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The jurisdiction of the Victorian Civil and Administrative Tribunal to determine disputes involving building work

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The question of whether the Victorian Civil and Administrative Tribunal (VCAT) has jurisdiction under the Domestic Building Contracts Act 1995 (Vic) (DBCA) to determine disputes involving building work is best ascertained by a two-stage test. First, if the relevant work falls within the statutory definition of "domestic building work" in ss 5 and 6 of the DBCA, then VCAT will have jurisdiction. Second, even if the work in question does not fall within the definition of "domestic building work", VCAT will still have jurisdiction if there exists a "domestic building dispute" under s 54 of the DBCA.

This article examines two different approaches which have been adopted by judges of the Supreme Court of Victoria to determine whether VCAT has jurisdiction under the DBCA to determine disputes involving building work.[1]

The first approach by Ginnane J in *Radojevic v JDA Design Group Pty Ltd (No 2)*[2] (*Radojevic*) applies where the relevant building work is excluded from the definition of "domestic building work" by s 6 of the DBCA.[3] In this circumstance, it does not necessarily mean VCAT will not have jurisdiction to determine a dispute. Instead, where the court or tribunal finds the building work in question is not "domestic building work" as defined in the DBCA, the first approach is one which requires an examination of whether there exists a "domestic building dispute" as defined in s 54 of the DBCA.[4]

The second approach by Croft J in *Lin Tiger Plastering Pty Ltd v Platinum Construction (Vic) Pty Ltd*[5] (*Lin Tiger*) considers whether the relevant building work falls within the definition of "domestic building work" provided in s 5 of the DBCA[6] and is not otherwise excluded from that definition by s 6 of the DBCA.[7] The second approach, which is less expansive than the first, does not consider whether a "domestic building dispute" exists under s 54 of the DBCA.

The first approach — if the building work in question is not "domestic building work", the question is then whether there is a "domestic building dispute" under s 54 of the DBCA

The exemplar of the first approach is *Radojevic* where Ginnane J determined the question of the jurisdiction of VCAT under the DBCA by a two-stage test, namely:

- first by considering the statutory definition of "domestic building work" in ss 5 and 6 of the DBCA, and
- then, second, by reference to the statutory definition of "domestic building dispute" in s 54 of the DBCA

The Radojevics commenced a proceeding against their architect, the first defendant, (JDA), in the Magistrates' Court seeking damages for breach of contract arising from the provision of architectural services by JDA in respect of design and proposed domestic building work in connection with the construction of four residential apartments on the Radojevics' land.[8]

By way of procedural summary, the Radojevics sought a stay of their own Magistrates' Court proceeding pursuant to s 57 of the DBCA[9] and to have the proceeding transferred to VCAT.[10] JDA opposed the stay application. The Magistrate dismissed the stay application. The Radojevics sought judicial review of the Magistrate's decision refusing the stay. Ginnane J ultimately quashed the Magistrate's decision.

Section 57 of the DBCA relevantly provides:

> (1) This section applies if a person starts any action arising *wholly or predominantly from* a *domestic building dispute* in the Supreme Court, the County Court or the Magistrates' Court.

(2) The Court must stay any such action on the application of a party to the action if—
(a) the action could be heard by VCAT under this Subdivision; and
(b) the Court has not heard any oral evidence concerning the dispute itself.
. . . [emphasis added].[11]

No oral evidence concerning the dispute had been heard in the Magistrates' Court.[12] The Radojevics' position was the dispute the subject of the Magistrates' Court proceeding arose "wholly or predominantly from a domestic building dispute" and that VCAT was therefore the proper forum.

Section 54 of the DBCA[13] defines a "domestic building dispute" and relevantly provides:

(1) A ***domestic building dispute*** is a dispute or claim arising—
. . .
(c) between a building owner or a builder and—
(i) an architect; or
(ii) a building practitioner registered under the **Building Act 1993** as an engineer or draftsperson; or
. . .
in relation to any design work carried out by the architect or building practitioner *in respect of domestic building work*; . . . [emphasis added].

In opposing the stay application, JDA argued the DBCA did not apply to the architectural work the subject of the dispute because of the operation of s 6(1)(e) of the DBCA, which provides:

This Act does not apply to the following work—
. . .
(e) design work carried out by an architect or a building practitioner registered under the **Building Act 1993** as a draftsperson . . .

