

JUDGMENT : Young CJ in Eq : New South Wales Supreme Court Equity Division 8th December 2006

1 This is an application to extend the caveat put on by a builder against a proprietor of property in the Cowra area. The plaintiff and the defendants entered into a contract in October 2004 for the construction of four residences. The contract was subject to the **Home Building Act 1989**.

2 Clause 28 of the contract read as follows:

"28. CHARGE ON LAND

The Owner subject to the Act hereby charges the parcel of land on which or on part of which the works are to be erected with the due payment to the Builder of all moneys that may become payable to the Builder by virtue of this Contract or otherwise arising from the carrying out of the works."

3 The builder in due course put a payment claim to the defendants which was disputed. Under the **Building and Construction Industry Security of Payment Act 1999** there was an adjudication, an order was made in favour of the builder for about \$62,000 and the adjudication was registered in the District Court in February 2006 as a provisional judgment in accordance with a statute.

4 The parties then became locked in battle in the Consumer Trader and Tenancy Tribunal and in the course of that the plaintiff builder filed a caveat on the basis of its rights under cl 28. The caveat is number AC680826.

5 It may be that the caveat is defective in form. However, if this is so, the plaintiff seeks to amend it and, as I understand it, the defendants have no particular quarrel with that part of the application.

6 However, the defendants say that s 7D of the **Home Building Act** means that the plaintiff has no interest in the land which can support a caveat.

7 Section 7D(1) of the **Home Building Act 1989** says that: *"A contract does not give the holder of a contractor licence or any other person a legal or equitable estate or interest in any land, and a provision in a contract or other agreement is void to the extent that it purports to create such an estate or interest."*

8 Subsection 3 says: *"However, subsection (1) does not apply to a provision in a contract that creates a charge over land if: ...*

(c) the charge is created to secure the payment to the holder of the contractual licence by another party to the contract of money due under the contract, but only if a court or tribunal has made an order or judgment that such payment be made"

9 That section in relation to caveats and charging clauses in building contracts was considered in depth by Brereton J in *Kell & Rigby Pty Ltd v Flurrie Pty Ltd* [2006] NSWSC 906. In para 32 of his Honour's reasons he said: *"The effect of s 7D(3) is that a contractual provision in a residential building contract which creates a charge is not void if the charge arises only upon a court or tribunal ordering or adjudging that the proprietor of the land pay moneys due under the contract and secures only moneys so adjudged to be paid, on the land on which the building works are performed. ... the only contractual provisions exempted by s 7D(3) from the operation of s 7D(1) are those which create a charge only if a court or tribunal orders or adjudges that the proprietor of the land pay moneys due under the contract"*.

10 The judge was considering special condition 1 in the contract between the parties in that case, which was that: *"Flurrie provides as security for its obligations ... by way of charge and acknowledges the right of Kell & Rigby to lodge caveats over the following properties"*

11 His Honour said in para 62: *"Special Condition 1 purports to secure all of Flurrie's "obligations under the ... Agreement", and the circumstances in which it creates a charge are not limited to those in which a court or tribunal has made an order or judgment that moneys due under the contract be paid. Accordingly, it does not create a charge only if a court or tribunal had made an order or judgment that moneys due under the agreement be paid, and it follows that Special Condition 1 does not satisfy the requirements of s 7D(3)(c); s 7D(1) therefore applies and Special Condition 1 is void. Kell & Rigby's caveat is not maintainable, by reason of s 7D(2)."*

12 Mr James Johnson for the plaintiff says that whilst he acknowledges that I would follow what Brereton J has held, the form of charge in the present case is different. He says that it is important to look at the words "subject to the Act" in cl 28. That must mean that the charge that is created is subject to the Act, and as the only charge that can be created under the Act is to operate only if a court or tribunal has made an order or judgment that payment be made, it has the effect of creating the charge only in that set of circumstances, and hence does not offend against the Act and is not vitiated.

13 Mr D Pritchard, who appears for the defendants, puts that on the true construction of s 7D of the Act the form of charge must say on its face that the charge is created only if a court or tribunal has made an order or judgment for payment.

14 In the instant case, it follows from what Brereton J held in the *Kell & Rigby case* that the court order for payment by the District Court provisional judgment of 22 February 2006 constitutes an order within s 7D(1)(c) of the **Home Building Act** . Accordingly, if there was a charge created as from the date of judgment then it would not be vitiated by the Act.

- 15 Mr Pritchard says that the Act is consumer legislation; it is to be understood as legislation written in such a way so that the ordinary man or woman building a house can understand its operation. The intent of section 7D cannot be satisfied by obscure wording, such as "subject to the Act" in cl 28, words which would not have any semantic significance to the average man or woman building a house.
- 16 He says further that the Act is one which requires documents such as this to be construed against the person proffering them. In my view, that is a valid submission.
- 17 Furthermore, it would seem to me that cl 28 does fall foul of the Act because of the use of the words "hereby charges". The section stops one creating a charge. Clause 28 seems to instantly create a charge. It may be that the words "subject to the Act" mean that the charge does not arise or spring into operation until there is a judgment, but there is a very real distinction in mortgage law between creating an interest and when the interest takes effect in interest or possession, so that one can have an executory interest by way of springing use, which one creates now but only springs up if the relevant circumstances occur within the perpetuity period.
- 18 Here what this clause seems to be doing is creating a charge at the moment of contract, even though that charge will only operate at a later date, and that, it seems to me, the Act does not allow.
- 19 Mr Johnson further says that under s 74K of the **Real Property Act** 1900 one is dealing with the caveat, one only needing to see the caveat may have validity, and it would be wrong at this stage to disqualify the caveat. Certainly that is an available argument.
- 20 It, however, has been our practice when there is a question of law or construction which can be decided definitively, to do so and, indeed, Brereton J did so in the *Kell & Rigby case* .
- 21 Accordingly, it seems to me I should dismiss the present summons with costs. **COUNSEL :**

James Johnson (P) instructed by Garden & Montgomerie (P)

D R Pritchard (D) instructed by Turner Freeman Lawyers (D)