

FITZ JERSEY PTY LTD V ATLAS CONSTRUCTION GROUP PTY LTD

[2017] NSWCA 53

FACTS

Fitz Jersey Pty Ltd (“Fitz Jersey”) engaged Atlas Construction Pty Ltd (“Atlas”) to design and construct a development project in Sydney. When a dispute arose over final payment, Atlas sought recovery through adjudication. The adjudicator determined that the final payment claim submitted by Atlas for \$11 million was payable in full. Fitz Jersey did not make the payment within the required 5 business days, and commenced a Court action to quash the decision. However, it took no steps to stop Atlas from enforcing payment. Atlas obtained and filed an adjudication certificate with the Supreme Court, creating a judgement debt and requesting a garnishee order on Fitz Jersey’s bank.

Shortly before the first hearing to quash the adjudicator’s decision, the garnishee order was granted and served, and Fitz Jersey’s bank paid \$11 million to Atlas. As noted by counsel for Atlas at the hearing, “the horse has bolted”. Fitz Jersey sought the return of the money.

ISSUE

Whether correct process was followed to obtain a judgement debt and garnishee order-without notifying Fitz Jersey?

FINDINGS

The Court referred to the fundamental application of the Security of Payment Act, whereby Basten JA identified its purpose as providing “a speedy and effective means of ensuring cash flow to builders from the parties with whom they contract”.

The Court found that Atlas was within their rights to obtain a judgement debt, and that the correct procedures were followed to enforce the garnishee order and recover the monies owed. The Court was critical of Fitz Jersey for failing to pay the amount owed into Court at the commencement of proceedings and seek an injunction on that basis.

QUOTE

Addressing the conduct of Fitz Jersey, Basten JA explained the following:

“The conduct of the developer had a dual aspect and revealed a degree of ambivalence. On the one hand, the commencement of proceedings in the supervisory jurisdiction of the Court demonstrated that the developer sought to challenge the validity of the adjudicator’s determination upon which the judgment was based. On the other hand, it had not taken either of the steps available to it, namely, to seek an undertaking from the builder not to take steps to enforce its entitlements under the determination, or to seek interim relief by way of a stay.”

IMPACT

Parties to an adjudication have a statutory obligation to adhere to an adjudicated decision. The Security of Payment Act, together with the availability of Court procedures for enforcement, provides a robust procedure for recovery in the event that a decision is not followed. It is important that both parties consider their rights and obligations under the Security of Payment Act and are aware of their requirements following a decision, and the impact that their actions may have.

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