The Magistrate referred to the Radojevics' argument regarding the distinction between the reference to "design work" in s 6(1)(e) of the DBCA, and the reference to "design work . . . in respect of domestic building work" in the s 54 definition of "domestic building dispute" in the DBCA. The Magistrate's finding was that s 54 conflicted with s 6(1)(e), and in accordance with *Project Blue Sky Inc v Australian Broadcasting Authority*[14] (*Project Blue Sky*), the question for determination was whether that conflict could be reconciled by identifying which section was the leading provision and which was the subordinate provision.[15] The Magistrate dismissed the stay application on the basis of his conclusion that s 6 was the leading provision and s 54 was the subordinate provision.[16]

The decision of Ginnane J on judicial review of the Magistrate's decision

Ginnane J formulated the question for his determination in the following terms: Did the Magistrates' Court action arise "wholly or predominantly from a domestic building dispute"? If so, then it should be heard by VCAT. The question required determination of whether the work of the architect and the associated claim for unpaid fees was "design work" within the meaning of s 54 of the DBCA.[17]

He noted a conflict arose because s 6(1)(e) excludes from the DBCA's operation "design work carried out by an architect", yet s 54(1)(c) contemplates "domestic building disputes" as including a dispute "in relation to any design work carried out by the architect or building practitioner in respect of domestic building work".[18]

Ginanne J considered the Magistrate's approach to the issue resulted in s 54(1)(c) having no application, on the basis that the work the subject of the dispute was, according to s 6(1)(e), not covered by the DBCA.[19]

His Honour had regard to the general principle that "all words in a statutory provision must be given meaning and effect".[20]

He also noted that in accordance with the Interpretation of Legislation Act 1984 (Vic), footnotes and end notes in statutes are not considered part of an Act but may be used to interpret its provisions.[21] The end note of s 6(1)(e)[22] of the DBCA states:

S 6(1)(e): Although such design work is not domestic building work for the purposes of this Act, as a result of paragraph (1)(c) of the definition of ***domestic building dispute*** in section 54, disputes concerning such design work may be dealt with by VCAT.

His Honour concluded the correct approach to construction was to seek to alleviate the conflict between the two sections, in accordance with the principles enunciated by the High Court in *Project Blue Sky*:

. . . by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions.[23]

He considered s 54(1)(c) of the DBCA has several important textual indicators: it specifically refers to "design work" that is carried out "in respect of" "domestic building work", and the section does not refer to a "domestic building contract".[24]

He concluded these factors suggested that Parliament intended to draw a distinction between:[25]

- design work as "domestic building work", to which s 6(1)(e) makes clear the DBCA does not apply and
- disputes regarding design work "in relation to" "domestic building work" which can be heard by VCAT

His Honour considered the end note to s 6(1)(e), while not part of the DBCA, operated to direct the reader towards a construction which reconciles ss 6(1)(e) and

54(1)(c) of the DBCA rather than applying one to the exclusion of the other.[26] If the distinction is maintained between — on the one hand, "design work", and on the other, "disputes" in relation to "design work in respect of . . . domestic building work" — then s 6(1)(e) of the DBCA still has work to do by excluding "design work" per se from the application of other sections of the DBCA where there is no "dispute", such as in Pt 2 (ie, Provisions that apply to all domestic building contracts), which includes the s 8 implied warranties concerning all domestic building work, while directing "disputes" in relation to "design work . . . in respect of domestic building work" toward VCAT.[27] This distinction achieves the aim of ss 54(1)(c) and 57 of the DBCA of directing such disputes to be heard by VCAT.[28]

Ginnane J said the dispute must be "in relation to any design work carried out by an architect or building practitioner in respect of domestic building work".[29] The ordinary meaning of "in relation to" encompasses a claim for an unpaid debt "in relation to" work carried out by an architect "in respect of domestic building work".[30] His Honour found the relevant "domestic building work" in question was the construction of four residential apartments by a registered builder, which would fall within the operation of s 5(1)(a) of the DBCA.[31]

Accordingly, Ginnane J concluded the dispute the subject of the Magistrate's Court proceeding fell within s 54 of the DBCA and that VCAT thereby had jurisdiction to hear the dispute.[32]

The second approach — is the building work in question "domestic building work" under ss 5 and 6?

