

FALGAT CONSTRUCTIONS v MASTERFORM
[2005] NSWSC 525
Supreme Court of New South Wales – 23 June 2005

FACTS

Falgat Constructions ('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 Tax Invoice deemed to be 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, however, there was no 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.

Masterform served a statutory demand under section 459G of the Corporations Act. Falgat then brought proceedings seeking to set aside the statutory demand on the grounds that there is a genuine dispute as to the amount due between the parties. Falgat also raised *res judicata*, that as a result of the CTTT proceedings Masterform could not agitate the same issues that were the subject of another proceeding as the Adjudicator holds the status of a judicial Tribunal. Further, Falgat submitted the demand should be set aside as there was an offsetting claim.

ISSUE

Whether an Adjudication Determination is final and conclusive for the purpose of setting aside a statutory demand similar to the decision of a Court or Tribunal.

FINDING

The Court found that an Adjudication Determination is conclusive and *res judicata* is applicable as an Adjudicator is akin to a judicial Tribunal. The Court approved the decision of *Plus 55 Village Management Pty Ltd v Parisi Homes Pty Ltd* [2005] NSWSC 559 and held that a genuine dispute as to the terms of the contract may give rise to a genuine claim which would be the foundation for an off-setting restitutionary claim to be brought pursuant to the contract. The Court concluded that, in the circumstances, there was a genuine dispute for the purposes of section 564 of the *Corporations Act*.

QUOTE

In the course of determining whether or not there was a genuine dispute, Macready AsJ at paragraphs 32 and 33 held:

“[32] The use of submissions satisfies the criteria set out by Lush J to the extent that he refers to the obligation to hear argument. The Adjudicator may as well as having submissions under s 21(4) call a conference of the parties and may carry out an inspection of any matter to which the claim relates. Plainly, the liquidator does not have power to call evidence orally from witnesses. However, given the obligation to receive any documentation it seems that there is an obligation on the Adjudicator to receive written evidence. In these circumstances it would seem to me that an adjudicator is a judicial tribunal.

[33] It does not seem to be denied that there was a judicial decision as a result of the Adjudicator's determination. He decided the amount of an interim payment pursuant to the provisions of the Act. Of course there has to be a final decision on the merits for *res judicata* to apply. There was a submission by the plaintiff that this was not a decision on the merits in that it was dealt with by the Adjudicator in default of receiving any submissions from the plaintiff. It is plain that a judgment obtained by default, like one obtained by consent, will, unless and until set aside, conclude between the parties the matters expressly decided by its operative or declaratory parts. ... Accordingly, it seems to me that the decision of the Adjudicator, to the extent that it is represented by the adjudication certificate, was a final judicial decision on the merits. In these circumstances there is *res judicata* as to that matter.”

IMPACT

An Adjudication Determination is conclusive and *res judicata* is applicable as the Adjudicator is akin to a judicial tribunal but that a genuine dispute for the purposes of setting aside a statutory demand can still exist.

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