

FALGAT CONSTRUCTIONS P/L V EQUITY AUSTRALIA CORPORATION P/L [2005] NSWCA 49

Supreme Court of New South Wales – 3 March 2005

FACTS

Falgat Constructions Pty Ltd (‘Falgat’) entered into a construction contract with ‘Equity Australia Corporation Pty Ltd (‘Equity’) to carry out works for the construction of a residential building at 23-25 Chesterfield Parade Bronte. Falgat sued Equity in the District Court for debt and damages under the contract in the sum of \$414,935.69. The action was stayed pending provision of security of costs in the sum of \$50,000. Falgat then initiated proceedings under the Building and Construction Industry Security of Payment Act 1999 (NSW) (‘the Act’) by serving a Payment Claim under section 13 seeking payment of \$232,114.30. A District Court granted an anti-suit injunction restraining Falgat from pursuing its remedies under the Act pending the final determination of the District Court proceeding. The District Court judge found:

- by inference that Falgat’s purpose was to harass Equity and those proceedings would be vexatious and oppressive;
- that the Adjudication, even though it only had interim affect, would “frustrate this Court’s task”;
- that Falgat had an elected to submit the dispute to the jurisdiction of the District Court and should be held to its election; and “at least generally”, the statutory proceedings should proceed and not follow the institution of Court proceedings and that “generally at least”, the Act was not intended to allow two concurrent adjudicative procedures to be on foot at the same time.

Falgat then applied for leave to appeal.

ISSUE

Whether proceedings under the Contract and under the Act can be on foot at the same time.

FINDING

The Court held that under the Act the statutory rights are only adjudicated on an interim basis and as such they supplement the rights of the parties under the general law. Consecutive proceedings under the Act and the general law are clearly permissible.

Further, the Court held that the Act contemplates that a Court will be free to undertake a final adjudication. Proceedings under the Act may interfere with Court proceedings if they are commenced or carried on close to trial, but this was not the position in the present case. There was no case for election; and the Falgat was entitled to pursue concurrently its statutory and common law remedies. The Court also held that there is no express provision in the Act that requires statutory proceedings to be completed before court proceedings are commenced, and the general provisions of the Act do not have this effect.

QUOTE

Handley JA at paragraph 30 stated:

“The Act contemplates that proceedings in a court of competent jurisdiction will be completed after the statutory proceedings have been completed. This is because s 32 provides that the court is to allow for any interim payments and order appropriate restitution. However, there is nothing in the Act which prevents the proceedings being concurrent. The District Court proceedings have not proceeded any distance, the opponent having filed its application for security for costs before filing a defence or cross claim.”

“I leave to one side, as irrelevant in this case, the possibility of statutory proceedings being commenced shortly before a trial is due to start where the statutory procedures would interfere with the orderly preparation and presentation of the parties’ cases in the Court. In such a case there may well be ample justification for an anti-suit injunction to stop the statutory proceedings. That is not the present situation.”

IMPACT

This case stands for the proposition that consecutive proceedings may be made under the Act and under the Contract.

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