DISTRICT COURT

CIVIL JURISDICTION

JUDGE ROBIN QC

No 1247 of 2007

KJERULF DAVID AINSWORTH	Plaintiff
and	
R J NELLER BUILDING PTY LTD	First Defendant
And	
PHILIP MARTIN	Second Defendant

BRISBANE

..DATE 03/11/2008

ORDER

CATCHWORDS: Uniform Civil Procedure rules r 5, r 165, r 171, r 280, r 483 re Building and Construction Industry Payments Act 2004 s 3 - separate determination that plaintiff a "resident owner" for purposes of the Act (being upon defendant builder's entitlement to bring a payment claim before an adjudicator) - argument that a person ordinarily resident elsewhere could not qualify rejected - plaintiff's claims for declaration that nothing owed to builder (notwithstanding adjudicator's unsatisfied awards in its favour) and for damages for alleged deficiencies in the work sought to be struck out or permanently stayed - grounds for defendant's application included that plaintiff's expert report foreshadowed in the pleading identifying unsatisfactory work as other particulars of it, were not forthcoming, plaintiff had "gutted" the premises so that while his experts had had access to them to examine the work, there was now nothing for the defendant's expert to see - plaintiff refused to allow defendant's people access to premises within 7 day period nominated in court's order, although offering access two days later.

HIS HONOUR: On the 14th of August, the court's determination whether, for the purposes of the Building and Construction Industry Payments Act 2004, section 3, the plaintiff was a "resident owner" was deferred because of the unavailability for cross-examination on the day of Mr Ainsworth, he being out of the country. I refer to the reasons available at [2008] QDC 199, which, having looked at them again, I may make some minor corrections to, to deal with typing errors.

Today Mr Ainsworth was made available for cross-examination. The consequence of his being a resident owner for the purposes of the Act was to take the relevant building contract, which was entered into in the latter part of 2005, out of the purview of the Act. See section 3 subsection (2)(b). Mr Neller signed the contract on 13 October 2005, Mr Ainsworth on the 31st. The reasons I have referred to indicate that Mr Ainsworth failed to raise this point in the way the Act envisaged. However, the first defendant in effect raised it by asserting, and probably unnecessarily, that Mr Ainsworth was not a resident owner. He quickly responded to that assertion by claiming that he was one, which it seems to me raised the issue for the adjudicator who determined it adversely to Mr Ainsworth on the basis, it would seem to me, that the place was not to be his principal residence. In my view, that fails to apply the correct test.

There are contexts, particularly in revenue legislation, where some sort of concession, for example, in respect of stamp duty or a land tax otherwise exigible, is made available in respect

of a principal place of residence. For obvious reasons, the legislature wishes to limit citizens to a single opportunity to enjoy that benefit. There can be only one principal place of residence. Where the concept of residence isn't qualified in that way, it appeared to me last August that a person might have multiple residences. Mr Anderson has demonstrated, by reference to authority, that courts of high authority have recognised that. See Levene v Commission of Inland Revenue [1928] AC 217, especially at 223("a man may have two homes - one in London and the other in the country"); Gregory v Deputy Federal Commissioner of Taxation (WA) [1937] 57 CLR 774 at 777; and Commissioner of Taxation v Miller [1946] 73 CLR 93 at 99. Mr Anderson has demonstrated that in some other contexts the same idea has been acknowledged, for example, in Logue v Hansen Technologies [2003] 125 FCR 390 and re Vassis [1986] 64 ALR 407, at 413 in the context of inquiry into where Mr Vassis was "ordinarily resident".

The possibility of multiple residences is not enough to provide success for Mr Ainsworth. It is incumbent on him to satisfy the court that he did indeed, at the time of contracting with the defendant for the relevant building work, have the intention to reside in the premises within six months of completion. The relevant townhouse or unit was sold off the plan to a third party from whom Mr Ainsworth purchased the right to become purchaser. In the end that happened. He says his general intention was to have a place at Noosa where he could spend time with his child, now children, given the birth of his two and a half year old daughter, who is a sibling for a six and a half year old son.

Mr Ainsworth's evidence is that he was dissatisfied with the quality of the finishing and fittings of the unit albeit they were new. He says that he has never had any intention of renting it out to others for short term or long term purposes, citing a couple of unhappy experiences in the past when he has done that.

Not until 2008 has Mr Ainsworth had any place he owned at Noosa where he might take his children. This year it seems he has made arrangements to use another unit in the same large development on Noosa Hill. Prior to that, particularly given the young age of the daughter, it was feasible to accommodate the family in a room at the Sheraton Hotel where a cot could be provided for her.