An example of the second approach is the decision in *Lin Tiger* where Croft J had to consider whether the DBCA applied to a dispute between a plastering subcontractor and a builder.[33] The earlier decision of *Radojevic* was not cited in *Lin Tiger*. *Lin Tiger* addresses the competence of a domestic arbitral tribunal and VCAT's jurisdiction under the Australian Consumer Law and Fair Trading Act 2012 (Vic) — these issues are not considered in this article.[34]

In *Lin Tiger*, the plastering subcontractor and the builder had entered into two subcontracts for the supply of plastering and associated works (the Sub-Contracts). The Sub-Contracts contained a dispute resolution provision referring disputes to arbitration.[35] If the court found VCAT had jurisdiction, then the arbitration clause would be void by operation of s 14 of the DBCA (ie, Arbitration clauses prohibited).[36]

To determine whether the DBCA applied to the dispute between the parties, and hence whether VCAT had jurisdiction to determine that dispute to the exclusion of the arbitration clause within the Sub-Contracts, Croft J focused on an examination of proper construction of the statutory definition of "domestic building work".

His Honour stated that "it is plain from the DBCA that a dispute will only be a 'domestic building dispute' if the dispute relates to work to which the DBCA applies".[37]

Section 54 of the DBCA provides:

> (1) A ***domestic building dispute*** is a dispute or claim arising—
> . . .
> (b) between a builder and—
> . . .
> (iii) a sub-contractor; . . .
> . . .
> in relation to a domestic building contract or the carrying out of domestic building work; . . .

Croft J noted that a subcontract between a builder and a subcontractor did not fall within the definition of "domestic building contract" as that definition excludes "a contract between a builder and a subcontractor".[38] He found the key question for his determination required a consideration of whether the work the subject of the Sub-Contracts — ie, plastering — was the type of work which fell within the definition of "domestic building work".[39]

His Honour referred to the definition of "domestic building work" in ss 5 and 6 of the DBCA.[40]

Section 5 provides: "This Act applies to the following work . . . the erection or construction of a home, including . . . any associated work . . ."

Section 6(2) provides:

> 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.

Regulation 7 of the Domestic Building Contracts Regulations 2017 (Vic) provides:

> For the purpose 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—
> . . .
> (g) plastering;
> . . . [emphasis added].

Croft J stated that to determine whether the DBCA applied to the disputes which arose under the Sub-Contracts, the central question for his determination was whether the plastering subcontractor carried out "domestic building works" under the Sub-Contracts or whether the Sub-Contracts provided for the carrying out of one type of work only as identified in Reg 7.[41]

His Honour's concluded view was, given that the Sub-Contracts were excluded from the definition of

"domestic building contract", then the dispute between the subcontract plasterer and the builder could only be a "domestic building dispute" if it related to work to which the Act applies.[42] He stated, in relation to Reg 7 and the jurisdiction of VCAT, that "if the [DBCA] does not apply no further argument can be made".[43] This statement does not sit well with the approach in the earlier decision of *Radojevic* and the pathway to VCAT jurisdiction offered by s 54 of the DBCA.

Was the subcontract plaster carrying out one or more than one type of work within the meaning of Reg 7? Based on the evidence as to the nature of the work carried out by the subcontract plasterer, Croft J found that the only works undertaken by the plasterer under the Sub-Contracts were plastering works. On this basis, he concluded that the DBCA did not apply to the works carried by the plasterer under the Sub-Contracts and that "the mandatory and exclusive jurisdiction of VCAT is not enlivened".[44]

Conclusion

The cases considered above demonstrate that so far as the determination of the question of whether VCAT has jurisdiction under the DBCA to determine disputes involving building work is concerned, it may not be sufficient to adopt the one-stage approach of Croft J in *Lin Tiger* and consider only whether the relevant building work falls within the statutory definition of "domestic building work" in ss 5 and 6 of the DBCA.

The more expansive approach in *Radojevic* deals with the question of VCAT's jurisdiction in two stages. First, VCAT will have jurisdiction if the relevant building work falls within the statutory definition of "domestic building work". Second, even if the relevant work does not fall within that statutory definition, VCAT will still have jurisdiction if there exists a "domestic building dispute" under s 54 of the DBCA.

Radojevic establishes that there is an important distinction between "domestic building work" and a "domestic building dispute". Even if certain work is excluded from the definition of "domestic building work", VCAT will still have jurisdiction under s 54(1) of the DBCA if there is a "domestic building dispute". The definition of "domestic building dispute" in s 54(1) of the DBCA is broad because it uses the wide phrase "in relation to" in three of its four limbs.

