, including *H Buildings* itself, involved a consideration of whether or not a contract for the construction of a mixed-use development that includes residential units constitutes a 'domestic building contract' for 'domestic building work'.

72 *Winslow Constructions Pty Ltd v Mt Holden Estates Pty Ltd*[29] concerned whether contracts for civil and engineering or subdivisional works for future residential land were contracts to which the DBC Act applied. The Court of Appeal held that 'home' in s 5(1)(a)(i) includes the plural 'homes'. It held that the definition of 'associated work' in s 5(1)(a)(i) of the DBC Act does not apply to work performed in

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27 Ibid, [60]-[61].

28 [2017] VSC 802 (*'H Buildings'*), [72]-[93] (Digby J).

29 [2004] VSCA 159; (2004) 10 VR 435 (Callaway, Buchanan JJA and Hansen AJA) (*'Winslow Constructions'*).

contemplation of prospective homes on a residential development.[30] In *Winslow Constructions*, the civil engineering and subdivisional work was found to lack a sufficient nexus with the erection or construction of a home to qualify as 'associated work'.[31]

73 In *Winslow Constructions*, Callaway and Buchanan JJA, who generally agreed with Hansen AJA, delivered short reasons including the following regarding s 5(1)(e) of the DBC Act:[32]

> 3. We would also leave open whether "a building" in s.5(1)(e) might include a home. We agree with the learned trial judge that, in *Fletcher Construction Australia Ltd v Southside Tower Developments Pty Ltd*,[33] Byrne, J. did not decide that "a building" in s 5(1)(e) does not include a home. On the contrary, his Honour said that '*any* structure or part of a structure is included', that the work must be associated with the construction or erection 'of a building *of whatever kind*' and that 'a building' in s.5(1)(e) 'cannot be *restricted* to a residential building' (emphasis added).[34,35]

74 Hansen AJA did not agree with that approach to s 5(1)(e):

> 118. Paragraph (e) is concerned with any work associated with the construction or erection of a building with certain additional criteria set down in sub-paras.(i) and (ii). The first point to make about this paragraph is the use of "building" instead of "home". Paragraphs (a) to (d) all refer to various activities in relation to a "home". The use of "building" as distinct from "home" in para.(e) appears to have been a deliberate drafting decision and there would thus seem force in the appellants' submission that "building" must exclude homes since otherwise sub-para.(a)(i) would be superfluous. This interpretation is supported by *Fletcher Construction Australia*. However, it is unnecessary to finally determine this point as, for the reason discussed at [116], the appellants' work was not work in respect of which a building permit was required under the *Building Act*.[36]

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30 Ibid, [2].

31 A similar approach is now found in reg 9 of the Regulations, applying to subdivisions.

32 *Winslow Constructions Pty Ltd v Mt Holden Estates Pty Ltd* [2004] VSCA 159; (2004) 10 VR 435, [3] (citations omitted) (emphasis in original).

33 Unreported, 9th October 1996.

34 At 7-8 and 15. True it is that his Honour went on to say that work associated with the erection or construction of a home was covered by s.(5)(1)(a) and that what appeared to be intended was that the Act should apply to work of a non-residential character carried out on land which itself had a residential character. It is unnecessary to pursue the point further to decide this case.

35 *Winslow Constructions Pty Ltd v Mt Holden Estates Pty Ltd* [2004] VSCA 159; (2004) 10 VR 435, [3] (emphasis in original).

36 Ibid, [118].

75 In *Kane Constructions Pty Ltd v Sopov*,[37] Warren CJ considered the application of the DBC Act to a development that included apartments, a gallery, restaurant space and office space. On the facts, Warren CJ held that the DBC Act did not apply to the development. Warren CJ expressed her agreement with Hansen AJA in *Winslow* that the DBC Act was not intended to apply to developers,[38] expressly leaving open the possibility that the DBC Act could have application to the residential component of a mixed-use development:

> 892 I have difficulty in accepting that in a project such as the present where it is a combined, mixed use development of residential, office and gallery and restaurant, developed by a developer, it should be subject to the protections enshrined in the *Domestic Building Contracts Act*. Picking up on the observations of Hansen AJA in *Winslow Constructions*, it seems to me that the Act was not intended to apply to developers, and for that reason alone the provisions have no bearing on the present case. Even so, the *Domestic Building Contracts Act* could only have application to those parts of the project intended for domestic residential use. Those parts of the development intended to be used "for business purposes" are expressly excluded from the operation of the Act by virtue of s.6(c).
>
> 893 I am of the view, therefore, that the Act does not apply to a project such as the present.[39]

76 In *Burbank Australia Pty Ltd v Owners Corporation PS447493*,[40] McDonald J was required to determine whether the DBC Act had application to a multi–apartment development. His Honour concluded that question should be answered in the affirmative, observing that the terms of ss 5(1)(a) and/or (e) of the DBC Act weigh heavily in favour of that conclusion.[41] McDonald J found that nothing in the extrinsic materials concerning the Domestic Building Contracts and Tribunal Bill 1995 (Vic) justified a departure from the plain meaning of the words used in s 5 of the DBC Act.[42]

77 McDonald J held that s 5 of the DBC Act directs attention to the nature of the work

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37 [2005] VSC 237 ('*Sopov*').
38 Ibid, [891]-[893].
39 Ibid, [892]-[893].
40 [2015] VSC 160 ('*Burbank*').
41 Ibid, [11].
42 Ibid, [25].

undertaken.[43] The development attracted s 5(1)(a) because the works constituted residential premises. Subsection 5(1)(e) applied because the building which comprised the apartments also fell within the terms of that subsection,[44] noting that 'home', as defined in s 3 has been held to include 'homes' and the definition of 'home' lists a series of exclusions, none of which exclude a residential apartment in a multi-apartment development.[45]

78 McDonald J noted that a number of earlier judgments have proceeded on the basis that the DBC Act applies to a multi-apartment development.[46]

H Buildings v Owners Corporation

79 In *H Buildings*, the contract was for a lump sum of $45,580,000 for the construction of 'The Resort Torquay'. The development was built on land zoned for residential purposes.[47] The plaintiff argued the development was a 'residential hotel', excluded from the definition of 'home' by part (d) of the definition in s 3 of the DBC Act. The defendants contended the contract was a 'domestic building contract' within the meaning of the Act. In *H Buildings*, both parties accepted that it was the physical characteristics and intended use of the premises to be constructed which were determinative under the DBC Act.[48]

80 Digby J considered that the intended use is likely to be most reliably ascertained by reference to the proposed building's physical characteristics, in turn ascertained by reference to the design specification of the works.[49] On the facts, the contract was agreed to be a 'major domestic building contract' for works which included substantial domestic elements in the nature of residential apartments.[50]

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43 Ibid, [32].
44 Ibid, [30].
45 Ibid, [9] citing *Winslow Constructions Pty Ltd v Mt Holden Estates Pty Ltd* [2004] VSCA 159; (2004) 10 VR 435, [2(a)] (Callaway and Buchanan JJA).
46 Ibid, [27], citing *Mrocki v Mountain View Prestige Homes Pty Ltd* [2010] VSC 624 (Dixon J).
47 *H Buildings v Owners Corporation* [2017] VSC 802, [111].
48 Ibid, [69].
49 Ibid, [105].
50 Ibid, [108].

81 Digby J found the intended use for the development included, in 'numerous and extensive parts', residential premises. Accordingly, the whole of the development did not fall within the meaning of 'residential hotel' as that term is intended by s 3(d) of the DBC Act.[51] Having found the works were, in a substantial component, in the nature of residential premises, his Honour determined that it was unnecessary for him to decide whether s 5(1)(c) of the DBC Act also caught the other works or was limited to the residential component.[52]

Bayside Design & Construct Pty Ltd v Kanbur

82 In *Bayside Design & Construct Pty Ltd v Kanbur*,[53] Woodward J considered the application of the s 7(2)(b) exclusion from the operation of the SOP Act to mixed-use developments. His Honour held that the s 7(2)(b) exclusion applied to the mixed-use development the subject of the contract under consideration.

83 In *Bayside*, the defendant engaged the plaintiff to construct a first floor residential unit and two ground floor shops pursuant to a single contract for the sum of $1,540,000.[54] The Defendant proposed to lease the shops so as to generate income once they were completed.[55]

84 Woodward J reasoned as follows:

> 25 There are a number of things to note about *Kane v Sopov*, and *Winslow Constructions Pty Ltd v Mt. Holden Estates Pty Ltd* [2004] VSCA 159 ("Winslow") to which it refers. First, they did not concern or consider the construction of s7(2)(b) of the SOP Act and its intersection with the definitions in the DBC Act. Rather, those cases involved substantial commercial developments where a question arose about the application of particular provisions of the DBC Act to the developments. Second, in discussing the framework of the DBC Act, including by reference to the second reading speech, Hansen AJA in *Winslow* emphasised that the intent of the DBC Act is to "protect individual homeowners rather than commercial developers". Third, it is not in dispute that Mr Kanbur is a "homeowner", in the sense that a substantial component of the development involved the construction

51 Ibid, [118]-[120].
52 Ibid, [134].
53 [2020] VCC 691 ('*Bayside*').
54 Ibid, [1], [3].
55 Ibid, [1], [21].

> of his home. Conversely, on no view could Mr Kanbur be described as a "developer" in the manner discussed in those authorities.
>
> 26 Thus, in my view (with respect), the reasoning in those authorities has limited application to the issue I must decide. Drawing together the language of the relevant definitions in s3 with ss5 and 6 of the DBC Act, that issue is whether the Contract is a contract for the carrying out of the erection or construction of a home, that is not work "in relation to a building intended to be used only for business purposes". In my view, the conclusion that it is such a contract is unavoidable. As noted above, there is no dispute that a substantial proportion of the work concerned the building of Mr Kanbur's new home. Nothing about the title given to the Contract or the zoning of the land on which the building is constructed can change that simple fact.
>
> …
>
> 31 In my view, Mr Kanbur's submissions must be accepted. Bayside has entered into one contract for both the domestic building work and the commercial work and has failed in that contract to clearly delineate between those two types of work, particularly as to the amount Bayside was to receive. Thus it is impossible to identify any part of the Contract as being other than a domestic building contract. I confess that even if a builder were to comply with s12, it is far from clear that doing so would avoid the operation of s7(2)(b) of the SOP Act for the non-domestic work. For example, I note that unlike s7(3) and (4) of the SOP Act, s7(2) does not use the expression "to the extent to which", which it could easily have done if the intention had been to apply the section only to a contract "to the extent to which" it related to domestic building work. In the case of mixed use developments with owners that are not in the business of building residences, I am inclined to the view that the consequences of s7(2)(b) could only be avoided by entering into two contracts – one for the domestic work and one for the commercial work. However, it is not necessary for me to decide that question.[56]

85 While urged by the builder to do so, in a case where the contract did not comply with s 12 of the DBC Act, Woodward J found there was no occasion to sever parts of a payment claim so as to distinguish between residential work and other parts of the work under the SOP Act.[57]

First Question: Does the s 7(2)(b) Exclusion Apply to Mixed-Use Developments?

Seascape's Submissions

86 Seascape submitted the exception in s 7(2)(b) only applies to 'domestic building

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56 Ibid, [25]-[26], [31].
57 Ibid, [31]-[32].

contracts' which concern the performance of 'domestic building work' that is 'purely domestic in nature', and not mixed-use developments.[58]

87 Seascape submitted that the words 'for the carrying out of domestic building work' (within the meaning of the DBC Act) have separate work to do where those words appear in s 7(2)(b) of the SOP Act. It submitted that s 7(2)(b) refers both to 'domestic building work', being work referred to in s 5 of the DBC Act that is not excluded by s 6, and to a 'domestic building contract', two distinct concepts. It submitted that, as a result of the deliberate reference to both concepts, s 7(2)(b) only applies to a 'domestic building contract' that *solely* provides for the carrying out of work that is 'domestic building work'. Work that is partly domestic building work and partly commercial work does not fall within the exception.

88 Seascape submitted that neither *Burbank* nor *H Buildings* answers the question of whether the exclusion only applies where the development comprises purely 'domestic building work'. It submitted that neither case was directed to the SOP Act. Neither case was concerned with the proper construction of s 7(2)(b).