One indicator of Mr Ainsworth's intention to reside in or be the resident from time to time of the premises is that he acquired it in his own name rather than in the name of a company, which has been his pattern in respect of his commercial activities. Mr Alford made much of Mr Ainsworth's experience in that regard, including their having previously crossed swords in the matter of Vanbeelen v. Blackbird Energy Pty Ltd [2006] QDC 285, which I happen to have read. It established that Mr Ainsworth is experienced and successful in business and has some acquaintance with the Act, at least from 11 April 2006: see [2006] QDC 285 at [18]. Those circumstances have some bearing on the significance of Mr Ainsworth's ticking in a box appearing at an early section of the building contract to indicate that he was not a resident

owner. Just below the boxes was a general reference to definitions which could be found on another page of the contract document (which went into 10 or so single pages) that reproduced accurately enough the statutory definition of "resident owner".

Mr Ainsworth explains a lack of interest in going through the contract in sufficient detail to locate, read and understand that definition. He says that he ticked the box he did because he wasn't and never had been a resident of unit 2/3 Morwong Drive, Noosa, although, somewhat curiously, he gives that as his address in his affidavits. Notwithstanding that he had the general long term intention to be living with his children and perhaps new partner when opportunities offered, his principal residence, it has always been clear, is in Victoria.

In this respect I accept Mr Ainsworth's evidence. There are other respects in which I found him far less convincing, for example, in his assertion that he had paid the full contract price to the first defendant, an amount in excess of $117,000. (The precise amount in the contract, which had "commencement" and "completion" dates of 18 October 2005 and 18 December, 2005, is $117,976 is a variation document signed on 30 and 31 January 2006 appears to authorise $14,500 extra.).

There is a document in evidence listing payments for something more than half of that, but not much more. It strikes me it would have been a simple enough matter to adduce today some

evidence that $117,000 had been paid over. Maybe on some future occasion that will happen.

I also thought Mr Ainsworth's evidence unsatisfactory in some other respects and, in particular, his trying to downgrade the status of some plans of a design firm called Minale Bryce. In a number of places the Statement of Claim refers to Minale Bryce plans as the plans and specifications which ought to have been adhered to by the first defendant.

In respect of the issue which has been determined today under rule 483, however, I do accept Mr Ainsworth's evidence and I do that in the face of certain indications about which he may have been somewhat evasive that he is receptive to the notion of selling the property. He agrees he listed it with an agent this year, but was unwilling to concede that a document found by the defence rather suggests that between May and December last year the property was also listed with an agent. Mr Ainsworth said he didn't recall that. I accept from him that listing a property with an agent doesn't necessarily indicate a willingness or a desire to sell the property. Fluctuating financial circumstances may well have their influence here. If I understood the documents correctly, Mr Ainsworth had the property listed at a price markedly in excess of what he paid. If I recall correctly, he indicated that if he was going to acquire somewhere to live in the Sunshine Coast area, his judgment was that for the purposes of preservation or enhancement of capital value, it would be better to be located in Noosa than elsewhere.

Mr Ainsworth denied that the only reason why the contract with the first defendant was in his name personally was that Mr Neller had insisted on it. He also denied saying to Mr Neller that the high quality design elements he was introducing to the unit had been settled upon because they would make the property more attractive to potential buyers.

For what it's worth, it seems to me that many in the community, if not most, in determining how to treat their own homes or their own holiday homes, would give a good deal of thought to what might enhance their market value in the event of sale.

There was some discussion early in the hearing about rule 165(2) when Mr Anderson, for the plaintiff, objected to Mr Alford's proposal to call for the defendant on the resident owner issue, both Mr Neller and Mr Chatwood, the manager of the relevant resort who was brought to court under subpoena. When Mr Alford had the opportunity to have a discussion with Mr Chatwood after his arrival, he withdrew any application to call Mr Chatwood. It rather seemed that the thought of calling Mr Neller came to an end as well.

It appears to me that the situation comes full square within rule 165 subrule (2). The relevant pleading in the amended defence and counterclaim of the first defendant filed the 23rd of October 2008 is, and I quote:

"The defendant does not admit to the allegation in paragraph

3B of the amended Statement of Claim as the plaintiff is estopped from making such an allegation by the plaintiff's own representation in ticking the 'resident owner' box on the written minor works contract dated 31 October 2005 (the contract) which the plaintiff induced the defendant to rely upon in entering into the contract and which was so relied upon by the defendant.

