

**Acclaim Building Management Pty Ltd v Loewenthal [2006] NSWDC 29
New South Wales District Court – 21 June 2006**

FACTS

Acclaim Building Management (“Acclaim”) served a payment claim on Heather Loewenthal (“Loewenthal”) under the *Building Construction Industry Security of Payment Act 1999 NSW* (“the Act”) for work done under a residential building contract. Loewenthal replied with a letter stating that there were many items of work outstanding and payment could not be finalized until these were completed. Acclaim issued proceedings claiming \$89,132.63 was owed by Loewenthal pursuant to the Act. Loewenthal sought to have the proceedings dismissed because the Act did not apply to their construction contract because they said it was excluded under section 7(2)(b) of the Act. Section 7(2)(b) says “the Act does not apply to a construction contract for the carrying out of residential building work (within the meaning of the Home Building Act 1989) on such part of any premises as the party for whom the work is carried out resides in or proposes to reside in.”

Acclaim asked the court for summary judgment against Loewenthal because they said: (a) she failed to serve a payment schedule in accordance with the Act (b) she was not entitled in the proceedings to raise any defence or bring a cross-claim, and (c) that it was too late for Loewenthal to say that the contract is excluded by section 7(2)(b) because this should have been raised in the payment schedule.

At the time of the proceedings Loewenthal was not residing in the property and it was not clear if and or when she would reside in the property.

ISSUES

Whether the construction contract was covered by the Act, having regard to the words “proposes to reside in” the premises used in section 7(2)(b) of the Act?

FINDING

The construction contract was removed from the operation of the Act as the relevant time for determining the intention to reside in the property was at the time that the contract was entered into. At the time of entering into this contract the evidence was clear that Loewenthal proposed to reside in the premises and this intention was made clear to Acclaim before the contract was entered into. Acclaim was therefore not entitled to summary judgment and the proceedings were dismissed.

QUOTE

Johnstone DCJ at [48]:

“In my view it can only be an intention held at the time of the formation of the contract. In other words the intention of the Act is to exclude from its operation construction contracts entered into between parties with a mutual understanding that the building work related to residential premises in which the party for whom the work is to be carried out either currently resides or proposes at some future time to reside.”

IMPACT

If at the time of entering into the contract for residential building work it is the intention of the owner to reside in the premises and this is made clear to the contractor, then the Act will not apply to the construction contract.

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