89 Seascape submitted that *Burbank* makes it clear that it is necessary to look at the nature of the work to determine the application or otherwise of the DBC Act. It submitted that Woodward J's analysis in *Bayside* supports the proposition that the SOP Act provides an exception only where the work the subject of the contract is the 'carrying out of domestic building work'.[59] Further, it submitted that that Woodward J's emphasis on characterising the contractual relationship meant that having found the contract was a domestic building contract, his Honour was not required to determine whether the contract was solely for the carrying out of domestic building work.[60]

90 Although contending that *Bayside* supported the construction of s 7(2)(b) for which it

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58 First Defendant, Submissions dated 5 October 2022, [17]-[20].

59 Transcript of proceedings, *Piastrino v Seascape Constructions* (Supreme Court of Victoria, Delany J, 27 January, 2 February 2022) ('Transcript'), 2 February 2022, 156.

60 Ibid, 156-157.

advocated, Seascape went on to submit that the reasoning in *Bayside* could lead to a perverse situation. The example was given of a single contract for the construction of a large supermarket on the ground floor and two residences above, with the two categories of work not delineated as required by s 12 (2) the DBC Act. It was submitted that in that situation, adopting the approach in *Bayside*, the contract would be a contract falling within s 7(2)(b) and as a result, would be excluded from the SOP Act.[61]

Mrs and Mr Piastrino's Submissions

91 Mrs and Mr Piastrino submitted that Seascape's construction of s 7(2)(b) impermissibly requires the Court to read words into the section. They submitted that the section does *not* say:

> …a construction contract which is a domestic building contract within the meaning of the Domestic Building Contracts Act 1995…for the carrying out of solely domestic building work (within the meaning of that Act)…[Word added.][62]

92 Mrs and Mr Piastrino submitted that if accepted, the construction contended for by Seascape would fundamentally alter the definition of 'domestic building work' in s 3 of the DBC Act.

93 Mrs and Mr Piastrino placed considerable reliance on the decision in *Bayside*. They also relied on *Burbank* and *H Buildings* to confirm that multi-apartment and mixed-use developments fall within the ambit of the DBC Act. They submitted that both decisions provide guidance on how the Court might approach the construction of s 7(2)(b).

The text of s 7(2)(b) of the SOP Act and definitions incorporated from the DBC Act

94 The analysis of s 7(2)(b) must begin with the text, including the definitions in the SOP Act itself and those incorporated from the DBC Act.

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61 Ibid, 167.

62 Plaintiffs, Outline of Submissions in Reply dated 14 October 2021, [4].

95 Before detailed consideration of the text, some general observations may be made.

96 First, s 7(2) distinguishes between two types of contracts: 'construction contracts', and 'domestic building contracts'. The latter is a subset of the former. The latter is defined in s 3 of the DBC Act, the former is defined in s 3 of the SOP Act. When construing s 7(2)(b), both defined expressions must be given work to do. It follows that unless the contract in question is both a 'construction contract', and a 'domestic building contract', the exception does not apply.

97 Second, just as a 'domestic building contract' is a subset of 'construction contract'; a 'domestic building contract … for the carrying out of domestic building work' is a subset of a 'domestic building contract'. For the s 7(2)(b) exclusion to apply, the definition of 'domestic building work' in s 3 of the DBC Act must also be satisfied. To approach the construction of the subsection this way recognises that both expressions that are separately defined in the DBC Act have work to do.

98 Third, adopting the approach favoured by McHugh J in *Kelly v The Queen*,[63] s 7(2)(b) must be read as if the defined words drawn from the DBC Act are inserted into the text of the SOP Act. That extends to words within those defined terms, themselves defined elsewhere within the DBC Act. For example, the word 'home' that appears in s 5 of the DBC Act as part of the definition of 'domestic building work' is separately defined in s 3 of the DBC Act, and that definition must be given effect to.[64]

99 To qualify for the exclusion from jurisdiction in s 7(2)(b) of the SOP Act for which Mrs and Mr Piastrino contend, the Contract must be (amongst others) all of:

(i) a 'construction contract'; and

(ii) a 'domestic building contract'; and

(iii) for the carrying out of 'domestic building work',[65]

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63 [2004] HCA 12; (2004) 218 CLR 216.
64 See paragraph 60, above.
65 See paragraph 10, above.

as those expressions are defined.

100 The exception in s 7(2)(b) cannot apply, and the SOP Act will therefore apply, unless all of those definitions are satisfied.

101 While s 3 of the DBC Act defines 'domestic building contract' to mean a contract for the carrying out of 'domestic building work', that does not mean that, as a matter of course, a contract for the construction of a mixed-use development (or the Contract in this case) is not a 'domestic building contract' for the carrying out of 'domestic building work'. Whether or not a construction contract is a 'domestic building contract' is a question which is answered only by application of the definition of 'domestic building work': namely, *any work* referred to in s 5 of the DBC Act that is not excluded by s 6.[66]

102 'Building work' is defined in s 5(1) of the DBC Act in an exhaustive, rather than inclusive, manner. There are eight subsections in s 5(1). Subsections 5(1)(a)-(d) concern the construction of 'homes'.[67] Subsection 5(1)(e) concerns 'buildings'. Like 'home', 'building' is a defined term in s 3 of the DBC Act. The remaining subsections, ss 5(f)-(h), are not significant for present purposes.[68]

103 Subsections 5(1)(a) and (e) both encompass not just work done directly to construct or erect a home, but also 'associated work'. What constitutes 'associated work' is not defined. Subsection 5(1)(c) refers to work 'such as landscaping …' carried out 'in conjunction' with certain other work, including the renovation of a home. The references to 'associated work' in ss 5(a) and (e), and the reference to work 'such as' in s 5(c) followed by examples serve to expand the scope of 'domestic building work'.

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66 Or, as a consequence of s 6(2), by the Regulations.

67 Section 5(2) also falls into this category, clarifying that a reference to a home in s 5(1) includes any part of a home.

68 Subsection 5(1)(f) is concerned with site work. 'Site work' is defined in s 5(1)(f) in an inclusive manner. Subsection 5(1)(g) is concerned with plans or specifications. Subsection 5(1)(h) permits the regulations to specify what constitutes 'building work' for the purposes of the Act. The Regulations do not do so.

104 When analysing the text of s 5 it is convenient to consider:

(a) first, s 5(1)(e), work being the construction or erection of a building;

(b) second, ss 5(1)(a)-(d) and 5(2) which, broadly, concern 'homes'; and

(c) third, to turn to work 'associated with' and 'associated works', expressions that have application to work concerning a building and to work concerning a home.

105 Having considered s 5 it is then necessary to turn to s 6. That is, so as to ascertain whether work for which the gate is opened in s 5 is work that is nonetheless excluded from the scope of the definition of domestic building work by s 6, or by the Regulations.

106 Finally, it is necessary to give separate consideration to s 12, which makes it an offence for a builder to enter into a contract for the carrying out of domestic building work and other work without complying with its provisions.

The Text of s 5(1)(e) DBC Act

107 Section 5(1)(e) is not concerned with the character of the building to which it has application, whether a home or otherwise. It is directed to any work associated with the construction or erection of any building. 'Building' is defined in s 3 to include part of a building. Subsection 5(1)(e) brings within the scope of 'domestic building work' (to which the DBC Act applies) any work 'associated with the construction or erection of a building', or part of a building, provided:

(a) the building is on land that is 'zoned for residential purposes under a planning scheme'; *and*

(b) the work is work in respect of which a building permit is required.

108 In *Fletcher Constructions Australia Ltd v Southside Tower Developments Pty Ltd*,[69] the

[69] Unreported, Supreme Court of Victoria, Byrne J, 9 October 1996 ('*Fletcher Constructions*').

subject matter of the contract was the refurbishment and conversion of a ten storey office building into 151 residential units, a gymnasium for residents, take-away food premises, a café/restaurant and associated car parking. The land was zoned 'Central Melbourne – Southbank Zone' under the Melbourne Planning Scheme. That zone was included in a Business Zone in the structure of the planning scheme. Byrne J considered that little guidance was to be had from an examination of the controls imposed on land grouped under the heading 'Residential Zones' in the Melbourne Planning Scheme. His Honour considered that while 'building' cannot be restricted to a residential building, the intention is that the DBC Act should apply to work of a non-residential character but which is carried out on land which itself has a residential character.[70] Byrne J concluded that rather than directly equating land zoned for residential purposes with Residential Zones:[71]

> The requirement of para (e) is therefore satisfied only where residential use or uses of the land are the principal or predominant purpose for the land use permitted by the zone.

109 *Fletcher Constructions* predated the introduction of the Victorian Planning Provisions ('the VPPs') pursuant to Part 1A of the *Planning and Environment Act 1987* ('the P&E Act'). Part 1A was introduced into the P&E Act by amending legislation in 1996,[72] and the VPPs came later.[73]

110 The structure of the VPPs is to distinguish, on a State-wide basis, between Residential Zones and Commercial Zones. Taking as an example the Port Phillip Planning Scheme ('PPPS'), being the scheme which has application to the Property, cl 1 states that the purposes of the planning scheme are:

- To provide a clear and consistent framework within which decisions about the use and development of land can be made.
- To express state, regional, local and community expectations for areas and land uses.
- To provide for the implementation of State, regional and local policies

70 Ibid, 15.
71 Ibid, 16.
72 By the *Planning and Environment (Planning Schemes) Act 1996* (Vic).
73 The VPPs were introduced progressively between 1997 and 2000.

affecting land use and development.

111 The PPPS provides for Residential Zones including Mixed Use Zones, Residential Growth Zones, General Residential Zones, and Neighbourhood Residential Zones. The construction of a home is generally an 'as of right' or 'Section 1 – Permit not required' use, in Residential Zones. Other uses may also be permitted, depending on the particular residential zone. Permits may be granted for Section 2 uses as provided for in the planning scheme. In a Mixed Use Zone, Section 1 uses, in addition to residential uses, include food and drink premises not exceeding 150m² leasable floor area, and a medical centre with a ground floor area not exceeding 250m². Section 2 uses in a Mixed Use Zone include retail premises.

112 I do not consider that, following the introduction of Part 1A of the P&E Act and the VPPs, when determining what constitutes land zoned for residential purposes in s 5(1)(e), it remains necessary to look beyond what constitutes a Residential Zone in the VPPs and to undertake a separate analysis in order to determine the principal or predominant purpose for land use permitted by the zone under consideration.

113 To undertake that analysis is unnecessary now that the VPPs provide a State-wide co-ordinated framework for planning schemes in Victoria. That is their purpose, as provided for in s 4A(1) of the P&E Act. Section 6(2)(b) of the P&E Act provides that a planning scheme may regulate or prohibit the use or development of any land. The structure of each planning scheme includes the incorporation of State-standard provisions and of local provisions. The State-standard provisions must consist of provisions from the VPPs.[74] The task of identifying land suitable for inclusion in Residential Zones, in particular municipal districts, and of amendments to planning schemes,[75] is taken up by the P&E Act.

114 Given the comprehensive State-wide planning regime now in place pursuant to the P&E Act, including the VPPs and State-standard provisions concerning zones, I consider that the reference to 'land' zoned for 'residential purposes' in s 5(1)(e) is to

74 P&E Act, ss 7(1) and (2).
75 P&E Act, Part 4B.

be read as reference to Residential Zones as defined and as provided for in the VPPs, and not to Commercial Zones. Commercial Zones include Business 1, 2 and 3 and Commercial 1. Building work in a Commercial Zone, including Commercial Zone 1, is not 'domestic building work' that falls within s 5(1)(e). Building work of whatever description in a Residential Zone is building work falling within s 5(1)(e).

115 In *Winslow Constructions*, the question of whether 'building' in s 5(1)(e) includes a home was left open by Callaway and Buchanan JJA. Hansen AJA considered that a 'home' was not included.[76]

116 I agree with Hansen AJA that the use of 'building' as distinct from 'home' in s 5(1)(e) appears to have been a deliberate drafting decision.[77] However, I do not agree with his Honour that the deliberate drafting decision was one intended to exclude homes from s 5(1)(e). To construe the term 'building' in s 5(1)(e) to exclude a 'home' would mean that the predominant use of land in residential zones to which s 5(1)(e)(i) refers would be excluded from the scope of the subsection. Such a construction should not be favoured unless supported by clear language. There is no clear language; on the contrary the reference to 'residential purposes' is both an express reference and a strong indicator that homes or residences are buildings to which the subsection is intended to apply.

