Bevan Pty Ltd v Robert Patrick Ltd (1987) NSW Conv R 55-363.

Young J. noted that, in *Wildshut's* case, Needham J. said at 55,122 that:

> "a caveator who seeks to maintain his caveat solely for the purpose of placing pressure upon the registered proprietor to give him something to which he is not entitled, should be ordered to withdraw the caveat."

And that in the *George Bevan* case, Needham J. said at p55,268 that the question whether the caveat should be maintained depends on the balance of convenience between the parties.

The builder argued that these five cases were wrongly decided and that the Court should prefer the Full Court of the Western Australian Supreme Court's approach in *Porter v McDonald* [1984] WAR 271. In that case, the Court said that questions of motive and balance of convenience were irrelevant and that, if a person has a claim over land which appears not to be without foundation, then the caveat is maintained until the hearing of the dispute between the parties.

Young J. noted that the Victorian Supreme Court took a similar view to the New South Wales authorities in *Commercial Bank of Australia v Schierholter* [1981] VR 292 and held that in appropriate cases the Court should substitute a security for the charge provided by the caveat.

Young J. stated that he should continue to follow the New South Wales and Victorian authorities, despite the existence of the Full Court in Western Australia's decision in *Porter v McDonald*, until the New South Wales Court of Appeal determines that the New South Wales decisions should be overrruled.

Young J. held that:

1. motive and the balance of convenience between the parties were relevant considerations;
2. the Court will permit a builder's caveat to be removed before the hearing of the dispute, but only if it is just an equitable to do so;
3. the builder was not entitled to a charge over the land in excess of the amount for which the owners might be liable under the building contract and that the land was not charged with the expenses of litigation to recover that amount;
4. if there was to be a substitute form of security, the builder was entitled to such security as would secure not only the claim but the reasonably costs of litigation.

The Court noted that it now has power in appropriate cases to amend caveats, due to the recently substituted provisions in the Real Property Act 1900 (NSW).

- John Tyrril

Duty of Care - Liability in Negligence - Effect of Contract Provisions

Norwich City Council v Harvey and Ors [1989] 1 ALL ER 1180.

The Plaintiff ("NCC") owned a swimming pool complex. NCC entered into a building contract for extension works to the complex. The contract was with Bush Building (Norwich) Limited ("Bush"). Bush sub-contracted part of the works to the Secondnamed Defendant ("Briggs"). Part of that sub-contracted work was carried out by an employee of Briggs, the Firstnamed Defendant ("Harvey"). Whilst Harvey was carrying out his work he accidently set fire to the existing building and the extension works.

A clause in the contract between NCC and Bush provided that the risk of damage caused by fire to the existing building lay with NCC. Having regard to this clause, no proceedings were brought by NCC against Bush. Rather NCC brought proceedings against Briggs and Harvey. These proceedings were brought in negligence.

On the facts of the case, there was no dispute that, if Briggs and Harvey owed a duty to NCC to take care to avoid damage to NCC's property, then they were in breach of that duty and liable to NCC. Accordingly, the relevant question was did Briggs and Harvey owe a duty to NCC?

The invitation to tender issued by Bush to Briggs, and the acceptance of the tender delivered by Bush to Briggs, stated that the work was to be carried out in accordance with the head contract and that Briggs was bound by the terms of that contract.

May LJ, in the Court of Appeal, examined the decision of Lord Wilberforce in *Anns v Merton London Borough* [1977] 2 ALL ER 492, [1978] AC 728 and subsequent judicial commentary on that decision. His Lordship noted that Lord Keith in the Privy Council in *Yuen Kun-Yeu v Attorney General of Hong Kong* [1987] 2 ALL ER 705, [1988] AC 175 quoted with approval the comments of Gibbs C J in the High Court of Australia in *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 at 13.

At page 1186 May LJ said as follows:

> "In my opinion the present state of the law on the question whether or not a duty of care exists is that, save where there is already good authority that in the circumstances there is such a duty, it will only exist in novel situations where not only is there foreseeability of harm, but also such a close and direct relation between the parties concerned, not confined to mere physical proximity, to the extent contemplated by Lord Atkin in his speech in *Donoghue v Stevenson* [1932] AC 562, [1932] ALL ER REP 1. Further, a Court should also have regard to what it considers just and reasonable in all of the circumstances and facts of the case."

