

## Insurance Provisions of Home Building Act (NSW)

**Brad Kermond  
Colin Biggers & Paisley, Sydney**

**T**HE *HOME BUILDING ACT*, affecting all residential building work undertaken in New South Wales, contains important regulations which came into force on 1 May 1997. A number of detailed provisions with specific regard to insurance require strict compliance.

Specifically, s.94(1) of the Act provides:

*A person who enters into a contract in contravention of sections 92(1) or 93(1):*

- (a) *is not entitled to damages or to enforce any other remedy in respect of a breach of the contract committed by any other party to the contract or to recover money in respect of work done under the contract under any other right of action (including quantum meruit action); but*
- (b) *is liable for damages and subject to any other remedy in respect of a breach of the contract committed by the person.*

Section 92(1) of the Act provides:

*A person must not contract to do any residential building work unless a contract of insurance that complies with this Act is in force in relation to the proposed work.*

### **Casa Maria Pty Ltd v Trend Properties Pty Ltd**

In the recent New South Wales Supreme Court decision of *Casa Maria Pty Ltd v Trend Properties Pty Ltd*, the owner of a block of flats in Sydney's Kings Cross (Casa Maria Pty Ltd) entered into a written contract with Trend Properties Pty Ltd to strata, develop and sell those flats. Under the contract, Casa Maria as owner was to get a fixed amount for the sale of each flat when converted to strata title. Trend Properties was to bear the cost of the restoration work and of whatever was necessary to obtain the strata subdivision and was to be entitled to the balance of the sale moneys after

payment of the owner's fixed amount.

Casa Maria refused to perform its obligations under the contract notwithstanding that Trend Properties had performed all of its, alleging that s.94 of the *Home Building Act* precluded Trend Properties from suing for damages (or taking any other form of legal action) by reason of Trend Properties having committed a breach of s.92 of the Act by doing residential building work without cover of insurance. If Casa Maria's contentions were correct, it would have received its full contractual entitlement of \$1 125 000 and in addition have retained five units worth \$1 100 000 on which Trend Properties had done about \$300 000 worth of work. Trend Properties, on the other hand, would have precisely nothing.

The central question in the case was whether, bearing in mind that s.92 of the Act forbids an uninsured person from contracting to do any residential building work, the contract between Casa Maria and Trend Properties could be described as a 'contract to do any residential building work'.

### **Decision at First Instance**

The primary finding of the trial judge was that the contract between the parties was not properly described as a contract to do any residential building work. The contract merely stated that if any building work was to be done, a licensed builder was to do it. The fact that one or more provisions might possibly involve a slight measure of 'building work' did not, in the trial judge's opinion, convert the contract as a whole to be a 'contract to do any residential building work'.

### **On Appeal**

Casa Maria appealed. It was unsuccessful, but for different reasons. The Court of Appeal did not support the trial judge's primary finding but upheld the trial judge's

secondary ground for rejecting Casa Maria's case based upon clause 7(1)(f)(iii) of the *Home Building Act Regulation 1990*. In that clause, the definition of 'residential building work' contained in the Act excludes work that is declared by the Regulations to be excluded. Clause 7(1)(f)(iii) excluded the supervision only of residential building work 'by any other person, if all the residential building work is being done or supervised by the holder of a licence authorising its holder to contract to do the work'.

The Court of Appeal upheld the trial judge's finding that Trend Properties' role fell within the exempting regulation because the entirety of the work contracted to be done would otherwise have constituted 'residential building work' was to be effected by a licensed builder, with Trend Properties adopting a purely supervisory role. The Court of Appeal thought it was not without relevance that Trend Properties were described as the 'Development Manager' in the Contract.

### **'Sweeping and Dire Consequences'**

In the end result, Trend Properties escaped what was described by the Court of Appeal as the 'sweeping and dire consequences' of s.94 of the Act which, if taken literally, has an 'absurdly wide application'. ■

**'Trend Properties  
escaped what was  
described by the  
Court of Appeal as  
the "sweeping and  
dire consequences"  
of s.94 of the Act  
which, if taken  
literally, has an  
"absurdly wide  
application".'**

Brad Kermond's article originally appeared in Colin Biggers & Paisley's *News Bulletin* (December 1999) and is reprinted with permission.