117 I therefore agree with Byrne J in *Fletcher Constructions* that 'building' in s 5(1)(e) includes homes. It also includes other Section 1 uses in Residential Zones. There is no reason to read down the reference to 'building' so as to exclude buildings which are Section 2 use buildings for which a permit may be issued on land zoned for residential purposes. By way of example, a 'building' in a Mixed Use Zone may include retail premises. There is also no reason to exclude buildings located on land zoned for residential purposes with the benefit of existing use rights, whether those buildings are residential in character or not, from the words 'a building' in s 5(1)(e).

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76 *Winslow Constructions Pty Ltd v Mt Holden Estates Pty Ltd* [2004] VSCA 159, (2004) 10 VR 435, [118], reproduced at paragraph 74 above.

77 Ibid.

The subsection deliberately leaves open the character of the 'building' to which it has application, to be determined in accordance with permitted uses in Residential Zones in the planning scheme.

118 In *Bayside*, Woodward J considered that the zoning of the property (in that case, Commercial Zone 1) did not change the character of the work under the contract.[78] I agree that is the case. However, argument before his Honour was not directed to the separate issue, being the impact of the applicable zoning on whether s 5(1)(e)(i) has application. A Commercial Zone 1 zone, being the zone in which the property in question in Bayside was located, is not a zone for 'residential purposes'.

119 The second criteria in s 5(1)(e) concerns work for which a building permit is required pursuant to the *Building Act 1993* (Vic). Section 16 of the *Building Act* provides that a permit is required for building work, unless exempt. No exemptions apply in the present case.[79]

120 To summarise, by reason of s 5(1)(e), the definition of 'domestic building work' in s 3 of the DBC Act includes any work to a building intended for mixed-use, provided that the building and any 'associated work' is work on land in a Residential Zone and a permit is required for the work. That is the case unless the work in question is excluded by s 6 of the DBC Act or by the Regulations.

Work to a Home: The Text of s 5(1)(a)-(d) of the DBC Act

121 Subsections 5(1)(a)-(d) describe different categories of building work to, or concerning, a home. Such work includes 'the erection or construction of a home' (s 5(1)(a)), the 'renovation, alteration, extension, improvement or repair of a home' (s 5(1)(b)), work carried out in conjunction with such work (s 5(1)(c)) and the

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78 *Bayside Design & Construct Pty Ltd v Kanbur* [2020] VCC 691, [22]-[28].

79 The *Building Regulations 2018* (Vic) provide that a building permit is not required for work less than $5,000 in value, for certain demolition work, for work that comprises the 'repair, renewal or maintenance' of a part of an existing building, or for alterations to a building if, amongst other things, the building work will not adversely affect the structural soundness of the building: *Building Regulations 2018* (Vic), sch 3, column 1, items 3-4. Note that similar provisions were contained in the predecessor regulations, the *Building Regulations 2006* (Vic), sch 8.

demolition or removal of a home (s 5(1)(d)).

122 Consistent with the purpose in s 1 of the DBC Act, the language of ss 5(1)(a)-(d) defining work that constitutes 'domestic building work' is broad. 'Home', includes the plural.[80] Section 5(2) provides that 'home' in s 5(1) includes part of a home. 'Home' in s 3 includes any part of commercial premises 'used as residential premises'. The definition of 'home' in s 3 excludes certain categories of 'homes', including motels and nursing homes. However, the definition is not directed to and does not restrict what constitutes work to a home and does not restrict the scope of ss 5(1)(a)-(d).

123 It is not necessary, in order to qualify as 'domestic building work' to or concerning a home to which the DBC Act applies, that the work is confined to work that fits neatly within one specific subsection. For example, ss 5(1)(a) and (d) may both have application to a single contract when what is proposed (as in this case) is the demolition of an existing home (s 5(1)(d)), and the construction of new homes (s 5(1)(a)), and associated work (ss 5(1)(a)(i) and (ii)).

124 Nothing in ss 5(1)(a)-(d) limits the building work to a home to work to construct or work concerning a 'home' itself. Section 5(1)(a)(i) refers to the erection or construction of a home '*including* any associated work including *but not limited to*…' (emphasis added). Although a reasonably extensive list follows, as is apparent from the words 'including' and 'but not limited to', that the list of 'associated work' that follows is not exhaustive.

125 Subsection 5(1)(c) begins with the words 'any work such as … carried out in conjunction with the renovation, alteration, extension, improvement or repair of a home'. The words that follow 'any work such as' might be thought to be restricted to a class of works defined by the words following 'such as'. However, that assumes that it is possible to identify a class of works to which the works in s 5(1)(c) belong.

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80 *Winslow Constructions Pty Ltd v Mt Holden Estates Pty Ltd* [2004] VSCA 159; (2004) 10 VR 435, [2] (Callaway and Buchanan JJA), see paragraph 72, above.

An examination of the language of s 5(1)(c) shows that is not the case. There is no readily identifiable class of work in s 5(1)(c), a clause that includes such diverse things as driveways and swimming pools. The construction of either of these items, or of a garage, or the erection of a retaining structure are not categories of work that, together with the other items of work specified, fit into a class. In s 5(1)(c), the general concept is building work, unified by its nature; work carried out 'in conjunction with the renovation, alteration, extension, improvement or repair of a home'. There is otherwise no restriction or limit on what constitutes building work 'such as'.

126 In *Franklins Pty Ltd v Metcash Trading Ltd*,[81] Campbell JA (Allsop P and Giles JA agreeing) held that a clause providing for a deduction of 'all allowances and discounts (such as …' followed by a list of various items, was not limited to those items. The words 'such as' indicated the items were merely a non-exhaustive list of the more general concept.[82] The same may be said of s 5(1)(c).

Associated Work

127 When identifying what constitutes 'domestic building work', the references to 'any associated work' in s 5(1)(a) and to 'any work associated with' in s 5(1)(e) serve to expand what would otherwise have been the reach of those subsections.

128 In its natural and ordinary sense, the word 'associated' means combined locally, circumstantially or in classification with.[83]

129 In *Winslow Constructions*, Callaway and Buchanan JJA held that s 5(1)(a)(i) did not apply to work performed in contemplation of merely prospective homes on a proposed residential subdivision. That was so because there was an 'insufficient nexus' with the erection or construction of a home or homes for the work in question to be 'associated work'. In *Winslow Constructions*, Hansen AJA said:

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81 [2009] NSWCA 407; (2009) 76 NSWLR 603.
82 Ibid, [353].
83 *Oxford English Dictionary* (3rd ed, 2000) 'associated' (def 3); see also *Deal v Father Pius Kodakkathanath* [2016] HCA 31; (2016) 258 CLR 281, [39] (French CJ, Kiefel, Bell, Gageler and Nettle JJ).

> 119. I consider that the word "associated" in paras.(a)(i) and (e) requires a relationship which is beyond a mere nexus. The appellants referred to the dictionary definition of "associated" as being "allied to" or "accompany", both of which require a degree of contemporaneity between the two items said to be "associated". I return to the hypothetical circumstance I posed above in which an individual lot(s) in the plan of subdivision may remain unsold or vacant for several years before any domestic building work occurs. No such contemporaneity exists. In these circumstances it cannot be said that the work carried out by the appellants would be "associated with" the subsequent development.[84]

130 In *Lilley v Lindsay-Smith*,[85] Hasluck J considered what constitutes 'associated work' in the context of the *Home Building Contracts Act 1991* (WA). The work in question was the installation of a floor in the course of construction of a dwelling. The statute contained an inclusive definition of 'associated work' in similar but not identical terms to s 5(1)(a)(i) of the DBC Act. Hasluck J stated as follows:

> 46 It emerges, then, from a consideration of the decided cases, that where a term such as "associated work" is defined so that it "includes" certain specified forms of work such as swimming pools and carports, the list should not be regarded as exhaustive. One is entitled to give proper weight to the ordinary meaning of the words, that is to say, work "associated" with the construction of a dwelling. I noted in earlier discussion that an interpretation that will promote the purpose of the statute is to be preferred to an interpretation that would not promote the purpose.
>
> 47 According to the Concise Oxford dictionary, the verb to "associate" means to join or to connect as an idea or to combine for a common purpose. I have already observed that the installation of a floor can be regarded as something that enhances or improves the utility of a house. Looked at in that light, it seems to follow that flooring of a reasonably permanent kind that is measured and made up to fit specific areas in a particular dwelling, such as the flooring in the present case, can properly be regarded as a form of work that is connected to or combined with other work in order to complete the dwelling. I therefore consider that the respondent in the present case was carrying out associated work in connection with the constructing of the subject dwelling.[86]

131 In a very different context, in *Deal v Father Pius Kodakkathanath*,[87] the High Court was called upon to consider whether there was a risk of musculoskeletal disorder

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84 *Winslow Constructions Pty Ltd v Mt Holden Estates Pty Ltd* [2004] VSCA 159; (2004) 10 VR 435, [119].
85 [2001] WASCA 168.
86 Ibid, [46]-[47].
87 [2016] HCA 31; (2016) 258 CLR 281 (French CJ, Kiefel, Bell, Gageler and Nettle JJ).

'associated with' a manual handling task. Regulation 3.1.2(1) of the *Occupational Health and Safety Regulations 2007* (Vic) provided that:

> An employer must ensure that the risk of a musculoskeletal disorder associated with a hazardous manual handling task affecting an employee is eliminated so far as is reasonably practicable.

132 French CJ, Kiefel, Bell and Nettle JJ held:[88]

> 36 Whether the risk of musculoskeletal disorder was "associated with" that manual handling task depends on the way in which reg 3.1.2 should be construed. Since reg 3.1.2 is remedial legislation passed for the protection of employees, it should be construed so as to afford to employees the protection which Parliament intended. …
>
> …
>
> 39 In its natural and ordinary sense, the phrase "associated with" may mean either combined in terms of circumstances or combined in terms of classification. If it is used in reg 3.1.2 in the former sense of combined in terms of circumstances, it would imply that the risk of an employee suffering a musculoskeletal disorder while carrying out a hazardous manual handling task could fall within reg 3.1.2 whatever the cause of the musculoskeletal disorder. By contrast, if it is used in the more limited sense of combined in terms of classification, it would imply that a risk of musculoskeletal disorder cannot fall within reg 3.1.2 unless the risk is caused by one or more of the characteristics which define a manual handling task as a hazardous manual handling task, namely, repetitive or sustained application of force, repetitive or sustained awkward posture, repetitive or sustained movement, application of high force, exposure to sustained vibration, manual handling of live persons or animals, or manual handling of unstable or unbalanced loads or loads that are difficult to grasp or hold. There is therefore a constructional choice to be made between those two possible meanings.

133 So too when s 5(1)(a) and (e) of the DBC Act refer to 'associated work', they do so as part of remedial legislation intended to benefit and protect those who enter into domestic building contracts.[89] The intention is to capture all domestic building work for purposes that include that domestic building owners have access to insurance for incomplete or defective work, not just work to or concerning a home, but also for all 'associated work'.

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88 Ibid, [36], [39] (citations omitted).

89 *Stephens v Cameron* [2021] VSCA 208, [60] (Kyrou, McLeish and Niall JJA).

134 In *Winslow Constructions*, when determining whether the work was 'associated work' the contemporaneity of the subdivisional work with work expressly referred to in the statute was regarded as important. If it were necessary to choose, as identified by the plurality in *Deal*, I consider that when used in s 5(1) 'associated with' means 'combined in terms of circumstances'. The classification is of the work as building work. The circumstances will dictate if the building work in question is 'associated work'. It will be a question of fact whether the circumstances, including the timing of the work, satisfy the requirement of 'associated work' in s 5(1). The fact that s 5(1)(a)(i) is expressed in terms that are both inclusive and 'not limited to' shows that a generous, and not a restricted approach is to be adopted. So too, s 5(1)(e), which begins with the words 'any work', confirms that no narrow view is to be taken of what constitutes 'associated work'.

135 The conclusion that the scope of the DBC Act ought to be construed broadly is supported by the second reading speech for the Domestic Building Contracts and Tribunal Bill 1995, in which was stated:

> The reforms contained in this bill constitute a comprehensive and integrated package … providing a means by which builder and consumer disputes can be expeditiously and inexpensively handled.[90]

The express intention that the DBC Act allow for expeditious and inexpensive resolution of disputes gives weight to a broad interpretation of the meaning of 'domestic building work'. To construe this phrase in a narrow manner would impermissibly restrict the application of the DBC Act in a way contrary to the express intention of Parliament.

