

DISTRICT COURT OF QUEENSLAND

CITATION: *Ainsworth v R J Neller Building Pty Ltd & another* [2009] QDC 26

PARTIES: **AINSWORTH, Kjerulf David**
(applicant)
v
R.J. NELLER PTY LTD
(first respondent)
MARTIN, Philip
(second respondent)

FILE NO/S: 1247/07

DIVISION: Civil

PROCEEDING: Application for stay of warrant of execution

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: Ex tempore on 20.02.2009

DELIVERED AT: Brisbane

HEARING DATE: 19.02.2009

JUDGE: Kingham DCJ

ORDER: **1. The application to stay the warrant of execution is refused**
2. The applicant to pay costs assessed on a standard basis

CATCHWORDS: STAY OF EXECUTION – Whether appropriate case – Where previous applications refused – whether changed circumstances justify stay
COSTS – INDEMNITY- Whether appropriate case
Building and Construction Industry Payments Act 2004 (Qld)
Uniform Civil Procedure Rules 1999 (Qld), r 800
R J Neller Building P/L v Ainsworth [2008] QCA 397

COUNSEL: R Anderson for the applicant
L Alford for the first respondent

SOLICITORS: Morgan Conley for the applicant

Ray Barber for first respondent

- [1] HER HONOUR: The plaintiff Mr Ainsworth, engaged the defendant, Mr Neller's company, to renovate a residence on property owned by Mr Ainsworth at Noosa Heads. There is a dispute between the parties about what, if anything, is owed by Mr Ainsworth to Mr Neller for work he performed. The parties signed a standard form minor works contract pursuant to the Building and Construction Industry Payments Act 2004. There is a dispute between them about whether the Act governs their dealings.
- [2] Mr Neller pursued his claim according to the process prescribed under the Act. In May 2007, he secured a favourable ruling from an adjudicator and, having registered the adjudication certificate as a judgment of the court, he took out an enforcement warrant in March 2008.
- [3] In the meantime, Mr Ainsworth commenced proceedings in the District Court seeking, amongst other relief, an order to set aside the adjudicator's certificate for want of jurisdiction. That claim rests on the assertion that Mr Ainsworth was a "resident owner" and the Act does not apply to the dispute.
- [4] Mr Ainsworth has applied for an order to stay that warrant, pending determination of his claim. The application sought a number of orders, including orders directed to the bailiff at Maroochydore. Before me yesterday, counsel for Mr Ainsworth stated a simple order staying the enforcement warrant would achieve the desired result and no further consideration was required of the orders as earlier formulated. The bailiff was named as a second respondent to the application. He informed Mr Ainsworth's solicitor that he would, as was his duty, abide by the order of the court and would not participate in these proceedings.
- [5] There is an unfortunately complex and somewhat lengthy history to the litigation which is at odds with the relatively modest sum involved - approximately \$60,000. In brief:
 - In May 2008, his Honour Judge Dodds refused an application to stay the warrant.
 - Pending appeal of that decision, his Honour Judge Searles granted an interim stay.
 - On 3 November 2008, his Honour Judge Robin SC determined that, at the relevant time, Mr Ainsworth was a resident owner within the meaning of the Act.
 - On 5 November 2008, the Court of Appeal heard the application for leave to appeal Judge Dodd's decision on the application to stay the warrant and, in the alternative, an oral application for the Court of Appeal to stay the warrant. Both applications were rejected by the Court of Appeal in a decision handed down on 9 December 2008.
- [6] Execution of the warrant is now imminent, with an auction of the property currently scheduled for Thursday 26 February 2009.

