[2008] QDC 199

DISTRICT COURT

CIVIL JURISDICTION

JUDGE ROBIN QC

No 1247 of 2007

KJERULF DAVID AINSWORTH	Plaintiff
and	
R J NELLER BUILDING PTY LTD (ACN 097 945 581)	Defendant
and	
PHILIP MARTIN	Defendant

BRISBANE

..DATE 14/08/2008

ORDER

CATCHWORDS: Building and Construction Industry Payments Act 2004 s 3, s 18, s 24, s 100 - Uniform Civil Procedure Rules r 483 - separate determination (in building dispute with claim and counterclaim) of issue whether plaintiff was (as he asserted) "resident owner" so as to deny jurisdiction to an adjudicator under the Act

HIS HONOUR: This is a claim commenced on the 2nd of May 2007 in which Mr Ainsworth, the plaintiff, seeks declarations that he is not indebted to the first defendant, a builder, further, that the second defendant lacked jurisdiction to make a determination under the relevant building contract pursuant to the Building and Construction Industry Payments Act 2004. There are additional declarations in that regard sought. The second defendant has indicated his willingness to abide by any orders of the Court, his principal concern being that he not be the subject of any adverse costs order. He's played no role today.

Thus far the claim has the appearance of one that might be brought under the Judicial Review Act 1991 as in Bezzina Developers Pty Ltd -v- Deemah, Stone (Queensland) Pty Ltd [2007] QSC 286, in which the Court of Appeal varied the orders made at [2008] QCA 213.

The first defendant filed a conditional notice of intention to defend on the 29th of May 2007 asserting that the Judicial Review Act was applicable, that the District Court lacked jurisdiction; however the procedures envisaged in Rule 144 of the UCPR were not followed. The first defendant appears to have abandoned its stance by the filing of a defence and counter-claim on the 14th of June 2007.

That document appears to have been prepared by a lay-person and is unsatisfactory in many respects in not responding to the complaints in the statement of claim that the second

defendant acted without jurisdiction, made invalid orders and the like - or to the specific assertion underlying the complaints against Mr Martin that for purposes of the Building and Construction Industry Payments Act 2004, Mr Ainsworth was a "resident owner". If he were such, then by section 3, the Act could not have applied in the way that it was applied. The definition of "resident owner" is to be found in schedule 2 of the Domestic Building Contracts Act 2000. It's in terms of a building owner being the person who arranges for building work to be done, who intends to reside in the building on completion of the domestic building work or within 6 months after the completion of that work. Whether or not it's relevant in the present dispute, I accept there's a genuine issue in respect of whether Mr Ainsworth was a "resident owner".

He has a home in Melbourne and says in his affidavit that he intends the unit in Noosa, where the first defendant did building work for him, to be his second (Queensland) residence; that in the interim when he is in Queensland he is residing in another unit in the same development at Noosa, part of a large development known as Viridian.

For present purposes, I'd accept the submission of his counsel, Mr Anderson, that it's possible for a person to be a "resident owner" in respect of multiple premises and that Mr Ainsworth would have reasonable prospects of establishing that that is what he was in respect of the premises where the first defendant did work until excluded from the site by

Mr Ainsworth. He is presently overseas and not available for cross-examination as Mr Alford, the first defendant's counsel sought.

After a short adjournment in the protracted hearing today, Mr Anderson conceded that the residence issue could not be properly resolved without Mr Alford having the opportunity to cross-examine the plaintiff. Just when he might be available to take the witness box hasn't yet been made clear.

The whole issue of "resident owner" is a false, indeed irrelevant one in Mr Alford's submission because the 2004 Act (he submits) precludes the raising of any issue about it. The Court of Appeal noted in Bezzina at paragraph 2 that subsections (3) and (4) of section 24 provide that the respondent (here Mr Ainsworth) may "give an adjudication response only if the respondent has duly served a payment schedule and the adjudication response may only include as reasons for withholding payment reasons already included in the earlier payment schedule."

The first defendant made a claim under the Act for what would generally be called a progress payment; that claim was dated the 23rd of February 2007, was a one-page document seeking amounts of $59,907.09 including GST as per nominated invoices and a further amount of $1,866 "for replacement and repair of tools and equipment which had been locked at 2 Saville Street Noosa by the client depriving the contractor of his tools of trade."

Mr Ainsworth's "payment schedule", being the response envisaged by section 18 of the Act, was dated the 28th of February 2007. In its assigning of reasons for withholding payment of the claimed amount, there was a general denial that any such amount was owing, a complaint that the work fell below standard and the like.

In those circumstances, the builder became entitled under the Act to engage an adjudicator charged with the task of ruling quickly on the claim.