Section 6 of the DBC Act

136 The 'domestic building work' gate that is opened in s 5 for work to or concerning

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90 Victoria, *Parliamentary Debates,* Legislative Assembly, 24 October 1995, 695 (Jan Wade, Attorney-General). The DBC Act, as originally assented to, established the Domestic Building Tribunal which had jurisdiction to hear and determine domestic building disputes. The portions of the Act establishing the Tribunal were repealed two years later upon the introduction of VCAT: *Tribunals and Licensing Authorities (Miscellaneous Amendments) Act 1998* (Vic), Part 5.

buildings on land zoned for residential purposes, and concerning homes on land no matter how zoned, and works associated with such buildings and homes, is partly closed by s 6(1) and (2) of the DBC Act. The gate is *partly* closed because it is closed in specific cases only:

> **6 Building work to which this Act does not apply**
>
> (1) This Act does not apply to the following work—
>
> (b) any work in relation to a farm building or proposed farm building (other than a home); and
>
> (c) any work in relation to a building intended to be used only for business purposes.
>
> (2) … any work that the regulations state is not building work to which this Act or that provision (as the case requires) provides.[91]

137 It is unnecessary to say anything about s 6(1)(b).

138 The defining feature of the exclusion in s 6(1)(c) is that the intended use of 'a building' (or any part thereof)[92] is *only* for 'business purposes'.

139 In *Bayside,* Woodward J had to decide whether:

> …the Contract is a contract for the carrying out of the erection or construction of a home, that is not work 'in relation to a building intended to be used only for business purposes'. [93]

140 His Honour said:

> 27. Further, there is nothing in the wording or scheme of either the SOP Act or the DBC Act to support a construction that requires all (or even most) of the work under the Contract is the erection or construction of a home. On the contrary, s 6(c) read with s 5(a), would suggest that a building must be used *only* for business purposes before it is disqualified. That view is supported by the definition of 'home', which clearly contemplates that it extends to part of a commercial or industrial premises that is used as a residential premises... [94]

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91 Note that s 6(1)(a) was repealed by the *Building Legislation Amendment (Consumer Protection) Act 2016* (Vic), s 4(1).

92 'Building' is expressly defined to include 'any part of a building': DBC Act, s 3(1).

93 *Bayside Design & Construct Pty Ltd v Kanbur* [2020] VCC 691, [26].

94 Ibid, [27] (emphasis in original).

141 I agree that there is nothing in s 5(1)(a) or the DBC Act generally that requires all or most of the work under a contract to involve the erection or construction of a home. The same is the case where a building is erected or constructed in a residential zone and s 5(1)(e) applies. The s 6(1)(c) exclusion is not an exclusion based on the nature of the building that has been built. It is an exclusion based on the intended use of the building or part of the building: use *only* for 'business purposes'.

142 The s 6(1)(c) exclusion is directed to 'any work' in relation to a building intended to be used *only* for business purposes. Because 'building', by its definition in s 3(1), includes part of a building, if part of a building the subject of the contract is intended to be used 'only for business purposes', the works to that part of the building are excluded from what otherwise constitutes 'domestic building work' falling within s 5.

143 Read this way, s 6(1)(c) contemplates that where part of the work (which is the subject of a single contract for the carrying out of domestic building work) is to part of a building intended to be used *only* for business purposes, then that portion of work is 'carved out' from 'domestic building work'. That part of the work, based on its intended use, does not constitute 'domestic building work'. However, the 'carve out' does not mean that other work, the subject of the same contract, loses its character as domestic building work or that the contract ceases to be a domestic building contract.

144 The language of s 5, and of the exclusions in s 6, is precise. It is no part of that drafting to draw the broad distinction for which Seascape contends; one that restricts domestic building contracts for carrying out domestic building work to contracts that are *solely* for the performance of domestic building work. There is no warrant for construing ss 5 and 6 of the DBC Act in that way, whether when construing the DBC Act in isolation or when importing those sections into s 7(2)(b) of the SOP Act. It would have been a simple matter for Parliament to either frame the s 7(2)(b) exclusion or to draft ss 5 or 6 of the DBC Act in a manner that restricted the exemption to contracts *solely* for domestic building work. That is not how the

legislation is framed.

145 For completeness, reference should also be made to the Regulations. Regulations 7-9 identify further 'carve outs' from domestic building work otherwise falling within s 5 of the DBC Act. None of the 'carve outs' in the Regulations are relevant on the facts of this case.

Section 12 of the DBC Act

146 An issue common to *Bayside* and to this case concerns s 12 of the DBC Act. That section makes it an offence for a builder to enter into a contract for 'domestic building work' and for carrying out 'other work' unless:

(a) the contract clearly identifies and distinguishes the domestic building work from the other work; and

(b) the amount of money the builder is to receive under the contract for carrying out the domestic building work is separately identified from the amount of money the builder is to receive as a result of carrying out the other work.

147 Section 12 applies to any contract which incorporates an element of work meeting the description 'domestic building work'. Section 12(a) requires that such work be separately identified. 'Contract', where it first appears, is not confined to a contract solely to perform 'domestic building work' as defined in s 5. The language of ss 12(a) and (b) both make it clear that s 12 is directed to regulating contracts both for the carrying out of 'domestic building work' and for the carrying out of 'other work'.

148 In *Bayside*, the building work included residential and commercial components. The contract contravened s 12 because it failed to distinguish between the two types of work.

149 The fact that a contract contravenes s 12 does not have the consequence that the contract ceases to be a domestic building contract for carrying out of domestic building work. The consequence of a contravention of s 12 is visited on the builder only and concerns the right of the builder to enforce the contract under the DBC Act.

Section 133 provides:

> **133 Effect of failure to comply with a requirement of this Act**
>
> A failure by a builder to comply with any requirement in this Act in relation to a domestic building contract does not make the contract illegal, void or unenforceable, unless the contrary intention appears in this Act.

150 While the issue was not argued in this case, it seems to me that the imposition by s 12 of a penalty for non-compliance, 20 penalty units, demonstrates the 'contrary intention' to which s 133 refers, appears.

151 While there are significant consequences for a builder of non-compliance with s 12, the section does not say that a single contract entered into in contravention of its provisions is *not* a 'domestic building contract' (or a 'domestic building contract' for 'carrying out domestic building work'). The SOP Act does not say that entry into a construction contract in contravention of s 12 of the DBC Act disentitles a builder from relying on the payment regime for which the SOP Act provides. The payment regime for which the SOP Act provides is, as Palmer J described it in *Multiplex Constructions Pty Ltd v Luikens*,[95] a 'pay now, argue later regime'.[96]

Section 7(2)(b) of the SOP Act: Context and Purpose

152 The SOP Act applies to all construction contracts in Victoria so as to ensure any person who carries out such work is entitled to receive and is able to recover progress payments in relation to work performed and goods and services supplied.[97] Section 7(1) sets out the application of the SOP Act:

> Subject to this section, this Act applies to any construction contract, whether written or oral, or partly written and partly oral, and so applies even if the contract is expressed to be governed by the law of a jurisdiction other than Victoria.

Sections 7(2)-(6) contain the exceptions to s 7(1).

153 Sections 7(2)(b) and (ba) provide the point at which the SOP Act and the DBC Act

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95 [2003] NSWSC 1140.
96 Ibid, [96].
97 SOP Act, s 3(1).

intersect. Both subsections were introduced by the same amending Act.[98]

154 Although the broad purpose of the SOP Act is to provide an entitlement to progress payments for persons who carry out construction works, that purpose is not to be given effect to in relation to domestic building contracts for the carrying out of domestic building work. Where a construction contract falls within s 7(2)(b), the progress payment and adjudication regime for which the SOP Act provides has no application.

155 When definitions such as 'domestic building contract' and 'domestic building work' from the DBC Act are imported into the SOP Act, they must be construed so as to ensure the imported definitions work as cohesively as possible with the objectives of the SOP Act.

156 Section 7(2)(ba) of the SOP Act contains a direct reference to s 6 of the DBC Act. Section 7(2)(ba) provides an exclusion from the SOP Act of a construction contract for work of a kind referred to in s 6 of the DBC Act 'relating to a residence'.

157 There are two qualifications to the s 7(2)(ba) exclusion. The first, s 7(2)(ba)(i), provides that the SOP Act applies where the person for whom the work is carried out 'is in the business of building residences'; the same language found within s 7(2)(b) of the SOP Act. The second qualification is in s 7(2)(ba)(ii), which provides that the SOP Act applies where the construction contract for the carrying out of work of a kind referred to in s 6 of the DBC, which relates to a residence, is carried out under another (separate) construction contract.

158 Although clause 8 of the Explanatory Memorandum to the Building and Construction Industry Security of Payment (Amendment) Bill 2006 (Vic) stated that the then proposed s 7(2)(ba) of the SOP Act was limited to construction work carried out by a subcontractor, s 7(2)(ba)(ii) is not so confined. The subsection makes no reference to a subcontractor.

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98 *Building and Construction Industry Security of Payment (Amendment) Act 2006* (Vic).

159 As observed by Woodward J in *Bayside*,[99] it is important to note that unlike ss 7(3) and 7(4) of the SOP Act, the exclusions in s 7(2)(b) and s 7(2)(ba) do not use the expression 'to the extent to which'. Section 7(2)(b) refers simply to a 'domestic building contract' for the carrying out of 'domestic building work'. Likewise, s 7(2)(ba) applies to 'a construction contract for the carrying out of any work of a kind referred to in section 6 of the DBC Act… relating to a residence'. As noted by Woodward J, language of a kind found in s (7)(3) of the SOP Act could easily have been employed in s 7(2)(b) if the intention was that s 7(2)(b) was only to apply to a domestic building contract to 'the extent to which' that contract is a contract for 'domestic building work' as defined in s 3 of the DBC Act.

160 In *Bayside*, where the contract did not comply with s 12 of the DBC Act, Woodward J considered that nothing in s 7(2)(b) supported a construction that, for the exclusion to apply, all (or even most) of the work under the contract must be work in the erection or construction of a home.[100]

161 I agree that the text of s 7(2)(b) does not impose a restriction to the effect that in order to be excluded from the SOP Act, all or most of the work under the contract must be work in the erection or construction of a home. However, I think it is necessary to look to the purposes of the SOP Act and to the language of s 12 of the DBC Act when considering the true scope of the s 7(2)(b) exclusion.

162 To give effect to the purpose that underpins the s 7(2)(b) exclusion, an exclusion limited to domestic building contracts for the carrying out of domestic building work it is both necessary and appropriate to limit the s 7(2)(b) exclusion to domestic building work separately identified in the contract, as required by s 12 of the DBC Act. To proceed in that way is to recognise and to give effect to the obligation in s 12 which requires that the domestic building contract separately identify 'domestic building work' and 'other work'. To limit the s 7(2)(b) exclusion only to the domestic building work component of the contract and not to the 'other work'

99 *Bayside Design & Construct Pty Ltd v Kanbur* [2020] VCC 691, [31].
100 Ibid, [27].

recognises the intent of the s 7(2)(b) exclusion is to remove 'domestic building work' performed pursuant to domestic building contracts from the scope of operation of the SOP Act, but not 'other work'.

163 Although s 7(2)(b) does not say that 'all (or even most) of the work' under the contract must be domestic building work for the exemption to apply, and although s 7(2)(b) does not use the words 'to the extent to which' (that are found in ss 7(3) and 7(4)), the clear purpose of s 7(2)(b) is that the exclusion is only to operate in favour of 'domestic building work'.

164 I consider that in cases where the contract is for domestic building work but which does not comply with s 12 of the DBC Act, there must be some limitation so far as the s 7(2)(b) exclusion is concerned. Failure to construe a limitation for such contracts could render the s 7(2)(b) exclusion ineffectual, or absurd: for instance, without appropriate limitation, major commercial construction projects could potentially fall outside the scope of the SOP Act if they included a single residential apartment, leading to perverse consequence to which Seascape referred in its submissions.