The defendant further says that the plaintiff cannot rely on a pleading asserting his own illegality by way of misleading or deceptive conduct, or conduct likely to mislead or deceive contrary to section 38 of the Fair Trading Act 1989 (Qld) to found a cause of action."

The foregoing is a non-admission within rule 165.

I believe we reached a point early in the hearing that the court would not be considering issues of estoppel today. The outcome in respect of the rule 483 aspect is that the court determines that at relevant times Mr Ainsworth was a resident owner within the meaning of the Act. Whether by ticking the wrong box he became estopped from asserting himself to be a resident owner is a question for another day.

The other aspect of today's hearing is an application by the first defendant which seeks the striking out of most of paragraph 10 of the amended Statement of Claim under rule 171, alternatively a permanent stay in relation to the bulk of the claim.

Paragraph 10 is:

"In breach of the Contract, the first defendant:

(a) in undertaking the Works failed to adhere to the plans and specifications on Minale Bryce Plan no B1688 8/9/05 which formed part of the Contract being a principal term pleaded at paragraph 7(a)herein;

(b) in breach of the term described at paragraph 7(b) herein invoiced the plaintiff for works in addition to the Contract Works, for which there was no agreement between the plaintiff and defendant and which did not form part of the Works (the 'Additional Works');

(c) in breach of the term described at paragraph 7(b) herein purported to charge the plaintiff for the Additional Works on a cost plus basis imposing a 20 per cent margin on the GST inclusive price of supplier invoices for which there was no agreement;

(d) in breach of the term described at paragraph 7(c) herein the first defendant sought and was paid a deposit of more than 5 per cent of the Contract's fixed price;

Particulars

Upon request of Richard Neller for the first defendant the precise time, date and circumstances of which is not presently recalled, the plaintiff paid the first defendant $10,000 when the deposit amount was $5,898.80.

(e) in breach of the term described at paragraph 7(d) herein the first defendant failed to have the Works completed by the Completion Date or at all;

(f) in breach of the term described at paragraph 7(b) herein the first defendant charged for other labour, such as numerous site meetings for which there was no agreement under the Contract;

(g) despite demand in breach of the term described at paragraph 8(a) herein the first defendant did not provide evidence of the cost of prime cost items of provisional sums or invoice the plaintiff before payment or progress payments;

(h) in breach of the terms described at paragraphs 8(b) and (c) herein the first defendant did not carry out the Works in an appropriate and skilful way nor with reasonable care and skill in accordance with Australian Standards.

Particulars

An expert report will be provided in accordance with the Uniform Civil Procedure Rules 1999."

All of that is sought to be struck out except for (d).

In addition, in the prayer for relief, the application seeks to have struck out the claim to a declaration that the plaintiff is not indebted in any amount to the first defendant and a claim for damages (a) for loss suffered by the plaintiff due to the defective workmanship and unfinished work of the first defendant, and (b) for legal expenses incurred by the plaintiff in relation to responding to the payments schedule and application for adjudication issued by the first defendant in an amount to be particularised but not exceeding $250,000.

The other aspect of the amended Statement of Claim filed on the 3rd of September 2008, which follows the original one filed with the claim on the 2nd of May 2007, is the so-called "promise" of an expert report. That "promise" is not only in paragraph 10, but also in other places such as paragraphs 12 and 13.

The intended author of the report has been identified, Mr Ainsworth says in his evidence, confirming what his legal representatives have been saying, that there is no report yet. The consequence is that the first defendant has had no particulars of what is allegedly wrong with its work. It has attempted to engage its own expert, Mr Helmold, who, with legal representatives, attended the relevant premises on the 27th of August 2008 for the purpose of enjoying the access contemplated in my order of the 20th of August 2008.

That order has not been complied with in circumstances where attempts made by the parties' representatives to identify a convenient time for the first defendant and its people to have access proved unavailing. Therefore the first defendant's party turned up on the last day. Essentially they were denied access on the plea that a builder was in the premises. Enough access was granted to permit Mr Helmold to take some pictures and for all present to appreciate that essentially the interior of the premises had been gutted, VJ boards and plastering removed and the like.

Mr Helmold inevitably reached a view that there was nothing he could do about providing an assessment of the quality of the first defendant's work. It is accepted by the first defendant that what I've called the gutting of the premises had been under way for a couple of weeks, which means it had started by the 14th of August.

Access was offered on the 29th of August 2008 when the "building" work then in progress was likely to be completed. I take it that was essentially demolition. Mr Ainsworth said in his evidence that the place is still not liveable, indeed he's deciding just what he wants to do with it and when, which may be affected by financial considerations. As I understood it he is now ambivalent about the asserted intention to reside in the premises on the basis of discovering that other owners in surrounding units in the resort are apparently making their properties available to the rental or holiday market.

