

A triumph for residents of retirement villages



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In *Goyal v West* [2021] NSWSC 526, receivers, appointed by the registered first mortgagee, had entered a contract for sale of property on which a retirement village had operated (**‘the Property’**). The operator of the retirement village was insolvent, and the receiver had applied for an order for sale pursuant to s 182F of the *Retirement Villages Act 1999* (NSW) (**‘the Act’**). Joined to the proceedings were the former occupants of the retirement village, beneficiaries of statutory charges created under the Act to protect their ongoing contributions, the Catholic Diocese of Maitland – the beneficiary of an unregistered second mortgage (**‘the Church Mortgage’**) and an unsecured creditor. The contract for sale for the Property was contingent upon the order.

The dilemma

The proceeds of sale of the Property were insufficient to reimburse all the parties to the proceedings. It was the position of the receiver that only half of the former occupants ought to be repaid their ongoing contributions (**‘the First Group’**). The second group, whose statutory charges were created after the mortgages (**‘the Second Group’**) included the fourth and fifth defendants, an elderly couple with dementia who are impecunious and were unable to obtain legal representation to protect their interests. Two weeks prior to the hearing of the application, Ward CJ in Equity referred the matter for urgent assistance to the New South Wales Bar Pro Bono Scheme and the writer accepted the brief.

The key issue in the proceedings

The key issue for the Court was whether on the proper construction of ss 182F and 182G of the Act, the proposed order of distribution of the proceeds of sale should be made (at [53]).

The receivers said that a proper construction of s 182G of the Act meant that the proceeds of sales had to be distributed in the order in which the statutory charges and the mortgages were created. That is, the proceeds of sale would be distributed to the First Group, the first mortgagee, the Church Mortgage, the

Snapshot

- The recent judgment in *Goyal v West* [2021] NSWSC 526, marks the first judicial consideration of s 182G of the *Retirement Villages Act 1999* (NSW).
- The Court found that all of the unregistered statutory charges ranked ahead of registered and unregistered mortgages.
- This outcome is consistent with the beneficial purpose and intention of the Act for the protection of vulnerable residents and former occupants of retirement villages.

Second Group, and the unsecured creditor. The writer and her learned junior, Sarah Danne, put forward a competing construction based upon the literal words of s 182G, on behalf of the fourth and fifth defendants. They said that all the former occupants ranked ahead of the mortgagees. The third defendant adopted this construction. The First Group were ‘largely agnostic to the construction argument since, on either side’s construction, their statutory charges will be discharged...’ at [9].

The beneficial nature of the Act

The Act is beneficial legislation enacted in 1999 to protect vulnerable residents and former occupants of retirement villages.

However, prior to the inclusion of Part 10A which came into force on 10 March 2010, there was nothing in the Act to protect the ongoing contributions of residents and former occupants. In the event of an operator becoming insolvent, residents and former occupants fell behind mortgagees and other secured creditors.

Part 10A and the history behind it

In March 2005 following a review of the Act, the Office of Fair Trading published a report and made several recommendations, including recommendation 39: ‘That a statutory charge, modelled on provisions in place in other States, be introduced to provide greater protection against the potential loss of refund entitlements by residents who have no registered proprietary interest in the property.’

The Report said (at page 34): ‘While conceding that a statutory charge may impact on the lending practices of financial institutions, this is not necessarily a bad thing. It may make lending bodies take a closer look at the financial viability of proposed retirement village developments...’

Almost four years later, Part 10A was included in the Act. However, unlike the other states, Part 10A is equivocal as to whether the statutory charges operate as a first charge. The Hon Penny Sharpe on 2 December 2008 said in the second reading speech for the *Retirement Villages Amendment Bill 2008*: ‘Regrettably there are occasional, albeit rare, instances

when a retirement village operator goes broke and the village cannot be sold as an ongoing concern. This can place residents in a difficult position in terms of getting their money back as an unsecured creditor. To address this issue the bill will introduce a statutory charge, which will give those residents who are not owners or registered long-term leaseholders priority in the event of a Supreme Court ordered sale of the village.’