165 In *Burbank*, McDonald J considered that s 5 of the DBC Act directs attention to the nature of the work undertaken.[101] I agree. Looking to construe the two Acts in a consistent manner, I consider that where the domestic building contract fails to comply with s 12 of the DBC Act, in order to qualify for the s 7(2)(b) exclusion, the dominant character of the work the subject of the contract must be 'domestic building work'. If that were not the case, the purpose of the SOP Act would be undermined, because the scope of the s 7(2)(b) exclusion would be impermissibly wide.

166 Just as there are consequences for a builder under the DBC Act in relation to enforceability of contractual rights, and an exposure to a penalty, if the contract fails to comply with s 12 of the DBC Act, there must also be consequences for the builder

101 *Burbank Australia Pty Ltd v Owners Corporation PS447493* [2015] VSC 160, [32].

under the SOP Act. If there is non-compliance with s 12 and the dominant character of the work is domestic building work, the whole of the contract works are captured by the s 7(2)(b) exclusion. In those circumstances, the builder cannot avail itself of the benefit of the payment regime for which the SOP Act provides.

Conclusion as to construction of s 7(2)(b)

167 In answer to the first question: the exception in s 7(2)(b) of the SOP Act does not have application to all mixed-use developments. It has application to certain mixed use developments only, depending on whether the work the subject of the domestic building contract, or the relevant parts of the work come within s 5 of the DBC Act and are not excluded by s 6 of that Act, or by the Regulations.

168 Section 5(1)(e) of the DBC Act means that the s 7(2)(b) exclusion applies to a contract for the construction of a mixed-use development building and associated work constructed on land zoned for residential purposes for which a building permit is required. That is the case except where, by reason of s 6 of the DBC Act, or the Regulations, work is excluded from the definition of 'domestic building work'. Such exclusions include work in relation to a building or part of a building intended to be used only for business purposes. Where the contract distinguishes between domestic building work and other work as is required by s 12 of the DBC Act, it will only be the domestic building work component of the contract which is exempt under s 7(2)(b) of the SOP Act. Where the contract fails to comply with s 12 of the DBC Act, if the dominant character of the work the subject of the contract is domestic building work, the exemption in s 7(2)(b) will apply to the contract as a whole.

169 Separately, the exception in s 7(2)(b) applies to a mixed use development where, pursuant to s 5(1)(a) of the DBC Act, the building work is appropriately characterised as the erection or construction of a home and associated work. That is the case irrespective of the zone that applies to the land in which the mixed use development is located. The same exclusions in s 6 of the DBC Act (and the Regulations), and the same issues that arise concerning s 12 that apply in the case of

s 5(1)(e) apply equally to contracts for domestic building work falling within s 5(1)(a).

Applying ss 5 and 6 of the DBC Act to the Facts

170 Turning to the facts, the planning permit for the works the subject of the Contract does not form part of the evidence. Town Planning drawings annexed to the Contract[102] note that the Property is located within the City of Port Phillip and the planning zone is 'Business Zone'. A Business Zone is not a Residential Zone. As a result, s 5(1)(e) of the DBC Act, which is concerned with buildings, of whatever nature, on land zoned for residential purposes, has no application.

171 The Contract describes the work to be performed as:[103]

> 4 x Triple storey apartments under HC-6 contract and Salon commercial, with 2 car stacker facing east bleak house land side. Existing masonry walls to remain ground floor and upper floors lightweight with kliplock/colorbond roofing and roof terraces/balconies with 1 meter and 600mm high walls and glass aluminium framed balustrades to legal heights as per plans
>
> 3 storey residential apartment with 4 x dwellings and a salon shop on ground floor, and car stacker, with shotcrete provided in the car pit, and all demolition costs (including the costs of obtaining permits for demolition and construction only inside boundary title property)

172 The work to construct the residential component, four apartments, clearly falls within s 5(1)(a) of the DBC Act. The demolition work required under the Contract is for the purpose of enabling the construction of the triple-level residential apartments and is demolition work that falls within s 5(1)(d) of the DBC Act.

173 I infer that the work associated with the construction of the car stacker is work for the use of the persons occupying the apartments. Such work is 'associated work' falling within the words 'including, but not limited to' in s 5(1)(a)(i) of the DBC Act, a list of works which, as noted earlier, is expressly 'not limited' to the types of work mentioned.

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102 CB, 166.
103 CB, 471.

174 The salon is part of a building 'intended to be used only for business purposes'. There has been no compliance by the builder with s 12 of the DBC Act. The 'other work', being the work to the salon, is not separately identified in the Contract by dollar value or otherwise in a clearly delineated fashion. It is necessary to identify the dominant character of the work the subject of the Contract in order to determine whether the Contract as a whole comes within the s 7(2)(b) exclusion.

175 The work to be performed includes the retention of existing masonry walls to the salon. The new residential accommodation is to be constructed both above and behind the existing salon.

176 Photographs of the Property in the course of construction were included in an expert report issued 11 June 2021 by Trevor Jeffery, a quantity surveyor.[104] The photographs show that while the existing salon was retained and modified, significant works were undertaken to construct an apartment and balcony directly on or above part of the roof of the salon.[105] The works included the provision of drainage to the newly constructed balcony above the salon. What is shown in the photographs accords with the description of the works in the Contract and with the plans annexed.[106]

177 I find that the works to the salon described in the Contract and that are apparent from the photographs exhibited to Mr Jeffery's report are integrated with the works to construct the apartments above and behind the salon. The work to both the apartments and the salon was carried out as part of the one construction project. The Contract summary that forms part of the Fixing Stage Claim refers to the 'Base Stage – Commercial Shop' followed by 'Base Stage – Residential/Basement', then 'Frame Stage – Commercial Shop', followed by 'Frame Stage – Residential'. [107]

178 Issues concerning the nature and extent of work solely to the salon were not touched

104 CB, 1588-1700.
105 CB, 1623-1624.
106 Ibid, 522-523.
107 Ibid, 628.

on during the hearing. Attention was not directed to the documents to which I have referred. Nonetheless, what is clear from the evidence to which I have referred is that work above the existing salon, and around it, to the extent not directly work for the erection or construction of a home, constitutes 'associated work' falling within s 5(1)(a)(i) of the DBC Act.

179 Although the Contract does not specify the amount of money Seascape is to receive for work that solely relates to the salon and as a result does not comply with s 12 of the DBC Act, in his 21 June 2021 statutory declaration, Mr Piastrino said that he had paid the 'full cost for the commercial salon building work' in the amount of $505,589.04, together with two amounts for variations.[108]

180 Based on the Fixing Stage Claim, payments which relate to the salon only were assessed by Seascape to comprise $416,489.40.[109]

181 The Contract includes an entire project costing breakdown,[110] but it is not possible to determine by reference to that breakdown, or otherwise, whether the amount to which Mr Piastrino referred in his statutory declaration only concerns work to the salon itself, or, as would seem to be the case based on the Fixing Stage Claim, also includes work to and above the salon relating to the apartments. Nonetheless, when regard is had to the integrated nature of the project, with apartments above and behind the salon, and taking into account the conflicting evidence of cost of works to the salon as a proportion of the total contract price, I am satisfied that the works to the salon itself are not such as to deprive the Contract works of their dominant character as domestic building work.

182 I am satisfied that the dominant character of the Contract is a contract for the 'carrying out of domestic building work' within the meaning of s 5(1)(a) of the DBC Act. In those circumstances, for the reasons previously given concerning s 12, the Contract is a contract that falls within the exclusion in s 7(2)(b) of the SOP Act.

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108 Ibid, 748.
109 Ibid, 628-629.
110 Ibid, 1430-1433.

Second Question: Were Mrs and Mr Piastrino in the business of building residences?

183 Although I have found the Contract falls within the exclusion in s 7(2)(b), the exclusion will not operate in favour of Mrs and Mr Piastrino if they are persons 'in the business of building residences' and the Contract was entered into in the course of, or in connection with, that business.

184 The term 'the business of building residences' is not defined in the SOP Act, the DBC Act or in the *Building Act 1993* (Vic).

185 The parties agree that whether a building owner is 'in the business of building residences' is to be assessed at the date the Contract was entered into.[111]

Legislative History

186 Concerning the term 'the business of building residences', Seascape drew attention to the legislative history of s 7(2)(b). The *Building and Construction Industry Security of Payment (Amendment) Act 2006* (Vic) ('2006 Amending Act') introduced a change of wording:

Pre-2007 s 7(2)(b)	**Post-2007 s 7(2)(b)**
…for the carrying out of domestic building work (within the meaning of that Act) the whole of which is carried out on any part of a premises that the building owner resides in or proposes to reside in	…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

187 Neither the Explanatory Memorandum nor the parliamentary debates relating to the 2006 Amending Act identify the reasons underpinning the amendment.[112] Seascape submitted that it can be inferred that the focus of the amendment was to address a common scenario where 'mum and dad' knock down the family home to put up two townhouses, with an intention to live in one and sell the other. Prior to 2007, their

111 See *Saath Pty Ltd v Seascape Constructions Pty Ltd & Anor* [2021] VSC 358, [49] (Stynes J) ('*Saath*'); *BWay Group v Pasiopolous* [2019] VCC 691, [29] (Marks J).

112 The Explanatory Memorandum states '[The s 7(2)(b)] "exemption" does not apply to 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': Explanatory Memorandum, Building and Construction Industry Security of Payment (Amendment) Bill 2006 (Vic), cl 8.

development would be subject to the SOP Act (as they did not propose to reside in the *whole* of the premises); after 2007 it may not be (provided the development did not occur in the course of, or in connection with, their business of building residences).

188 Certainly the amendment broadened the scope of the s 7(2)(b) exclusion, removing the need to show an intention on the part of the building owner to reside in the premises. The amendment came after the decisions in *Sopov* and *Winslow*, where Warren CJ and Hansen AJA respectively had expressed the view that the DBC Act was not intended to apply to developers.[113]

189 After amendment, s 7(2)(b) did not expressly exclude 'developers' from the benefit of the exclusion. However, the reference to 'building owners' in the business of building residences is consistent with an intention to exclude 'developers' who enter into domestic building contracts for carrying out domestic building work from the benefit of the s 7(2)(b) exclusion.

Previous decisions concerning s 7(2)(b) of the SOP Act

190 What constitutes 'the business of building residences' has been the subject of a number of judgments in this Court and in the County Court. It is helpful to refer to a limited number of those decisions.

191 In *Director of Housing v Structx Pty Ltd t/as Bizibuilders*,[114] Vickery J construed 'in the business of building residences' to mean:[115]

> …the construction of dwelling houses as a commercial enterprise on the basis of a going concern, that is, an enterprise engaged in for the purpose of a profit on a continuous and repetitive basis.

192 In support of his approach, Vickery J cited the decision of the High Court in *Hope v*

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113 *Kane Constructions Pty Ltd v Sopov* [2005] VSC 237, [892]; *Winslow Constructions Pty Ltd v Mt Holden Estates Pty Ltd* [2004] VSCA 159; (2004) 10 VR 435, [110].

114 [2011] VSC 410 ('*Structx*').

115 Ibid, [28].

Bathurst City Council.[116] In *Hope*, the appellant was the owner and occupier of land near Bathurst. He appealed against the decision of the Bathurst City Council that his land, the subject of a rate notice, was not rural land. The expression 'rural land' was defined in the *Local Government Act 1919* (NSW) as:

> a parcel of ratable land which is valued as one assessment and exceeds 8,000 square metres in area, and which is wholly or mainly used for the time being by the occupier for carrying on one or more of the *businesses or industries* of grazing, dairying, pig-farming, poultry farming, viticulture, orcharding, bee-keeping horticulture, vegetable growing, the growing of crops of any kind or forestry.[117]

The question was whether Mr Hope's land was wholly or mainly used by him for carrying on the business or industry of grazing.

193 Mason J, with whom the other members of the Court agreed, said:

> I accept, then, that "business" in the subsection has the ordinary or popular meaning which it would be given in the expression "carrying on the business of grazing". It denotes grazing activities undertaken as a commercial enterprise in the nature of a going concern, that is, activities engaged in for the purpose of profit on a continuous and repetitive basis.[118]

194 In *Structx*, Vickery J accepted that the expression 'in the business of building residences ....', as it is used in s 7(2)(b) of the SOP Act, has a similar meaning.[119] On the facts, it was found that the Director of Housing was not constructing houses 'for the purposes of profit on a continuous and repetitive basis'. The Director was not conducting a business, but rather constructing houses pursuant to its function as a statutory body.