It is troubling to find that the demolition work referred to was commenced on the eve of the matter coming before me in August. There may be aspects of coincidence there given Mr Ainsworth's evidence that it's taken him a lot of time and effort to locate a builder in whom he has confidence to do the work. If there'd been anything smacking of an attempt to frustrate the Court's order by tampering with the real evidence, that would be a matter of concern, but it appears everything that happened relevantly preceded the Court's order.

There is a technical breach of my former order in the plaintiff's failure to allow the first defendant access by the 27th of August 2008, however nothing appears to turn on that and nothing was lost, except perhaps some costs so far as the defendant was concerned by the couple of days' delay which the plaintiff, or those working for him, forced.

I can see no merit in an application under rule 171 which, in my opinion, focuses narrowly on the contents of the pleading, whose future is in jeopardy if it has any of its deficiency listed in subrule (1). I construe subrule (2) not as an independent grant of power to the Court standing on its own, but as available if subrule (1) applies.

The first defendant's complaint is not really about the pleading, but about the pleading in its context and the inability which Mr Alford asserts for the first defendant to

get a fair trial now that the evidence has been destroyed.

Counsel have not been able to present to the Court any authority in the civil area of the kind that's available in the criminal jurisdiction for the striking out of proceedings or the staying of them on the basis that there can't be a fair trial.

The relevant considerations came before the High Court in Jago v. District Court of New South Wales (1989) 168 CLR at 23 where the Chief Justice in paragraph 3, having referred to some civil cases, stated that:

"The criteria for determining what amounts to injustice in a civil case will necessarily differ from those appropriate to answering the question in a criminal context. However, for the purpose of applying the principles of abuse of process, the distinction to be drawn between criminal and civil proceedings is not a rigid and inflexible one. It's the nature of the proceedings, not their formal classification that's important."

It's trite to observe that it frequently happens that evidence which it would have been extremely useful to have is unavailable - for example, where an assertion is made that a person recently deceased promised some benefit to the plaintiff who appears to have a huge advantage from being able to give evidence which the deceased is not there to controvert. There are many cases of that kind which get to

trial. The loss of an opportunity to send in an independent expert to assess building work may arise through circumstances such as cyclone or fire supervening.

Mr Neller would have available the evidence of himself and his staff or subcontractors to attest to the quality of his work. One would think in the ordinary course he would be able to do so personally without having to involve too many others.

Mr Anderson has frankly conceded - I think he had to - that in these circumstances, if things are at all finely balanced, Mr Ainsworth, who has the onus of proof in respect of what he contends in his Statement of Claim, may well be seriously embarrassed if serious difficulty for the first defendant appears to flow from the destruction of much of the internal fabric of the premises so that Mr Ainsworth and his expert, if that gentleman ever produces a report, appear to have an unfair advantage.

I don't think judgments along these lines can be made in advance of the trial, as Mr Alford seeks today. The judgments will have to await the day of trial so that the court can make an assessment, whether it really feels affirmatively satisfied of assertions that the defendant, by reason of conduct of the plaintiff, may have been precluded from responding to by evidence of similar quality.

The consequence is that the first defendant's application filed on the 23rd of October 2008 must be refused.

Otherwise what emerges from today is the court's determination that at the time of the contract referred to in the Statement of Claim the plaintiff was a resident owner for purposes of the Building and Construction Industry Payments Act 2004.

MR ANDERSON: If your Honour pleases, we'd seek the costs of those applications.

HIS HONOUR: What happened last time? One of the things that can be said against you is that Mr Ainsworth possibly shouldn't have brought the thing on on the 14th of August.

MR ANDERSON: Your Honour reserved the costs-----

HIS HONOUR: Were they reserved.

MR ANDERSON: -----but you dealt with the costs of the appearance on that day, so that issue has been dealt with. So really what is left are the costs of the application, and Mr Ainsworth has been successful in that respect.

HIS HONOUR: Yes.

MR ALFORD: Your Honour, as for the 14th, I'll see if I can paraphrase, because it was quite difficult your Honour's order.

At the end of the day I only managed to scribble down that it was containing the costs awaiting today.

MR ANDERSON: It's in the order. It reads as follows: That the costs of the application in both parties be reserved except for the costs of preparation by and appearance by counsel on 14 August, in respect of which the question of who should pay the costs of the first defendant only is reserved.