- [7] Mr Ainsworth's case is that there are changed circumstances since the matter was heard by Judge Dodds and the appeal was determined by the Court of Appeal which justify the court exercising its discretion. Mr Neller disputes that there is any change of circumstances and opposes the order being made.
- [8] The changed circumstances relied on upon are these:
1. Firstly, the consequence of Judge Robin's decision for Mr Ainsworth's prospects of succeeding in these proceedings were not fully appreciated, in part because it was handed down only 2 days before the hearing in the Court of Appeal and Mr Neller's defence of estoppel had not been properly articulated in the pleadings. I will return to this ground shortly.
 2. Secondly, there was no urgency when the Court of Appeal determined the matter as no action was being taken to enforce the warrant – that argument lacks merit. The warrant had been stayed by order of Judge Searles pending the Court of Appeal's decision. Once the court had delivered its decision, there was no impediment to the warrant being executed. There can be no doubt the court was cognizant of that when it made its determination. The sale of property owned by Mr Ainsworth was an obvious consequence.
 3. Thirdly, Mr Neller's interests are protected by Mr Ainsworth having paid the sum claimed into his solicitor's trust account pending determination of the proceedings and his willingness to make payment into court if so required as a condition of a stay. This is one step further than Mr Ainsworth went when the first application was made before Judge Dodds. At that time an undertaking was made not to reduce the equity in the Noosa Heads property below a sum sufficient to meet the amount claimed. Both Judge Dodds and Justice of Appeal Keane noted Mr Ainsworth is a man of means with substantial equity to support his undertaking. Although it is a relevant consideration, I do not regard the payment into the trust account as a material advance on the position as it then was.
- [9] There are other matters which, although there is no change alleged since the question was last before the court, Mr Ainsworth says, justify this court exercising its discretion. They are these:
- There is a risk that Mr Neller's company will be unable to meet any judgment Mr Ainsworth obtains if ultimately successful in these proceedings.
 - Refusal of this application will mean a valuable property is subject to a forced sale to recover only a modest sum. In that regard, Mr Ainsworth is evidently in a position to prevent the sale of the property by meeting the judgment debt. The more cogent consideration is where the risk of recovery should lie in the circumstances.
- [10] I will now return to the argument that the consequences of Judge Robin's ruling for the prospects of success of Mr Ainsworth's case were not properly appreciated when the matter was argued before the court of appeal.

- [11] The allegation that the adjudicator had no jurisdiction to determine the dispute was made in Mr Ainsworth's response to Mr Neller's submissions to the adjudicator in 2007. The adjudicator rejected the submission applying a test which Judge Robin subsequently concluded was an incorrect test. While Judge Dodds referred to the adjudicator's decision, it is clear enough from the submissions made on Judge Dodds behalf that the question was not squarely put before him for his consideration.
- [12] It seems to me, though, that the potential consequences of Judge Robin's ruling that Mr Ainsworth was a resident owner were given detailed consideration by the Court of Appeal. Indeed that decision was placed before the Court as fresh evidence in the appeal and as evidence of new circumstances in support of Mr Ainsworth's application for a stay by the Court of Appeal under r800.
- [13] That Court rejected an argument apparently put in written submissions that the effect of Judge Robin's decision was to conclusively determine that the Act does not regulate the relationship between the parties. It noted a number of arguments still open on that question. In brief, that Mr Ainsworth's private intention to reside in the property once completed is not determinative if:
- The court finds that he contracted with Neller on the footing that he was and that the Act would apply; or
 - That, in the circumstances, he may be estopped from resiling from the representation that arises from ticking the box stating that he was not a resident owner.
- [14] I am asked to view the effect of Judge Robin's decision as establishing a prima facie case the Act does not apply. It seems that Mr Neller has only pursued the estoppel argument which, I note, the Court of Appeal expressed some doubts about. In effect I am asked to come to a different conclusion, however, to that reached by the Court of Appeal because the defence has now been amended to more explicitly plead estoppel only.
- [15] It is abundantly clear that a factor of considerable significance in the reasoning of both Judge Dodds and Justice Keane was the policy underlying the Act that an adjudication made under it should have effect unless and until an inconsistent decision is made by a court of competent jurisdiction. Having explored the strength of Mr Ainsworth's case, Justice Keane, with whom the other members of the court agreed, concluded that Mr Ainsworth's case was not sufficiently strong to displace that consideration.
- [16] I am satisfied that Mr Ainsworth has established a prima facie case to set aside the adjudicator's certificate. I also note the payment of the disputed sum into the trust account, and his willingness to pay that sum into court, and the risk that Mr Neller may not be able to meet a judgement ultimately obtained in these proceedings are factors that weigh in favour of the grant.