195 In *Promax Building Developments Pty Ltd v PCarol & Co Pty Ltd,* Anderson J considered the position of a discretionary investment trust with its own ABN and registered for GST.[120] His Honour focused on the purpose of the trust and its activities:

> 25 In the present case, the purpose of the PCarol & Co Trust is to make

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116 [1980] HCA 16; (1980) 144 CLR 1 (Gibbs, Stephen, Mason, Murphy and Aickin JJ) ('*Hope*').
117 Ibid, 4.
118 Ibid, 8-9.
119 *Director of Housing v Structx Pty Ltd t/as Bizibuilders* [2011] VSC 410, [31].
120 [2017] VCC 495 ('*Promax*'), cited with approval in *Golets v Southbourne Homes* [2017] VSC 705 (Vickery J) ('*Golets*'), [19].

> investments in the property market. The sole activity of the Trust has been the purchase and subsequent development of two properties. In my view, it does not matter that both projects may have been unsuccessful. Many businesses are.
>
> ….
>
> 27 In my view, the determination of the question of whether a 'building owner is in the business of building residences' does not depend on the scale of the business, the success of the business, the number of projects undertaken either on the past or at any one time, or as contemplated for the future.
>
> 28 PCarol entered into the building contract with Promax in pursuit of the purpose of the Trust, which was essentially the purchase and the redevelopment of land for residences. I am satisfied that PCarol was in December 2016, and thereafter until the termination of the building contract, 'in the business of building residences'.[121]

196 In *Ian Street Developer v Arrow International*,[122] Riordan J held that a special purpose vehicle incorporated for the purpose of developing a site with 83 residential apartments and six ground floor premises was '*in the business of building residences*'. That was so albeit the special purpose vehicle was not the owner of the land and would not profit from the sale of the apartments:[123]

> (a) Ian Street was incorporated for the purpose of completing the construction of the Project, including the entry into the Construction Contract for a sum in excess of $10 million with Arrow, and by its officers and agents ensuring that Arrow performed its obligations under the Construct Contract. The sole purpose of Ian Street was to complete the Project for the purpose of the units in the Project being resold by a related corporation Ian Street Land Pty Ltd for a profit. It undertook the Project for at least many months.
>
> (b) The fact that Ian Street itself was not intending to make a profit does not mean it was not in the business of building residences. Ian Street was a special purpose entity and was an integral part of the business structure established to commercialise the Project. In these circumstances, in my opinion, the submission that Ian Street was not in the business of building residences because it was part of a larger commercial structure where the profits would be directed to other entities, defies the commercial reality of the situation.
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> (c) Counsel for Ian Street did not produce any authority in support of his contention that, for Ian Street to be in business, it must intend to make

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121 Ibid, [25], [27]-[28].

122 [2018] VSC 14; (2018) 54 VR 721 ('*Ian Street*'), appeal (not as to s 7(2)(b)) dismissed in *Ian Street Developer Pty Ltd v Arrow International Pty Ltd* [2018] VSCA 294 (Maxwell P, McLeish and Niall JJA).

123 Ibid, [102] (citations omitted).

a profit itself. Such an interpretation would enable the application of the Act to be avoided by the incorporation of special purpose intermediary entities. Such a narrow interpretation would not advance the object of the Act.

(d) Although the fact that the activities are carried on in a continuous and repetitive basis may be consistent with the conduct of a business, it is well recognised that a single venture may constitute a carrying on of the business. In *United Dominions Corporation Ltd v Brian Pty Ltd*, Dawson J said as follows:

> A single adventure under our law may or may not, depending upon its scope, amount to the carrying on of a business. Whilst the phrase "carrying on a business" contains an element of continuity or repetition in contrast with an isolated transaction which is not to be repeated, the decision of this court in *Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales (Finance) Pty Ltd* (1974) 131 CLR 321 suggests that the emphasis which will be placed upon continuity may not be heavy.

197 Recently in *Saath Pty Ltd v Seascape Constructions Pty Ltd,* Stynes J synthesised the principles emerging from the cases:[124]

(a) the expression 'in the business of building residences' connotes the construction of dwelling houses as a commercial enterprise on the basis of a going concern, that is, an enterprise engaged in for the purpose of profit on a continuous and repetitive basis;

(b) s 7(2)(b) of the SOP Act 'speaks in terms of the actual business which the builder owner undertakes, not whether a party in the position of the building owner has the power to undertake the activity';

(c) the determination of the question of whether a 'building owner is in the business of building residences' does not depend on the scale of the business, the success of the business, the number of projects undertaken either in the past or at any one time, or as contemplated for the future;

(d) 'what constitutes being "in the business of building residences" for the purposes of s 7(2)(b) of the [SOP] Act is in each case an issue of fact to be determined on a case by case basis';

(e) a single joint venture may be sufficient to fall within the concept [of carrying on a business], in spite of the apparent absence of the element of a going concern conducted on a continuous and repetitive basis. In *Ian Street Developer Pty Ltd v Arrow International Pty Ltd*, Riordan J confirmed that special purpose entities or companies incorporated for a single project may be 'in the business of building residences' even where the entity or company intends to sell the residences through another entity or company. It was considered relevant in *Ian Street*

124 [2021] VSC 358, [51] (citations omitted).

> *Developer* that a special purpose vehicle was incorporated with the sole purpose of constructing the project and the units in the project being resold to a related corporation for profit.

198 Other authorities have considered what is meant by the word 'business'. In *NT Power Generation Pty Ltd v Power and Water Authority*,[125] McHugh ACJ, Gummow, Callinan and Heydon JJ observed that:

> While the word 'business' in any particular context takes its meaning from that context, normally it is a 'wide and general' word.[126]

199 In *Re Australian Industrial Relations Commission; Ex parte Australian Transport Officers Federation*,[127] Mason CJ, Gaudron and McHugh JJ remarked that:

> [T]he word "business" is notorious for taking its colour and content from its surroundings.[128]

200 There has been consideration in the tax context of what constitutes 'carrying on a business'. The High Court and the Full Federal Court have identified the criteria against which a gambler could be considered to be carrying on a business for tax purposes.[129] Relevant criteria include the extent to which the conduct said to constitute 'carrying on a business' was engaged in a 'systematic' way,[130] whether it was large and organised in scale, whether proper records were kept and whether money was set aside as capital outlay or investment for the enterprise.

201 In *Brajkovich v Federal Commissioner of Taxation*, Pincus, French and Gummow JJ summarised the principle criteria by which gambling conduct said to constitute the 'carrying on of a business' are determined:

> 1. whether the betting is conducted in a systematic, organised and

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125 (2004) 219 CLR 90.

126 Ibid, [66], citing *Re Australian Industrial Relations Commission; Ex parte Australian Transport Officers Federation* [1990] HCA 52; (1990) 171 CLR 216, 226 (Mason CJ, Gaudron and McHugh JJ) and *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* [1982] HCA 23; (1982) 150 CLR 169, 184 (Gibbs CJ).

127 [1990] HCA 52; (1990) 171 CLR 216.

128 Ibid, 226.

129 See *Trautwein v Federal Commissioner of Taxation (No 2)* (1936) 56 CLR 196 (Evatt J) ('*Trautwein*'); *Jones v Federal Commissioner of Taxation* (1932) 6 ALJR 201 (Evatt J); *Brajkovich v Federal Commissioner of Taxation* (1989) 89 ALR 408 ('*Brajkovich*') (Pincus, Gummow and French JJ).

130 *Trautwein v Federal Commissioner of Taxation (No 2)* (1936) 56 CLR 196, 207; *Brajkovich v Federal Commissioner of Taxation* (1989) 89 ALR 408, 414-415.

'businesslike' way;

2. its scale, ie the size of the wins and losses;

3. whether the betting is related to, or part of, other activities of a business-like character, eg breeding horses;

4. whether the better appears to engage in his activity principally for profit or principally for pleasure,

5. whether the form of betting chosen is likely to reward skill and judgment or depends purely on chance;

6. whether the gambling activity in question is of a kind which is ordinarily thought of as a hobby or pastime.[131]

202 Although these criteria relate to a very different activity – the characterisation of gambling activities, rather than the characterisation of building and construction activities – the approach adopted in *Brajkovich* provides assistance when it is necessary to characterise the activity of any business.

Mrs and Mr Piastrino's Submissions

203 Mrs and Mr Piastrino submitted that they were not engaged in carrying on a business, they were not commercially sophisticated persons; they were pursuing the redevelopment of the Property not as a business, but for the benefit of themselves and their family. Their lack of commercial sophistication was noted by Mr Toh when he met with them prior to them signing the Contract. The same lack of sophistication was said to be evident from the error in Mr Piastrino's 21 June 2021 statutory declaration when he referred to a partnership between he and his wife, when he should have referred to the Family Trust.[132]

204 It was submitted that the purchase of properties in Endeavour Hills by Mrs and Mr Piastrino and by the Family Trust did not displace the lack of sophistication on their part as businesspersons. The level of rent received from those properties was modest, and the properties represented a small number of investment properties purchased over 30 years.

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131 *Brajkovich v Federal Commissioner of Taxation* (1989) 89 ALR 408, 414-415.

132 CB, 747 [5].

205 It was submitted that the investments in residential property were carried out by the Family Trust whose only business activity was purchasing residential property in order to derive long-term rental income. If anyone was in 'business' in relation to these properties, it was the Family Trust through its trustee and not Mrs and Mr Piastrino.

206 Concerning the project itself, significant reliance was placed on the evidence of Mr Toh as to the intention of Mrs and Mr Piastrino concerning the four apartments. Mr Toh met with Mrs and Mr Piastrino as prospective clients in a café before he gave advice to them about the Contract. He gave evidence that he 'vividly remembers' them telling him they intended keeping all four apartments for them and for their family.[133] Mr Toh is a solicitor who had not previously met Mrs and Mr Piastrino. He was not Mrs and Mr Piastrino's solicitor in these proceedings. It was submitted that his evidence was independent and could and should be relied upon.

207 Mr Toh recalled that Mrs and Mr Piastrino were intent on self-financing development at the Property. This evidence was relied on as evidence of Mr Toh's clear recollection of the meeting. It was not relied upon in support of the proposition that, because there was no borrowing, Mrs and Mr Piastrino were not in 'the business' of building residences.

208 Mrs and Mr Piastrino submitted that the aspiration held by them that they and their children would live in and use the apartments was a 'vague aspiration'.[134]

209 Mrs Piastrino's evidence was that her father told her that he wanted to make sure that the Property would be used, and owned by them. After the Property was transferred, she and her husband began discussing their plans for it. Those plans included wanting to build four apartments, for them and their children, for their families to live in, and a hair salon to be conducted by Michael. Their wish was that their family could be closer together. Mrs Piastrino gave evidence in her 28 July 2021

133 Ibid, 1739 [4].
134 Transcript, 184.

affidavit that their 'intention was [to] develop the land into a better investment for our family'.[135]

210 Mr Toh gave evidence on affidavit that when they met, Mrs and Mr Piastrino told him specifically they would not sell or rent out any part of the development. That intention, whilst also the subject of evidence by both Mrs and Mr Piastrino, was strongly disputed by Seascape. When cross-examined, both Mrs and Mr Piastrino denied their intention was to rent out the apartments to generate income.

211 Mrs and Mr Piastrino gave evidence that at the time of signing the Contract, they intended to give Michael the front shop, one apartment to live in, and another apartment to use for his hair salon business, to give Chantelle one apartment to live in with her children, and to live in the fourth apartment themselves.

212 When cross-examined, Mrs Piastrino said that Michael's children, aged eight and four, together with his wife, would 'eventually' move from their four bedroom house in Berwick to one of the two bedroom apartments.[136] In the case of Chantelle, the 'hope' was that she and her family (her two children were aged eleven and six) would use the apartment, including when the children eventually go to university.[137] Mrs Piastrino accepted that Chantelle would be moving from a home with an area of approximately 660m² to an apartment with an area of around 60m², if she chose to do so. Mr Piastrino said that he did not think the children would want to rent out the apartments, but whatever the children chose to do with the apartments after he and Mrs Piastrino were gone is 'up to them'.[138]

213 In his 21 June 2021 statutory declaration, Mr Piastrino stated that while initially it was not intended to charge Michael rent for the salon, in late 2019, because the construction was taking so long, it had been necessary to charge him $850 per week rent. Late 2019 coincided with the issue of a Certificate of Occupancy for the salon.

