

**FALGAT CONSTRUCTIONS PTY V MASTERFORM PTY LTD [2005] NSWSC 728**

Supreme Court of New South Wales – 3 August 2005

**FACTS**

Falgat Constructions Pty Ltd ('Falgat') entered into a construction contract with Masterform to carry out works building works at 23 to 25 Chesterfield Parade, Bronte. A contractual dispute arose, and proceedings commenced in the Consumer Trader & Tenancy Tribunal ('CTTT'). At the same time as these proceedings were on foot, Masterform submitted a Payment Claim under the Building and Construction Industry Security of Payment Act 1999 (NSW) ('the Act') for \$20,541.49. Falgat, at the time of receiving the claim believed it was simply a statement much the same as previous months statements. Falgat responded, demanding delivery dockets for steel and concrete and did not provide a Payment Schedule under the Act.

Masterform submitted an Adjudication Application under section 17(2) of the Act to the Master Builders Association who awarded the full amount to Masterform. However, Masterform did not provide Falgat with a notice that it intended to apply for Adjudication prior to submitting its Adjudication Application in accordance with section 17(2) of the Act. Section 17(2) provides that if a party intends to apply for adjudication, that party must notify the other of its intention within 20 business days of the due date of the payment and allow a further 5 business days for the provision of a payment schedule before the adjudication application is made to the authorised nominating authority and served on the other party.

Falgat appealed to the Supreme Court contending that the Adjudication Determination was void on the grounds that there was a substantial breach of natural justice due to the failure of Masterform to properly notify Falgat of the Adjudication Application such that Masterform was given no opportunity to file an Adjudication Response.

**ISSUE**

Whether there had been a breach of natural justice.

**FINDING**

The Court found that the scheme of section 17 had not been followed because the Adjudication Application had already been lodged. Accordingly, there had been a breach of natural justice.

**QUOTE**

Macready AsJ at paragraph 36 commented:

*"It is plain that the scheme of s17, in a case where there has been a failure to provide a payment schedule, is to allow a further five days after notice for the respondent to provide a payment schedule and thereafter it allows a further ten days for the lodgment of the Adjudication Application. No doubt this is intended to allow the person who is intending to make an Application to do so by reference to the other party's stated position in the payment schedule which they are given a second opportunity to serve. Section 17(3)(f) requires the Application to identify both the relevant payment claim and payment schedule."*

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Macready AsJ at paragraph 42 held:

*“The Act has specified the time frames for the completion of the steps so as to balance the ability of the parties to prepare the requisite material with the efficiency required to determine these matters. The plaintiff was not given the opportunity to properly put its case to the Adjudicator because it assumed that the time had passed within which it could respond. In my opinion the failure of the defendant to abide by the timetable of the Act constitutes a substantial breach of the measure of natural justice expressly afforded by the Act in accordance [with] the decision of Brodyn.”*

## **IMPACT**

If a Claimant intends to apply for an Adjudication, where the Respondent has failed to provide a Payment Schedule, the Claimant should ensure that the scheme set out in section 17 is strictly followed as a failure to do so will result in a breach of natural justice and miscarriage of the Adjudication process.

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