The authors respectfully suggest the more expansive two-step approach of Ginnane J in *Radojevic* is to be preferred as it reflects a more robust and holistic analysis of the DBCA than the approach of Croft J in *Lin Tiger*.[45]

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For full disclosure, Andrew Blair appeared as counsel for the plaintiffs in Radojevic.

Footnotes

1. The first approach was advanced by Ginnane J in *Radojevic v JDA Design Group Pty Ltd (No 2)* [2017] VSC 796; BC201711315 (*Radojevic*). The second approach was advanced by Croft J in *Lin Tiger Plastering Pty Ltd v Platinum Construction (Vic) Pty Ltd* (2018) 57 VR 576; [2018] VSC 221; BC201806955 (*Lin Tiger*).
2. *Radojevic*, above.
3. Section 6 is headed "Building work to which this Act does not apply".
4. Section 54 is headed "What is a domestic building dispute?"
5. *Lin Tiger*, above n 1.
6. Section 5 is headed "Building work to which this Act applies".
7. Above n 3.
8. *Radojevic*, above n 1, at [2].
9. Section 57 is headed "VCAT to be chiefly responsible for resolving domestic building disputes".
10. *Radojevic*, above n 1, at [3].
11. Above n 9.
12. *Radojevic*, above n 1, at [14].
13. Above n 4.

14. *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; 153 ALR 490; [1998] HCA 28; BC9801389.
15. *Radojevic*, above n 1, at [12].
16. *Radojevic*, above n 1, at [3], [11] and [12].
17. *Radojevic*, above n 1, at [45].
18. *Radojevic*, above n 1, at [46].
19. *Radojevic*, above n 1, at [47].
20. *Radojevic*, above n 1, at [37], citing *Commonwealth v Baume* (1905) 2 CLR 405 at 414.
21. *Radojevic*, above n 1, at [37], referring to s 36(4) of the Interpretation of Legislation Act 1984 (Vic). See also the discussion in DC Pearce and RS Geddes, *Statutory Interpretation in Australia*, 6th edn, LexisNexis, New South Wales, 2006, [4.38] and [4.49].
22. The end note was not drawn to the attention of the Magistrate, see *Radojevic*, above n 1, at [9].
23. *Radojevic*, above n 1, at [48] and [36].
24. *Radojevic*, above n 1, at [48].
25. *Radojevic*, above n 1, at [49].
26. Above.
27. *Radojevic*, above n 1, at [49] and [19] where the Radojevics submitted that the exclusion of "design work" from "domestic building work" in s 6 was because Parliament intended that the statutory warranties in the Domestic Building Contracts Act 1995 (Vic) (DBCA) not apply to contracts regarding "design work".
28. *Radojevic*, above n 1, at [49].
29. *Radojevic*, above n 1, at [50].
30. Above.
31. *Radojevic*, above n 1, at [50]. More broadly, Ginnane J accepted the Radojevics' submission that "meaning and effect must be given to the words 'in respect of' in s 54(1)", (see *Radojevic* at [18] and [44] where Ginnane J stated "I therefore accept the Radojevics' submissions for the following reasons . . .").
32. *Radojevic*, above n 1, at [44]–[50]. Note also that Ginanne J's comments regarding ss 5, 6, 54 and 57 of the DBCA, at [29]–[32] and [40]–[42] of *Radojevic*, above n 1, were referred to with approval by Associate Judge Ierodiaconou at [19] of *A40 Construction and Maintenance Group Pty Ltd v Smith* [2021] VSC 575; BC202108597.
33. *Lin Tiger*, above n 1, at [1].
34. For a discussion of these issues see C Croft, D Stamboulakis and M Warren, *International and Australian Commercial Arbitration*, LexisNexis, 2022, [5.25]–[5.26].
35. *Lin Tiger*, above n 1, at [4].
36. Section 14 of the DBCA provides: "Any term in a domestic building contract or other agreement that requires a dispute under the contract to be referred to arbitration is void".
37. *Lin Tiger*, above n 1, at [5].
38. *Lin Tiger*, above n 1, at [6], see also s 3 of the DBCA.
39. *Lin Tiger*, above n 1, at [6].
40. *Lin Tiger*, above n 1, at [6] and [7].
41. *Lin Tiger*, above n 1, at [10].
42. *Lin Tiger*, above n 1, at [16].
43. *Lin Tiger*, above n 1, at [19].
44. *Lin Tiger*, above n 1, at [47].
45. As mentioned above, it appears that the earlier decision of *Radojevic*, above n 1, was not cited to Croft J.