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135 CB, 407.
136 Transcript, 38.
137 CB, 407; Transcript, 38.
138 Transcript, 88.

214 The objective evidence was that an advertisement – a large sign on the front of the Property advertising the four apartments for rent on completion – was in place from December 2018 through to October 2019. Mrs and Mr Piastrino were cross-examined about the sign. Mrs Piastrino said the sign was originally put there by Michael, who, when Mrs Piastrino found out about it, she asked to take it down.

215 Mrs and Mr Piastrino submitted that even if the Court were to find that they intended to rent out the apartments, that would not have the consequence that they were in 'the business of building residences'. That was said to be so because they were in the business of investing in and enhancing the family property portfolio, a different business to a 'business of building residences'. It was submitted that if the purpose of building the residences was to hold them for investment, to rent them out so as to derive rental income, that they were not in 'the business of building residences'.

216 The facts were submitted to be similar to the earlier cases of *Golets v Southbourne Homes* and *Saath*. In *Golets*, two units were constructed, one for use as a residence and the other to sell on completion to cover the costs. In that case, Dr Golets was found not to be in the business of building residences.[139] In *Saath*, the trustee company for two naval engineers was intending to develop four units, two for the families of each of them to occupy. The plaintiff trustee company was held not to be in the business of building residences.[140]

217 It was submitted that, just as in *Golets* and *Saath*, the developments were essentially family developments and the building owners were not engaged in the business of building residences, the same was so in the present case.

Seascape's Submissions

218 Seascape submitted that as the phrase 'is in the business of building residences' is not defined, that it must be given its ordinary meaning. However, it must not be

139 *Golets v Southbourne Homes* [2017] VSC 705.
140 *Saath Pty Ltd v Seascape Constructions Pty Ltd* [2021] VSC 358.

viewed in isolation or in a vacuum, but within the context, the purpose, and intended operation of the SOP Act.[141]

219 Seascape submitted the evidence demonstrated an intention by Mrs and Mr Piastrino to develop the property as a residential and commercial project. Seascape submitted that the decisions in *Saath* and *Golets* were distinguishable. Reliance was placed on *Bayside* which, it was submitted, demonstrates the importance of characterising the nature of the work.

220 Seascape did not agree that residential property constructed for the purpose of rental for profit, if not offered for sale, did not constitute the 'business of building residences'. The example was given of a developer who builds a residential tower to hold the tower as an investment. It was submitted that facilitation of profit is what matters. If the Court were to find the intention of Mrs and Mr Piastrino was to rent the apartments upon completion and later gift them to their family, that would not make a difference to the proposition that they were 'in the business of building residences' when they entered into the Contract.

221 Seascape accepted in its final address that even if the Family Trust was in the business of building residences, that the activities of the Family Trust are not to be regarded as the activities of Mrs and Mr Piastrino personally when it comes to determine if Mrs and Mr Piastrino were in the business of building residences.[142] However, it was submitted that the activities of the Family Trust as an investor in a number of residential properties over time shows that Mrs and Mr Piastrino have adequate knowledge, capability and 'commercial savvy' to effectively rent out properties for profit. Reference was made to *Promax* in support of the proposition that a single development such as the development of the Property may itself constitute the carrying on of a business.[143]

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141 SOP Act, ss 1 and 3.

142 Transcript, 165.

143 Transcript, 168; *Promax Building Developments Pty Ltd v PCarol & Co Pty Ltd* [2017] VCC 495, [27] and also to *Maxcon Constructions Pty Ltd v Ily Australia Pty Ltd* [2017] VCC 1382 (Burchell JR), [24] and [27].

222 Seascape accepted that if the Court was to find that the intention of Mrs and Mr Piastrino was for the family members to live in the apartments, then it would not be the case that Mrs and Mr Piastrino were in the business of building residences. However, the case for Seascape was that throughout, including at the time the Contract was signed, the intention of Mrs and Mr Piastrino was to lease the apartments upon completion. In support of that submission, Seascape relied on evidence of Mr Sagor, Mr Kendall and Mr Rattana.

223 Mr Sagor made a statutory declaration on 11 June 2021 in which he said that he was introduced to Mrs and Mr Piastrino in around 2017. They advised him that they intended to undertake a four apartment and one shop development at the Property. They told him they intended to lease the four apartments to tenants and that they would lease the shop to Michael for his hairdressing business. Mr Sagor gave evidence that at the time of entering into the Contract, Mr Piastrino told him the purpose of the development was to expand his and his wife's investment portfolio and business, and that the construction and leasing out of the apartments was a good long-term business investment. It was put to Mr Sagor in cross-examination that he was mistaken about these matters. Mr Sagor responded by saying that assertion was incorrect.

224 Mr Kendall, who in early 2017 was performing project management work for Seascape, gave evidence that on 28 March 2017 he attended a contract preparation meeting with Mrs and Mr Piastrino, and Mr Sagor, at Seascape's office in Brooklyn. At that meeting Mrs and Mr Piastrino said that they were undertaking the development to make money by leasing the four residential apartments and the shop. There were further discussions with Mr Kendall in early 2017 and late 2018 where Mrs and Mr Piastrino said they were planning on leasing the apartments and that they wanted the works completed quickly. Mr Kendall was cross-examined about those matters. It was put to him that at neither meeting was there discussion of an intention to rent the apartments or the shop. His response, 'that's not what I

recollect at all'.[144]

225 Mr Rattana, who worked for Seascape on the project from late 2020, gave evidence on affidavit about discussions between October 2020 and July 2021 in which Mrs and Mr Piastrino, when complaining about delays on the project, referred to the need to finish the works so the apartments could be rented out. He gave evidence that at a site meeting on 15 February 2021, the loss of rental income was raised by Mrs Piastrino. Further, Mr Rattana's evidence was that in April 2021, Mrs and Mr Piastrino attended the site with a real estate agent and, in a conversation overheard by Mr Rattana, discussed leasing out the apartments.

226 Mr Rattana also gave evidence of a conversation with Michael at the site in June 2021 where Michael said he had arranged for the manager of his hairdressing salon to lease out apartment no. 2 when the apartments were ready to be occupied.

227 Mr Rattana was briefly cross-examined about the conversations in his affidavit with Mrs and Mr Piastrino. When cross-examined, Mr Rattana confirmed the truth of his affidavit evidence. He was not cross-examined about his evidence of a conversation with Michael in June 2021.

228 Mrs Piastrino and Mr Piastrino were cross-examined about the conversations of which Mr Sagor, Mr Kendall and Mr Rattana gave evidence. They denied that such conversations took place.

229 Seascape submitted that the evidence of Mr Sagor, Mr Rattana and Mr Kendall should be accepted.

230 Seascape further submitted that if the Court accepted that paragraph 5 of Mr Piastrino's 21 June 2021 statutory declaration was accurate,[145] then the Court should find Mrs and Mr Piastrino were engaged in the business of building residences. Paragraph 5 stated:

144 Transcript, 119-120.
145 CB, 747, [5].

> We have always had a family partnership registered between myself and my wife, as I am an entertainer and it was recommended by our accountant. This partnership has been established for nearly 30 years. The family partnership is not registered for gst as the income generated is below the gst reporting threshold amount of $75,000 annual turnover. Our account [sic] recommended that we commence a new family trust for collection of rent only from the four units, not because we intended to start a development company as this is not our intention. We intend to gift the units to our grandchildren as their inheritance.

231 Mr Sagor made a statutory declaration on 11 June 2021 in which he referred to being told by Mr Piastrino about the advice received by him from his accountant and that the establishment of the partnership might impact on GST relating to the project.[146]

232 In his 28 July 2021 affidavit, Mr Piastrino denied any such discussion with Mr Sagor. He also 'clarified' some of the matters in paragraph 5 of his 21 June 2021 statutory declaration.[147] The 'clarifications' included:

(a) correcting the reference to 'family partnership' to the Family Trust;

(b) correcting the reference to rent from the four units by stating:

> my statutory declaration is intended to be a reference to the rent from the four investment properties we owned through our family trust, not rent to be collected from the Property.

233 Mr Piastrino gave evidence in his 28 July 2021 affidavit of a discussion with his accountant about recording the expenses from the development of the Property separately from Mrs and Mr Piastrino's other affairs.

234 In addition, Mr Piastrino's 28 July 2021 affidavit included the following statement:[148]

> To be clear, my wife and I have not structured our affairs because we are in the business of building residences.

235 In cross-examination, Mr Piastrino denied that when his 21 June 2021 statutory declaration referred to income from four units, he was intending to refer to the four apartments at the Property. Instead, consistent with his 28 July 2021 affidavit, he

146 CB, 69, [6].
147 CB, 62, [19]; CB, 64, [30]-[35].
148 CB, 66, [37].

said he meant to refer to properties owned by the Family Trust.

236 Seascape submitted the Court should act on the truth of Mr Piastrino's statutory declaration and not on the truth of the matters later 'clarified' in his 28 July 2021 Affidavit. It submitted that the statutory declaration was more reliable than later evidence on affidavit in the proceeding, including the evidence of Mr Toh.

237 Although well after entry into the Contract in 2017, two emails sent by Mr Piastrino in 2020 were contended to be relevant. At 8:53am on 1 July 2020, Mr Piastrino sent an email to Mr Sagor stating the following:

> Hi David, after a lengthy discussion with family members the apartments are not to be leased out. Melina & I and our children and Melina's mum will be moving into the apartments our selfs, so I need this build completed and handover ASAP.[149]

238 Later that day, at 8:42pm, Mr Piastrino sent another email to Mr Sagor:

> Hi David, I have been through the drawings and it has come to my attention that the terrace has got doors to each section to give privacy to the tenants …[150]

239 The 1 July 2020 email from Mr Piastrino that referred to 'give privacy to tenants' was said by Seascape to be consistent with the proposition that the apartments were always intended to be tenanted. The email was also said to contradict Mrs Piastrino's evidence that she always intended the property would be a home for her children and their families. That evidence was also submitted not to sit comfortably with the configuration of the development, the size of the apartments, all relatively small, and either one or two bedrooms only, compared to the size and current living arrangements of Michael and Chantelle and their respective families. Seascape submitted that the notion that the intention was for the family to live in the Property and therefore the development did not involve carrying on a business was recent invention.

240 Mrs and Mr Piastrino were cross-examined about the sign advertising the to-be-

149 CB, 1582.
150 CB, 1581.

completed apartments as available for rent on display at the Property between December 2018 and October 2019, and about proposals that Michael would pay rent for the use of the salon.

241 Seascape submitted that when the criteria applied by Riordan J in *Ian Street* is applied to the facts, it is clear that Mrs and Mr Piastrino were in the business of building residences. That is so even if the intention of Mrs and Mr Piastrino was to build residences for their children to benefit from, because their intention in that case would be to provide a financial windfall to the children, which would still constitute being in the business of building residences.

Consideration

242 I find that, prior to entry into the Contract, neither Mrs or Mr Piastrino, whether personally or through the Family Trust, had been engaged 'in the business of building residences'. I make that finding noting the acceptance by Seascape that even if the corporate trustee of the Family Trust was engaged in such a business, the fact the Family Trust was engaged in that business cannot be treated as the activities of Mrs and Mr Piastrino when it comes to determining whether they personally were engaged in the business of building residences.

243 Although Mrs and Mr Piastrino, through the Family Trust, owned various properties in Endeavour Hills, and those properties were tenanted, I find that in respect of none of those properties (whether taken individually or collectively) were Mrs or Mr Piastrino (or for that matter, the Family Trust) engaged 'in the business of building residences'. On none of those properties did they or the Family Trust construct residences or parts of residences, whether as part of a business enterprise or otherwise.

244 The building work performed at the residences was maintenance work, repairs or (in the case of the Hunter Rise property), work which was not structural work. The type of work performed on those residential properties, including work to replace a kitchen at the Warburton Court property in 2013, was work which did not require a

building permit under the *Building Act 1993* (Vic) or by the building regulations then in force. Such work was performed to ensure the properties were in a condition to command the rent and/or was work performed with a view to obtaining a better price on sale. It was not work which, individually or collectively, constituted 'carrying on a business' of building residences.