When the first defendant made its adjudication application, apparently on the 13th of March 2007, a mass of material was provided to Mr Martin or his company, including lengthy submissions which perhaps unnecessarily in paragraph 4 asserted that Mr Ainsworth was not a "resident owner" as the term was defined in section 3(5) of the Act, embroidering that assertion with a considerable amount of further detail. Those assertions happened to precede later paragraphs dealing with the "respondent's reasons for withholding payment". Nevertheless they attracted, and I would say understandably so, a response from Mr Ainsworth in his adjudication response which appears at page 90 and following of the affidavit of Brooke Nicole Milligan filed on the 8th of August.

In paragraph 4 on page 92, in a double negative, the respondent (Mr Ainsworth in this context) denied that he was not a resident owner going on, and I quote:

"The respondent does not rely on the fact that he is a resident owner for withholding payment which is the situation contemplated at section 24(4) of the Act. The respondent relies on his status as resident owner to dispute jurisdiction of the adjudicator to decide this matter."

Unsurprisingly, the adjudicator considered the issue, dealing with it as follows, in his paragraph 5.9 Place of Residence:

"The claimant submits that the project is not the principal place of residence of the respondent. The respondent did not raise this issue in the payment schedule but in the response contends the property is where the respondent intends to live in Queensland. The contract at item 1 states that the owner is not a resident owner.

I am not satisfied that the provisions of the Act which exempt resident owners from the application of the Act apply to the respondent."

The observation regarding the contract which refers to the ticking of one box rather than another is factually correct, it seems, but perhaps beside the point in that that part of the contract is not shown to have any statutory relevance. No explanation has been advanced for the way in which the box to be ticked was selected. Now, it is claimed, the box was ticked erroneously. It doesn't seem to me that the contract determines this issue.

The determination of Mr Martin of the 28th of March 2007 was that an amount of $50,771.74 ought to be paid by Mr Ainsworth and in addition costs and interest. Mr Ainsworth did not make any payment. The first defendant allowed some time to pass for which I don't suggest it deserves any criticism. A year or so later, having filed the adjudicator's certificate in the District Court at Maroochydore, on 3 May 2007 according to paragraph 6 of the reasons of Judge Dodds about to be referred to, it then embarked on procedures, namely an enforcement warrant, to enforce the adjudicator's order as a judgment of the Court (which it became under s 31 of the Act).

Application was made by Mr Ainsworth to Judge Dodds in file 95 of 2007, Maroochydore, on the 23rd of May 2008 was to obtain a stay of the enforcement warrant. The purpose of the application to Judge Dodds was to obtain a stay of enforcement procedures until the determination of this proceeding which ought to work out once and for all the proper state of accounts between the plaintiff and the first defendant.

It's clear from section 100 of the 2004 Act that whatever happens in an adjudication is simply a step along the road and effectively is open to review in an indirect way in the sense that if any payment ordered is inappropriate, the matter can be corrected in the ultimate resolution. That's not to say that an appeal is conducted against what the adjudicator has done or that what he's done is in some way removed from the record.

The present proceeding, that's Brisbane matter 1247 of 2007, is plainly the kind of proceeding that section 100 contemplates. It's on the basis of the money claims which appear in paragraphs f and g of the claim that the District Court may have jurisdiction. Those claims are in

f: "Damages for loss suffered by the plaintiff due to defective workmanship and unfinished work of the first defendant" and in

g: "Damages for legal expenses incurred by the plaintiff in relation to responding to the payment schedule and application for adjudication issued by the first defendant."

I'm concerned in light of the relatively well-known decision in Startune Pty Ltd -v- Ultra-tune Systems Pty Ltd [1991] 1 QdR 192 that the claim and the statement of claim do not clearly show the matter to be within the jurisdiction of this Court conferred by s 68 of the District Court of Queensland Act 1967. In my opinion, the plaintiff should be compelled to amend the claim to show that f and g in aggregate come within the relevant monetary limit. Once that is attended to, to establish a claim within this Court's jurisdiction, then the wide powers conferred on the Court under s 69 to do what the Supreme Court may and ought to do in the circumstances arise.

I am not suggesting that jurisdiction under the Judicial Review Act would be conferred on the District Court in this way. Mr Anderson has been at pains to make it clear that he's not trying to get Mr Martin's order set aside. He or his client has been concerned to be spared having to satisfy the

order until the final state of accounts is determined in this proceeding. It is Mr Ainsworth's approach, as I understand it, that Mr Martin's order having been made without jurisdiction, if his assertions are about being a "resident owner" are made good, strengthens the case against having to satisfy the payment ordered.

Judge Dodds refused the application for a stay but, as paragraph 19 of the reasons show, on the basis of the general approach to be taken to a stay application. All Mr Ainsworth had to go on at that stage was that the first defendant was, "a $2 private company registered since 2001 operating on overdraft secured over real property...and with a charge registered over its assets and undertaking."

His Honour was not prepared to regard those circumstances as justifying the inference that if Mr Ainsworth was successful in this proceeding, "he may not recover the paid over adjudicated amount."

