



Leighton v Arogen [2012] NSWCA1370 (6 November 2012)

FACTS

Leighton contracted with Ausgrid to carry out works for the upgrade of electricity supply to the southern suburbs of Sydney and after dispute. Leighton gave written notice to Arogen terminating the contract for convenience. Arogen was required to cease work and to demobilise from the site all person, plant, temporary works, vehicles, equipment and other things owned by or under its control. After notice was served, Leighton took control of the work site and engaged guards to secure it. Later Arogen personnel reoccupied the site and locked themselves in. Leighton made an interlocutory application for an order that Arogen vacate the site as quickly as possible. In response Arogen offered certain undertakings to the Court and to submit to directions that it prepare its case quickly for either an interlocutory or a final hearing.

ISSUE

Whether the Court should grant mandatory interlocutory relief ordering that Arogen vacate the site.

FINDING

The dispute gave rise to a very significant public interest, in that Leighton demonstrated that the work was held up and the completion date for a major public project was being adversely affected. It was accepted that the Court will in limited circumstances grant specific performance of a contract for construction. After considering a careful analysis of the balance of convenience factors, the Court made an order for Arogen to vacate the site on the basis that Leighton gave the usual undertakings as to damages and Arogen was allowed a reasonable time to remove its personnel and equipment.

QUOTE

McDougall J at [28]...“There are very significant and important balance of convenience factors. On the one side, there is the presumption that contracts should be performed according to their terms, and that parties should not be able to buy their way out of contractual obligations by paying damages for breach. That is a powerful consideration in Arogen’s favour...

[29] On the other hand, there is, as I have said, a very strong public interest in completion of the works. There is also the circumstance that the costs of delay are accruing at a very substantial daily rate. Finally, there is the circumstance that whatever the outcome of the termination question may be, the real rights that Arogen has are right in damages, and this is a case where damages would appear to be an adequate remedy for loss of the benefit of the contract if indeed it is proved that Arogen has lost that by reason of some reach on Leighton’s part.

[31]...In those circumstances, and taking into account, as I have already acknowledged, that it is only in a most unusual case that the Court will grant, by way of interlocutory relief, an order of a mandatory nature, nonetheless I think that the balancing of all of those factors requires that the relief be granted in the present case.”

IMPACT

The case demonstrated that the Court is reluctant to grant mandatory interlocutory relief but will do so if required. Where a suitable remedy lies in damages, the court will usually restrain a “lock in”.

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