[17] Weighed against that are the following factors:

- The evident legislative intention underlying the Act is that there is a speedy and effective process of adjudication to ensure cash flow to builders who operate in a commercial, not a domestic, context. To quote Justice Keane in *R J Neller Building P/L v Ainsworth* [2008] QCA 397, at [39] and [40]:

“[39] It is evidently the intention of the BCIP Act, and, in particular, s 31 and s 100 to which reference has been made, that the process of adjudication established under that Act should provide a speedy and effective means of ensuring cash flow to builders from the parties with whom they contract, where those parties operate in a commercial, as opposed to a domestic, context. This intention reflects an appreciation on the part of the legislature that an assured cash flow is essential to the commercial survival of builders, and that if a payment the subject of an adjudication is withheld pending the final resolution of the builder's entitlement to the payment, the builder may be ruined.

[40] The BCIP Act proceeds on the assumption that the interruption of a builder's cash flow may cause the financial failure of the builder before the rights and wrongs of claim and counterclaim between builder and owner can be finally determined by the courts. On that assumption, the BCIP Act seeks to preserve the cash flow to a builder notwithstanding the risk that the builder might ultimately be required to refund the cash in circumstances where the builder's financial failure, and inability to repay, could be expected to eventuate. Accordingly, the risk that a builder might not be able to refund moneys ultimately found to be due to a non-residential owner after a successful action by the owner must, I think, be regarded as a risk which, as a matter of policy in the commercial context in which the BCIP Act applies, the legislature has, prima facie at least, assigned to the owner.”
- The mere existence of the risk that Mr Neller may not be able to meet the judgment debt is insufficient to disturb enforcement of the certificate. It is the risk that the Act appears to have placed with the owner.
- It is not only the prospects of success in disturbing the certificate that must be considered. There is also the question of Mr Ainsworth's prospects of succeeding in his claims against Mr Neller on the substantive issue – ie what, if anything, he owes for the work done. Mr Neller has complained, at an earlier stage in these proceedings, about a lack of particulars of what is alleged to be wrong with his work and directions were made by this court to facilitate investigation by Mr Neller of the state of the premises so as to assess its quality. In his reasons, Judge Robin noted that when access was given, further building works had been in progress for a couple of weeks and the premises effectively gutted. Whether this was the intended consequence or not, the outcome is that Mr Neller is unable to obtain an expert assessment of the quality of his work. That could have consequence for both parties at the trial. At this stage, however, there remains the arbitrator's determination; itself an independent and expert assessment and it should be accorded due weight in this exercise.

- Finally I am not satisfied that the detriment to Mr Ainsworth of either meeting the judgement in the interim or suffering the sale of a valuable property if he does not, is a significant factor given his evident means and the course that this litigation has taken thus far.

[18] Before concluding, I want to make it absolutely clear that I reject the argument put by Mr Neller's counsel that to grant the stay would render the certificate void and that the application is necessarily a request for final relief. Perhaps that submission was more a rhetorical flourish than a legal argument, although it seemed to me it was put forward as a statement about the legal effect of a stay. This application is entirely different to the circumstances of to which Mr Alford referred me. There can no question that Mr Ainsworth was not seeking final relief.

[19] I decline the application to stay the warrant of execution.

[20] Costs will, of course, follow the event. I have been asked to award costs on an indemnity basis. Mr Alford's argument that the decision not to pursue orders against the bailiff provides some justification is rejected. There is more force in his submission that there has been no relevant change in circumstances since the Court of Appeal rejected the application that it stay the warrant and that to once again seek such relief in this court amounts to vexatious conduct. After a closer analysis of the course of this litigation and the matters ventilated before the Court of Appeal, I do have some concerns about the decision to bring further application for the same relief. Nevertheless, I am not satisfied I should exercise the court's discretion to award indemnity costs in this case.