245 The activity engaged in by Mrs and Mr Piastrino (themselves and through the Family Trust) in relation to the properties in Endeavour Hills was that of investment in residential property.

246 The holiday house at Phillip Island is in a different category. The reason for the purchase of the house at Phillip Island was not business-related.

247 While it may be the case that a person who is engaged in business as an investor is also engaged in the business of building residences, the fact a person is an investor does not necessarily mean that they are engaged in the business of building residences. In the case of the Endeavour Hills properties, those properties were residential properties purchased and held for investment. That was the character of the business in which Mrs and Mr Piastrino were engaged in through the Family Trust prior to entry into the Contract.

248 Prior to entry into the Contract, Mrs and Mr Piastrino were not persons who had previously been or were at that time 'in the business of building residences'. However, as was recognised by Riordan J in *Ian Street*, and by Anderson J in *Promax*, a single venture may constitute the carrying on of a business.

249 It is critical to consider the intention of Mrs and Mr Piastrino at the time they entered into the Contract, accepting that subsequent events and statements may shed light on what was in truth their intention at that time. The evidence is to be evaluated bearing in mind the burden of establishing that Mrs and Mr Piastrino were not in the business of building residences (and that as a result the Adjudicator lacked

jurisdiction), rests on Mrs and Mr Piastrino as the party seeking relief.[151]

250 Mrs and Mr Piastrino have not discharged the burden that they bear. It is plain that Mrs and Mr Piastrino were in the business of building residences when they entered into the Contract. That is so for the following reasons:

(a) first, the commercial scale and nature of the project to redevelop the Property;

(b) second, despite the evidence of Mrs and Mr Piastrino, and that of Mr Toh, I am not satisfied it was the intention of Mrs and Mr Piastrino that they and their children would live in the apartments in the short to medium term;

(c) third, I am satisfied it was always the intention of Mrs and Mr Piastrino to rent out the apartments upon completion;

(d) fourth, the long-term objective was to hold the apartments as an investment;

(e) fifth, while I accept the intention of the redevelopment was to benefit Mrs and Mr Piastrino and their family, that intention does not deprive the activity engaged in of its character as a business activity; and

(f) sixth, the objective to hold the apartments as an investment was to be achieved by 'building the residences'.

251 It is necessary to elaborate on each of those reasons.

252 As to the commercial scale and nature of the project; the contract price for the works was $1.78 million. Looking at the question of scale to which *Saath* and the other cases refer, the second of the criteria mentioned in *Brajkovich*, the project involved a very substantial redevelopment of the Property. It was of a large scale. It was both a commercial development involving the salon, and a residential development involving four apartments over three levels, plus a car stacker. Apartment no. 1 was a one bedroom apartment with an area of 54m²; apartment no. 2 was also a one

151 *Watpac Constructions Pty Ltd v Collins & Graham Mechanical Pty Ltd* [2020] VSC 414 (Riordan J), [39(b)].

bedroom apartment of 58m²; apartment no. 3 was a two bedroom apartment; and apartment no. 4 a two bedroom apartment of 64m². The car stacker provides for two car spaces only for the development, with other parking required to be on the street. The project was a mixed-use residential development on a commercial scale.

253 As to the intention of Mrs and Mr Piastrino, they contended that it was their intention in 2017 that they would keep all four apartments for themselves and their family. It was their aspiration for their family to all live within the development where their son Michael would also conduct his hairdressing business. However, the size of each of the apartments and the limited car parking, compared to Michael and Chantelle's current living arrangements, tells objectively against the proposition that Michael and Chantelle and their families would live in the apartments in the short to medium term, and that the apartments would not be rented out. Both Michael and Chantelle have children who are attending schools elsewhere. If they moved to the Property, this would require a change to the children's schools and would require both families to relocate. They would be relocating with their families from large, freestanding houses to much smaller two bedroom apartments.

254 The evidence of Mrs Piastrino was that she and her husband would live in one apartment, that one would be provided to Chantelle and her family to live in, another to Michael and his family to live in, and the remaining apartment was initially to be provided to Mrs Piastrino's mother to live in or to be provided to the children.

255 There was evidence that Michael would use one of the apartments to see his private hairdressing clients who required privacy.

256 I accept the evidence that it was intended that Michael would use one of the one bedroom apartments for his business. But I do not accept that it was intended that Michael (and his family) and Chantelle (and her family) would move into the apartments on completion. I do not accept that it was the intention that Mrs and Mr Piastrino would move from where they had lived, in close proximity to their

children and grandchildren, to move into one of the one bedroom apartments upon completion. I find the intention was to lease the apartments upon completion.

257 While I accept that the broad purpose of entering into the Contract for the redevelopment of the Property was so as to benefit Mrs and Mr Piastrino's family, including their children and grandchildren, I do not accept it was intended in 2017 that the family would move into the apartments in the short- or medium-term. Neither Michael nor Chantelle were called to give evidence to corroborate an alleged intention that they and their families would move to the apartments. Both were available to give evidence. I do not accept there was any realistic prospect of Michael and Chantelle and their families relocating to the Property in the short to medium term, or any real intention on the part of Mrs and Mr Piastrino that the two families, or they themselves, would do so.

258 As to renting out the residential apartments, Mr Toh's affidavit evidence was that Mrs and Mr Piastrino told him they intended keeping all four apartments for their family. There was to be no external borrowing. Those two matters are not controversial. He also gave evidence on affidavit that Mrs and Mr Piastrino said they would not sell or rent any part of the Property. His evidence of an intention on the part of Mrs and Mr Piastrino not to rent any part of the property was contradicted by the evidence of Mr Sagor and of Mr Kendall of conversations with Mrs and Mr Piastrino at around that same time. It is inconsistent with my finding the family had no intention of moving into the apartments in the short- to medium-term. Mr Toh's evidence was also inconsistent with later events and conversations.

259 I prefer the evidence of Mr Sagor and Mr Kendall of conversations at about the time of entry into the Contract with Mrs and Mr Piastrino, of their intention to rent out the apartments, to the evidence of Mr Toh. While Mr Sagor is not an independent witness, Mr Kendall was not said to lack independence. His account of what he was told at the time is consistent with later objective facts. Mr Toh's evidence is not consistent with later objective facts or evidence of later conversations.

260 The later events include the advertisement offering all four apartments to let on completion (on display in 2018 and 2019), Michael Piastrino paying rent for the salon upon its completion, Mr Piastrino's 1 July 2020 email referring to 'privacy to the tenants', and his email earlier that same day saying that after a discussion with the family, the apartments were not to be leased out (such advice as found by the Adjudicator) is consistent with it earlier being the intention that they would be leased out. Mr Rattana also gave evidence of discussions in 2020 and 2021 where he was told of, or witnessed, conversations about renting out the apartments.

261 The objective evidence is that between December 2018 and October 2019 there was a 'for lease' sign erected at the property, for all four apartments. The case for Mrs and Mr Piastrino was that the sign was initially erected by Michael without their knowledge and for the purpose of impressing his hairdressing salon clients. It was their evidence that the sign was later re-erected by Seascape as a hoarding to provide protection after the front window of the salon was broken.

262 I do not accept that the advertising sign that remained up for almost 12 months was an instance of Michael, who was not called to give evidence, acting on a frolic of his own, or that his parents knew nothing of the sign or the proposal to rent the apartments before the sign was put up. I do not accept Mrs Piastrino's evidence that she was very upset when she heard the board had been put up. The advertising sign invited persons to 'apply now' by emailing or by calling Joe or Melina – Mr and Mrs Piastrino – on mobile numbers specified.[152] Mrs Piastrino gave evidence she found out about the sign when someone called her to enquire. I reject that evidence. The sign inviting prospective tenants to contact Mrs and Mr Piastrino would not have been erected by Michael without their prior knowledge and consent.

263 I find paragraph 5 of Mr Piastrino's 21 June 2021 statutory declaration to be true. Contrary to Mr Piastrino's 28 July 2021 affidavit, the reference in paragraph 5 was to rent from the four apartments. The accountant's recommendation concerned the

152 CB, 1574.

development at the Property. The apartments were aptly described as 'units'. That is not a description that could be said to be apt to describe residential properties in Endeavour Hills.

264 Concerning their long-term objective, Mrs and Mr Piastrino were seeking to develop the Property into a better investment for their family. The way they were seeking to achieve that outcome was by 'building residences', four of them, and renting them out, and also by refurbishing the hair salon which they rented out to Michael as soon as the certificate of occupancy issued at a rent of $850 per week. I infer that it was always the intention that Michael would pay rent.

265 I accept that the Property held a strong emotional attachment to Mrs Piastrino and to her husband. It was where she had grown up. The shop had been operated as a delicatessen by her mother for over a decade. It was her father's wish that it be kept in the family. Michael had occupied the shop for the purposes of conducting his hairdressing business for more than ten years before the date of the contract and it was intended that he would do so after work involving the salon was completed. His profession is the same as that of his mother and that which his father took up between 1998 and 2005. However, the emotional ties of the family to the Property and the intention to hold it in the longer term for the benefit of the family do not mean that, when entering into the Contract, Mrs and Mr Piastrino were not engaged in a business activity.

266 The long-term nature of the investment does not deprive it of a business character. The manner in which the development was funded might not have been what would usually be expected from a person carrying on the business of developing residences. There was no intention to fund the development by borrowing. However, in early 2018, consistent with the first of the criteria in *Brajkovich*, on the advice of the accountant, separate accounts and a partnership to collect the rents were established. The advice from the accountant to establish that structure and to keep such records, advice about which I accept Mr Piastrino told Mr Sagor might have GST ramifications for the work the subject of the Contract, is only consistent

with carrying on a business.

267 Having observed Mrs and Mr Piastrino giving evidence, consistent with their modest formal education, I accept that they are not sophisticated persons. They wanted to build the apartments and to refurbish the salon on the Property from the heart for the benefit of their family. However, that does not mean that they necessarily did not have an eye to profit or that they were not engaged in the business of building residences. They had previously gathered together a portfolio of residential investment properties and were no doubt astute to the business of investment in such properties via the Family Trust.

268 One of the factors identified by the Full Federal Court in *Brajkovich* was whether the activity was engaged in principally for profit or principally for pleasure.[153] The entry into the Contract was both for profit and for family. It was to develop the Property as an investment for the family, Mrs and Mr Piastrino's children and grandchildren. Income was to be derived from the Property as a result of leasing out the apartments and the hair salon.

269 The project for which the Contract was entered into was to construct homes and associated works to rent out and to hold as an investment for Mrs and Mr Piastrino and their family. The fact the intention was to benefit the family does not deprive the activity of its business character. The partnership established on the advice of the accountant in early 2018 was to be the vehicle to construct the apartments and carry out the works to the salon and to receive the rents. The establishment of a partnership with the intention of keeping records is consistent with a business conducted in a systematic, organised and 'businesslike' way, as discussed in *Brajkovich*. The scale, four apartments and a shop, is consistent with a business activity. The activity, building residences and a shop, is not an activity in the nature of a hobby or a pastime.

270 I find that when Mrs and Mr Piastrino entered into the Contract, particularly given

153 *Brajkovich v Federal Commissioner of Taxation* (1989) 89 ALR 408, 414.

the scope of the work and their intention to lease the apartments on completion, that Mrs and Mr Piastrino were carrying on a business, even though entry into the Contract was a single transaction (as discussed by Dawson J in *United Dominions Corporation v Brian*).[154] That business was the building of residences, to lease out those residences, to construct and rent out the salon, and to hold the apartments and the salon as long-term investment properties.

271 As it is the entry into the Contract that constitutes the carrying on of the business of building residences by Mrs and Mr Piastrino, it is unnecessary to give separate consideration to the third question.

Disposition

272 The appropriate order is that the application in the nature of certiorari to quash the Adjudication Determination made by Mr McMullan dated 30 June 2021 is refused.

273 The solicitors for Mrs and Mr Piastrino should prepare a draft form of order in consultation with the solicitors for Seascape and should provide it to my Chambers within seven days.

274 If the parties are unable to agree about orders as to costs within seven days, then within a further seven days the parties should file and serve submissions in relation to costs of no more than four pages. I anticipate dealing with questions of costs on the papers.

154 [1985] HCA 49; (1985) 157 CLR 1, 15 (Dawson J).