His Lordship then considered this particular case. He said at page 1187:

> "In the instant case it is clear that as between the

employer (NCC) and the main contractor (Bush) the former accepted the risk of damage by fire to its premises arising out of and in the course of the building works. Further, although there was no privity between the employer and the sub-contractor (Briggs), it is equally clear from the documents passing between the main contractor and the sub-contractors to which I have already referred that the sub-contractors contracted on a like basis."

After reviewing the authorities, His Lordship upheld the decision of the trial judge and held that Briggs and Harvey were entitled to the benefit of the provisions in the contract between NCC and Bush whereby the risk in relation to fire lay with NCC.

This case is a good example of a situation where there is a prima facie duty owed, and therefore liability in negligence, but the duty does not crystallise because of provisions contained in a contract between the injured party and a "stranger".

- **Phillip Greenham, Partner, Minter Ellison, Solicitors, Melbourne. Reprinted with permission from the Building Dispute Practitioners" Society Newsletter.**

Final Certificate - Injunction to Restrain Arbitration
Warrandyte High School v Ian Delbridge Pty Ltd and Others, Supreme Court of Victoria, Cummins J.

This was a case in which the Plaintiff High School sought a Supreme Court injunction restraining the Defendant Builder from proceeding with an Arbitration. The Arbitrators were also joined as parties to the proceedings. The High School sought the injunction because the Arbitration Proceedings were alleged to be defectively instituted because a Final Certificate has been issued by the Architect under the Building Contract and the time within which that Certificate could be disputed had passed before the Arbitration was commenced.

The Contract was an Edition 5b Contract and Clause 31(b) provided that the Architect shall issue the Final Certificate within fourteen (14) days of the last to occur of the following events:

(i) The end of the Defects Liability Period;
(ii) The completion of the making good of defects pursuant to clause 26 of the conditions;
(iii) The receipt by the architect of the detailed statement by the builder pursuant to clause 31(c);
(iv) The receipt by the architect of information substantiating the builder's claim if requested under Clause 31(c).
(v) The receipt by the architect of all warranties, certificates, records, drawings and other documents called for under the contract.

A Notice of Practical Completion was given by the Architect on 25 February, 1987 but the Defendant Builder did not submit its final claim to the architect until the 21 December 1987, four (4) months after the expiration of the Defects Liability Period.

On 16 February, 1988 the Architect then issued to the Builder a Final Certificate in the copyright form under the contract which certified that the sum of $28,493.65 was due by the builder to the Proprietor. Accompanying that Final Certificate and other documentation was a letter dated 16 February 1987 from the architect to the builder which stated as follows:

"Enclosed find Contract Summary and Final Certificate which show a final balance of $28,493.65 payable to the proprietor. Note that we have been unable to finalise some variations for which we are awaiting details and information, i.e. variation nos. 61(a), 61(b), 96, 126 and 157. The adjustment to the final balance will be made when you have submitted the information requested. We advise that we have not had your reply to our letters of 4 February 1988 regarding completion of maintenance and rectification items and construction of vanity/sink tops. We advise that we should not release the bank guarantee until payment of the final balance is made to the proprietor and all outstanding work is satisfactorily completed."

Two arguments were raised by the Builder.

The first was that the Final Certificate issued was not in fact a Final Certificate at all, presumably because the architect was seeking the further information set out in the accompanying letter, the text of which is set out above. Mr Justice Cummins had no hesitation in rejecting that argument and found that the document was a valid and an effective Final Certificate as required by Clause 31.

The second argument concerned a question of evidence. The builder gave evidence that the architect had agreed that time under Clause 31 would not run pending negotiations to settle the matter, whereas the architect gave sworn evidence that there was no such agreement that time would not run. On this issue of fact, the judge accepted the evidence of the architect in preference to that of the builder.

The result was that the judge then granted an injunction to the Plaintiff High School restraining the Arbitrators from conducting or proceeding to conduct the Arbitration and further ordered that the builder pay the High School the sum of $28,493.65 plus interest and entered judgment for that sum with costs.

The case represents a warning that if an effective Final Certificate is issued under the contract that it will be effective to terminate any further action under the contract once the time within which a challenge must be made of that final certificate has expired.

- **John Pilley, State Director, BISCOA, Victoria. Reprinted with permission from the Building Dispute Practitioners Society Newsletter.**