HIS HONOUR: That is what's reserved.

MR ANDERSON: Yes.

MR ALFORD: Do I take it then in terms of the costs of the 14th of August, as Mr Ainsworth wasn't present and is present today, that it would be appropriate that your Honour award the costs of the 14th of August to the first respondent and I think-----

HIS HONOUR: That is the easy part. What about the other part? What about the plaintiff's costs of today?

MR ALFORD: Of today? The plaintiff's costs of today, I would - I appreciate, your Honour, the rule that costs follow the event and I appreciate my learned friend's submission in relation to costs following the event. It is possible for the court to decide otherwise if there are unusual circumstances or facts that are lets say most extraordinarily placed before the court in seeking the court's judgment.

The exceptional circumstances in today's hearing were particularly in relation to the second of the issues, the

striking out. Your Honour, the exceptional circumstances were that your Honour was faced with a very difficult decision in relation to the destruction of evidence, something, your Honour, which I imagine you haven't been placed in such a situation before in your long experience and something which your Honour grappled with in terms of authority in this matter.

This exceptional circumstances of the destruction of the evidence, of the gutting, as your Honour put it, of the premise, in my submission should mean that in the second matter of today, which is the striking out, that each party should pay its own costs. I can't, under the circumstances, offer your Honour - possibly I could submit that - it would fall on deaf ears if I said that it should be paid by the respondent but I would suggest in these exceptional circumstances each party should bear, in the second matter, it's own costs.

In the first matter, in relation to Mr Ainsworth being a resident owner, on the grounds of today, and I can understand my learned friend's submissions, I again say to your Honour that if there was a detailed argument or an argument which went to the heart of the Building Construction Industry Payments Act and in fact, your Honour, a matter that has in fact now tested - in my view, in terms of authority in Queensland, has tested this element of the Building Construction Industry Payments Act for the first time. That is really the juxtaposition, wasn't it, of the fact that a

contract is in a sense the first element of an adjudicator's decision and he followed on from that basis and whereas this ruling is a ruling which will certainly be a precedent in terms of the written contract being subsumed by later assertions. I would again argue that each party should pay their own costs.

HIS HONOUR: I don't need to hear from you.

MR ANDERSON: Does your Honour need to hear me in respect of the question of the first defendant's costs of the 14th of August though?

HIS HONOUR: I am going to order to you pay those unless you talk me out of it.

MR ANDERSON: Yes, that's what I seek to do. The test of that question really - in my submission, the first defendant should bear his own costs of that occasion and the reasons are: Nothing has happened since then that justified the adjournment. That is, following the adjournment the first defendant put on a defence which made only a non-admission of the very issue that's before your Honour. He was therefore unable to bring forward any evidence on today. All that resulted was that he was permitted to cross-examine Mr Ainsworth, which, in the outcome, proved to be an effort of inutility. So he should not have his costs of the previous hearing because nothing has been gained by the exercise. That's all I wish to say about that.

HIS HONOUR: I will order the plaintiff's costs of today be paid by the first defendant and that the first defendant's costs reserved by the order of the 14th of August 2008 be paid by the plaintiff.

MR ANDERSON: Just before your Honour rises, may I clarify that the opening words of the order 14 made last time, that is that the costs of the application of both parties be reserved, that has now been subsumed by your Honour's-----

HIS HONOUR: Sorry, what did I reserve?

MR ANDERSON: It says: The costs of the application of both parties be reserved.

HIS HONOUR: I thought there was something specific about the costs of the first defendant.

MR ANDERSON: Yes, there is. It's in two parts. The costs were reserved except for the consideration of the question of who is to pay the costs of attending - sorry, of the first defendants attending last time around. Your Honour's order now means that the plaintiff is to pay the first defendant's costs of attendance on the 14th of August but, as I understand it-----

HIS HONOUR: There is no order about the other costs?

MR ANDERSON: Otherwise my submission would be consistent with what your Honour just ordered; that the first defendant would otherwise be playing the plaintiff's costs of the application.

HIS HONOUR: I make no order about those other costs.

MR ANDERSON: Thank you.

HIS HONOUR: It's only the specific costs of the first defendant that were reserved that I am making you pay today.

MR ANDERSON: Yes.

HIS HONOUR: If there are other costs, I suppose they might remain reserved, but I am not going to make any other order about that.

MR ANDERSON: The order that your Honour has made means that the first defendant is to pay the plaintiff's costs of and incidental to the hearing of the separate question.

HIS HONOUR: Yes, today, yes.

MR ANDERSON: Yes, which is the hearing of the 7th.
