



**Southern Cross Constructions (NSW) Pty Ltd v Salfa Pty Limited
(In Liquidation) (Receivers and Mangers appointed) [2009] NSWSC 634
New South Wales Supreme Court 30 June 2009**

FACTS:

Salfa Pty Limited (“Defendant”) are the owners of two strata units, which were built by Southern Cross Constructions (NSW) Pty Ltd (“Plaintiff”). By a deed of agreement, the Defendant provided these two strata units as security for the Plaintiff.

The Defendant failed to pay the Plaintiff certain money owed to the Plaintiff. The Plaintiff approached the Court seeking relief by way of declaration that it had acquired an equitable interest in the two strata units by virtue of the deed of agreement.

The Defendant argued that by virtue of section 7D of the *Home Building Act* (NSW) 1989, (which relevantly provides 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.”) that no such interest had arisen in favour of the Plaintiff.

ISSUES:

Whether the deed of agreement validly gave rise to an equitable interest in the strata units, and avoided the exclusion provided by the *Home Building Act* (NSW) 1989?

FINDING:

The Court found that the deed of agreement did in fact give rise to an equitable interest in the strata units because it was a separate agreement which came about after the debt to pay had arose and was not an agreement by the Plaintiff to do any building work.

QUOTE:

Hammerschlag J [at 16]:

...The Deed is not a Contract under which the plaintiff agreed to do any work. By the time it was entered into the debt which it purports to secure had already arisen. The work in respect of which the debt arose had by then well and truly been finished. In those circumstances s 7D did not apply to the deed.”

IMPACT:

The case illustrates that a builder or contractor as a party to a residential building contract, may in some circumstances secure their right to payment, by an equitable charge over the subject property. This approach offers to residential builders a possible method of securing their position over the property improved by their work.