

**FALGAT CONSTRUCTIONS PTY LTD v EQUITY AUSTRALIA CORPORATION PTY LTD
[2006] NSWCA 259
Court of Appeal of New South Wales – 19 September 2006**

FACTS

Falgat Constructions Pty Ltd (“Falgat”) entered into a construction contract with Equity Australia Corporation Pty Ltd (“Equity”) to convert a building owned by Equity in Bronte into townhouses. On 13 October 2004 Falgat served a Payment Claim on Equity under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (“the Act”). Equity was required under section 14 of the Act to provide a Payment Schedule to Falgat on or before 27 October 2004.

Falgat sought judgment in the District Court against Equity under section 15 of the Act, claiming that a Payment Schedule had not been received from Equity until 28 October 2004. Equity claimed to have provided a Payment Schedule to Falgat on 22 October 2004 by delivering a copy to its registered office and also by post on or before 27 October 2004. Nielson DCJ decided in favour of Equity, finding that a Payment Schedule had been provided on the dates Equity contended. Falgat appealed the decision of Nielson DCJ to the Court of Appeal.

ISSUES

When is service of a Payment Schedule effected under the Act?

FINDING

The Court held that section 109X of the *Corporations Act 2001* (Cth) dealing with service of documents applies to the provision of Payment Schedules under the Act, and that the Payment Schedule had first been provided on 22 October 2004.

The Court considered Falgat’s claim that it had not received the Payment Schedule by mail until 28 October 2004 due to their mail having been redirected to another address. The Court held that the Payment Schedule was provided by post on or before 27 October 2004 when it would have been delivered to Falgat in the ordinary course of post.

The Court held that Falgat’s appeal was dismissed.

QUOTE

Hodgson JA held at paragraph [54] that:

In the case of leaving a document at a company’s registered office, prima facie the time service is effected would be the time of leaving the document; although, if a document is left there outside normal office hours, at a time when the office is in fact closed, it is at least arguable that service is not effected until the document is either detected by a person acting on behalf of the company, or the commencement of the next period of normal office hours, whichever is the earlier.

Hunt AJA held at paragraph [67] that:

That document is deemed to have been served on the company at the time when it would have been delivered to that address in the ordinary course of post, unless the contrary is proved by the company: *Acts Interpretation Act 1901*, s 29. The company is entitled to prove that the document arrived at its registered office at a different time from that if the document had been delivered to that address in the ordinary course of post. However, it does not do so, again in my respectful opinion, by proving that it arrived at the address to which it had diverted its mail at a different time from that on which the document would have been delivered to its registered office in the ordinary course of post.

IMPACT

Given the strict timetable of the Act, parties should ensure that Payment Claims and Payment Schedules are served carefully and in accordance with the Act and other statutes to avoid later disputes. Delivering documents to a companies registered office remains the most reliable way to ensure correct service.

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