Pursuant to s 182B of the Act, unregistered statutory charges secured against the land upon which the retirement village operated are created when each resident enters the village contract which grants them a licence to occupy a unit in the retirement village in return for an ongoing contribution. It is a condition precedent to the operation of Part 10A that the land was registered for use as a retirement village. An order for sale pursuant to s 182F requires the Court to apply s 182G on the ‘Priority of interests’ which provides relevantly: ‘For the purposes of any order made under this Part, interests in the land concerned are to be satisfied in the following order—

- ...
- any ... mortgage ... on or over the land created or registered before the creation of a charge under this Part, or otherwise taking priority over a charge over the land that has been created under this Part,
- the entitlements of residents and former occupants of the retirement village arising from village contracts in respect of which a charge over the land has been created under this Part,
- any ... mortgage ... on or over the land created or registered after the creation of a charge over the land under this Part,
- ...

First & Second Groups ranked ahead of mortgagees

The fourth and fifth defendants said that, considering the purpose and context behind Part 10A, a proper construction of s 182G ranks the entitlements of all the former occupants of the retirement village equally and ahead of the interests of the mortgagees ([87] – [92]). This arises from:

- a literal reading of s 182G(b) which requires the Court to look for mortgages which fall within the terms of that subsection. There were no mortgages that fell within the terms of subsection (b). This arose from the fact that the mortgagees were created after the creation of the first statutory charge created under the Act. There were also no mortgages that were created prior to the creation of the first residential charge. As the 2 mortgages were created after the commencement of Part 10A, they do not fall within the phrase ‘or otherwise taking priority over a charge over the land that has been created under this Part.’
- The First and Second Groups fell within 182G(c). This means that the entitlements of all the former occupants rank together. This is clear from a literal construction of the subsection.
- The mortgages fell within subsection (d) as both were

created after the creation of the first statutory charge under the Act.

- There is no mechanism in s 182G or Part 10A to accommodate the repayment of the mortgagees in between the First and the Second Group.
- In *South-Eastern Drainage Board (SA) v Savings Bank of South Australia* [1939] HCA 40; (1939) 62 CLR 603 the High Court said that parliament is free to depart from its own prescribed form and override an earlier statute despite absence of the use of the formula. In that case, the High Court said that the *South Eastern Drainage Act 1931* (SA) that created a first charge in respect of construction costs for a drainage scheme took priority over a registered mortgage. There had been no requirement nor any mechanism available for the statutory charge to be registered. Further, the *Drainage Act* did not use the equivalent formula prescribed in s 6 of the *Real Property Act 1886* (SA). Nevertheless, this did not preclude the Court from finding that the statutory charge took priority over the registered mortgage.
- It was the clear intention of the legislature that the indefeasibility provisions of the *Real Property Act 1900* (NSW) were to be overridden by the charges created under Part 10A of the Act in certain circumstances. While the Act does not expressly state that Part 10A is to ‘have effect despite anything contained in this section [42 of the *RPA*],’ this does not preclude the later act from overriding the earlier act by implication.

The Court accepted the construction put forward by the fourth and fifth defendants and found that all the unregistered statutory charges rank ahead of registered and unregistered mortgages (at [99] and [100]).

Conclusion

Statutory charges under the Act rank ahead of mortgages that are created after the land is registered for use as a retirement village and after the creation of the first statutory charge. While the statutory charges themselves are not registered, the certificate of title notes that the property is being used as a retirement village. Therefore, to protect the positions of both the residents and the financiers, it is recommended that:

1. Potential financiers of retirement villages ought to determine: (a) when the first village contract was entered into; and (b) the potential value of the ongoing contributions that will be secured against the land; and
2. Financiers ought to make it a condition of the finance that trust accounts are set up for the incoming contributions to ensure that their security remains protected; and
3. Residents of retirement villages ought to obtain proof that their ongoing contributions have been properly quarantined in trust accounts. In the subject case, the village contracts had provided for the establishment of trust accounts, but the operator had failed to honour their contractual obligation. **LSJ**