His Honour had specifically noted in paragraph 17 of his published reasons for a reserved decision that it was asserted that because Mr Ainsworth was a resident owner, the first defendant's claim wasn't open and the adjudicator had no jurisdiction. His Honour made no comment about that contention, indeed it's not clear to me to what extent he was asked to make any determination of the "resident owner" issue. My understanding is that there was not before him an affidavit of Mr Ainsworth about it corresponding with the one I have.

An appeal was instituted to the Court of Appeal, CA Number 7018 of 2008, Exhibits 1, 2 and 3, are copies of the Notice of Appeal, Application to Court of Appeal and a letter 4th of August 2008 to the Registrar of the Court of Appeal from Mr Ainsworth's solicitors.

The application Exhibit 2 seeks a stay of the operation of Judge Dodds' order, which dismissed the application to him with costs, of 25th of June 2008 and also a stay of the Enforcement Warrant which had issued from Maroochydore Registry of the District Court on the 6th of March 2008 until the Appeal should be determined. The assumption appears to have been made that an appeal lies as of right. The Notice of Appeal assigns the following grounds:

1. "The learned Judge erred as a matter of law and fact and failing to determine the appellant to be a 'resident owner' for the purposes of the Building and Construction Industry Payments Act 2004.

2. The learned Judge erred as a matter of law in determining the Act as applying to the appellant.

3. Alternatively the learned Judge erred as a matter of law as to the proper construction and effect of section 100 of the Act."

The letter I mentioned refers to the application before this Court today and seeks the alteration of a timetable apparently

proposed for the proceeding in the Court of Appeal because the appeal and application to the Court of Appeal might be superfluous if there is success in the District Court today which, as Mr Anderson now concedes, there will not be - essentially because of the unavailability of Mr Ainsworth for cross-examination.

Matters are in an unsatisfactory state. It appears that the "resident owner" issue is formally before the Court of Appeal in which event it's odd to have it being determined by me. Mr Anderson has foreshadowed that the appeal grounds may be changed. It may be implicit in what Judge Dodds said that he determined that issue but reading what he wrote one suspects that he did not. There seems to have been little evidence before him about it and perhaps for good reason.

The essential purpose of the application before him was to obtain the stay mentioned. Anything to do with the "resident owner" issue was really no more than a make-weight, one would think. It was doubtless an unpleasant surprise to Mr Ainsworth and his advisors, who didn't include Mr Anderson, to find the discretion in relation to a stay exercised in the way in which his Honour exercised it. It is difficult to see that given the lack of evidence on issue, the Court of Appeal could determine the "resident owner" issue. The likelihood is that should that be considered relevant by the Court of Appeal, the question will be remitted elsewhere for consideration.

I'm not inclined today to accede to Mr Alford's submission that section 24 of the 2004 Act in the special circumstances precluded Mr Ainsworth from making submissions about the "resident owner" issue. Although noting that it may not have been open to Mr Ainsworth to raise the matter, it appears Mr Martin did consider the issue, finding sufficient reason to determine it adversely to Mr Ainsworth.

The first defendant having invited the raising of the issue, I'm not inclined to decide now that it was something that could not have been raised before the adjudicator and I say that fully aware of the strong policy of the Building and Construction Industry Payments Act 2004 which Judge Dodds noted in particular in paragraph 20 of his reasons with reference to authority from New South Wales:

"... is to have adjudication in relation to progress payments with a minimum of delay and Court involvement."

His Honour went on to say,

"The party seeking the stay however has the task of persuading the Court of discretionary factors in favour of that course, sufficient to overcome the policy of the Act."

He was not persuaded that Mr Ainsworth had done that.

I think that the determination of that issue does have utility and therefore under rule 483 would order that unless a

different order is made in CA 7018 of 2008 for its determination, the question whether the plaintiff was a "resident owner" for purposes of the Building and Construction Industry Payments Act 2004 be determined separately in accordance with directions which I'll determine after hearing from the parties. Although this is a difficult matter, in the end, I don't accept that what Mr Anderson is seeking to do here is bring an application which ought to be under the Judicial Review Act to challenge Mr Martin's jurisdiction although it is certainly going to be contended in the course of Mr Ainsworth's arguments about what if anything he might owe that Mr Martin's decision was made without jurisdiction. One way or another the payment claim on which the first defendant has succeeded will have to be brought into the overall picture.

As events have turned out here, any chance of the policy of the Act being achieved, that is, prompt payment of contractors and subcontractors in the construction industry evaporated long ago with the indulgence shown by the First defendant, which did not seek to enforce its order seriously until faced with this proceeding which is oft to resolve all issues with the plaintiff.

HIS HONOUR: All right. Well I will note your application for costs but I'll keep that before myself at the moment since I haven't finished yet.

MR ALFORD: Thank you, your Honour.

HIS HONOUR: I'd like to think about it more. Your suggestion is costs reserved, Mr Anderson. Mr Alford, yours is - you want the costs.

MR ALFORD: Yes, your Honour.

HIS HONOUR: And I'll adjourn the consideration of costs.

We'll see you possibly next Wednesday.

MR ALFORD: Thank you, your Honour.
