

**COURT OF APPEAL**

**MORRISON JA**

**Appeal No 9125 of 2015  
SC No 5173 of 2014**

**RCR O'DONNELL GRIFFIN PTY LTD  
ACN 003 905 093**

**Appellant**

**v**

**FORGE GROUP POWER PTY LTD  
ACN 103 678 324**

**MARK FRANCIS XAVIER MENTHA**

**SCOTT DAVID HARRY LANGDON**

**Respondents**

**BRISBANE**

**FRIDAY, 15 JULY 2016**

**JUDGMENT**

**MORRISON JA:** The appeal in this case was on a number of separate questions ordered to be determined ahead of any trial. Those questions concerned the ability of the respondent, Forge, to call on two guarantees which had been given by RCR under a construction contract.

The issue arose because Forge, which had gone into liquidation, announced it intended to call on the guarantees and the appellant, RCR, denied it had any entitlement to do so. Specific issues were excluded from those questions. Among those were the proper assessment of RCR's claim to extensions of time under the contract, the proper assessment of Forge's entitlement to

be paid liquidated damages and the proper assessment of RCRs claim lodged previously and deemed to be certified under the contract in the sum of about \$4.2 million.

The appeal was heard on 10 May 2016. On 24 June 2016, the Court pronounced its orders ahead of giving reasons because the undertaking not to call the guarantees was due to expire on 10 July 2016. In summary, the orders allowed the appeal and declared that Forge was not entitled to call on the guarantees.

The guarantees are due to expire tomorrow, Saturday, 16 July 2016. Forge has now applied for two forms of relief. The first is a stay of this court's orders until the later of 28 business days after delivery of the court's reasons; secondly, the determination of an application for special leave in the High Court; or, if that leave is granted, the determination of the appeal to the High Court.

The second form of relief is for a mandatory injunction compelling RCR before the guarantees expire tomorrow to extend the guarantees until 24 June 2017. That date was selected, no doubt, to accommodate the prospect of special leave being granted and the time for an appeal to the High Court.

In support of the application for an injunction Forge proffers the usual undertaking as to damages from itself and from the individuals who are liquidators. Because of the urgency attaching to this application these reasons will be brief.

As to the stay, I can see no benefit to Forge to a grant of a stay as the guarantees will still expire tomorrow unless the injunction is granted. Mr Dunning QC, appearing for Forge, accepted as much.

In relation to the injunction, some little history is needed to assess this issue. RCR has agreed from time to time to extend the expiry dates of the guarantees. For its part, Forge has agreed not to call on the guarantees pending determination of the separate questions and this appeal. Those agreements are reflected in consent orders, including orders made on 24 February 2015 and 25 August 2015.

On 23 June 2016 RCR proposed that, depending on the court's reasons on this appeal, the orders be extended to cope with the prospect that either party may wish to seek special leave to appeal. The material does not disclose any response to that proposal but, in any event, circumstances have overtaken it.

Forge has requested RCR to extend the expiry dates but RCR has declined to do so, essentially, on the basis that extending the guarantees would incur cost, RCR is financially sound and could meet any orders that Forge might ultimately obtain in the eventual trial and Forge cannot offer to meet RCRs certified claim of \$4.2 million.

There are difficulties confronting the grant of relief and which have persuaded me that relief should be refused. In giving these reasons, I shall refer only sparingly to authority, though many more than I will refer to were included in the material put before me and in the very detailed outlines.

First, the jurisdiction to grant mandatory relief is not doubted but special caution is needed once a party's appeal has been determined by this court. Where special leave has not yet been obtained, exceptional circumstances must be demonstrated in order to obtain a stay. In that respect, I will refer to *Advance Building Systems Pty Ltd v Ramset Fasteners (Aust) Pty Ltd* [1997] HCA 24 and *Gerah Imports Pty Ltd v Duke Group Ltd (in liq)* [1994] HCA 3.

That is because, apart from the case of special leave being granted, the decision of this Court, being the final decision on the question set for determination, is conclusive of that aspect of the litigation. As for that, see *Rahme v Commonwealth Bank of Australia* [1993] HCA 62. The position is no less when the issue is an injunction pending the application for special leave.

Added to that is the fact that the injunction sought here is a mandatory one. Forge has not yet applied for special leave and frankly acknowledges that it has not yet decided to do so. In the absence of an extant application for special leave, this court should be even more cautious about granting relief in the form of either a stay or an injunction, let alone a mandatory injunction.

Secondly, the prospects of special leave cannot be said, in my respectful view, to be substantial. The issues turn upon the construction of a particular private contract. Even if the construction contract itself was in a standard form, the deed of novation was not. The issues of construction of the contract are inextricably affected by the deed of novation. Where private contracts are concerned, that is a well-known ground upon which special leave is often refused. By these comments, I obviously cannot and do not intend to decide the question of special leave. That is not for me but the prospects seem to me to be not substantial.

Thirdly, it is by no means clear to me that Forge will suffer irreparable harm if relief is denied. It has deposed that the existence of the guarantees will assist it in the litigation against RCR but that is hard to understand while it is agreed not to call on them.

RCR has deposed that it is financially sound and will be able to meet any eventual claim by Forge after the trial settles the final assessment of claims. No real issue was taken with RCRs ability to do so. Thus, whilst Forge might lose the right to call on the guarantee, its ultimate claim, if successful, can be met.

Fourthly, the injunction sought would force an alteration in the contractual relations between the parties and between RCR and its bank. There is no issue in the proceedings that Forge has any contractual right, at least post-novation, to force the extension of the guarantees. Extensions to this time have been a matter of agreement to accommodate the resolution of the separate questions. That has occurred but for the prospect of special leave being granted.

The intrusion of a court order to force a party to alter its contractual relations is something which would always be done cautiously, *a fortiori*, where the issues have reached the stage they have and Forge is yet to decide if it will challenge those orders any further.

Fifthly, I do not consider that the injunction is supportable on the basis that it would preserve the “integrity of litigation” as that term is used by Justice McHugh in *Advance Building Systems*.

Private agreements have been reached under which the guarantees have been extended and the right to call on them restrained but they have been private agreements in the course of the parties taking steps to have the separate questions determined. Subject to the prospect of special leave being granted by the High Court, that has occurred.

Sixthly, it is difficult to see that Forge has any contractual or other right in aid of which an injunction might be obtained. The basis upon which it was put was, essentially, that it was within the inherent jurisdiction of the court in order to support what Mr Dunning QC referred to, drawing on Justice McHugh in *Advance Building Systems*, as the “integrity of the litigation.”

The absence of any demonstrable right in aid of which an injunction might be granted, particularly at the circumstances this case has reached, is a matter of concern. Ultimately, I’m not persuaded that the discretion should be exercised in the circumstances here.

Forge has not decided to apply for special leave yet. If it does, it is not clear it will succeed. If it does succeed, and then succeeds in the trial to establish a money claim, RCR can meet it. No irreparable harm will be sustained such as would warrant the grant of extraordinary relief such as a mandatory injunction in circumstances when the orders of the court are not to be stayed because a stay would be inutile.

For those brief reasons, I refuse the application for an injunction and for a stay.

The applicant, Forge, is to pay the respondent’s costs of this application, to be assessed.