

SUPREME COURT OF QUEENSLAND

CITATION: *R J Neller Building P/L v Ainsworth* [2008] QCA 397

PARTIES: **R J NELLER BUILDING PTY LTD** ACN 097 945 581
(respondent)
v
KJERULF DAVID AINSWORTH
(applicant)

FILE NO/S: Appeal No 7018 of 2008
DC No 95 of 2007

DIVISION: Court of Appeal

PROCEEDING: Application for Stay of Execution

ORIGINATING COURT: District Court at Maroochydore

DELIVERED ON: 9 December 2008

DELIVERED AT: Brisbane

HEARING DATE: 5 November 2008

JUDGES: Keane and Fraser JJA and Fryberg J
Separate reasons for judgment of each member of the Court,
each concurring as to the orders made

ORDER: **1. Application for leave to appeal struck out**
2. Application for leave to amend the notice of appeal struck out
3. Application for stay of execution refused
4. Applicant to pay the respondent's costs of each of the applications to be assessed on the standard basis

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL - PRACTICE AND PROCEDURE – QUEENSLAND – STAY OF PROCEEDINGS – WHEN REFUSED – where the respondent was successful in an adjudication of its claim for payment from the applicant for work performed under a construction contract – where the respondent obtained an enforcement warrant against property owned by the applicant based upon the adjudication certificate – where the applicant commenced proceedings against the respondent seeking an order that the adjudication be set aside and damages for breach of contract – where the applicant applied to have the enforcement warrant set aside – where the applicant applied for a stay of the enforcement warrant – whether the learned primary judge erred in dismissing the applications – whether this Court may order a stay of the enforcement warrant pursuant to r 800 of the *Uniform Civil Procedure Rules* 1999 (Qld)

CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – where the applicant engaged the respondent to carry out renovations to his property – where the applicant, in signing the standard form contract, declared that he is not a "resident owner" – where the respondent carried out the work – where the applicant refused to make all payments to the respondent for the work completed – where the respondent sought to rely upon the provisions of the *Building and Construction Industry Payments Act 2004 (Qld)* – where the applicant now claims to be a "resident owner" – whether the provisions of the Act apply to the contract between the applicant and respondent

Building and Construction Industry Payments Act 2004 (Qld), s 3, s 31, s 99, s 100

Domestic Building Contracts Act 2000 (Qld), Sch 2

Uniform Civil Procedure Rules 1999 (Qld), r 800

Alexander v Cambridge Credit Corp Ltd (1985) 2 NSWLR 685, cited

Brodyn Pty Ltd v Davenport (2004) 61 NSWLR 421;

[2004] NSWCA 394, cited

Cook's Construction P/L v Stork Food Systems Aust P/L

[2008] QCA 322, considered

Deputy Commissioner of Taxation (Vic) v Yosemite

Afforestation Pty Ltd (1988) 19 ATR 1326, cited

R J Neller Building Pty Ltd v Ainsworth [2008] QDC 129, approved

COUNSEL: R J Anderson for the applicant
L C Alford for the respondent

SOLICITORS: Morgan Conley for the applicant
Ray Barber for the respondent

- [1] **KEANE JA:** The applicant, Mr Ainsworth, is the owner of a residential property at Noosa Heads. By a contract in the standard form known as the Queensland Master Builders Association Minor Works Contract dated 31 October 2005, the respondent, R J Neller Building Pty Ltd ("Neller"), agreed with Ainsworth to carry out renovations to the property. Neller proceeded to carry out the work but Ainsworth claimed that it was defective. As a result, Ainsworth refused to make all the payments claimed by Neller.
- [2] On 26 February 2006 Neller served upon Ainsworth a payment claim for \$59,907.09 under the *Building and Construction Industry Payments Act 2004 (Qld)* ("the BCIP Act").
- [3] Ainsworth disputed Neller's claim, and the dispute proceeded to adjudication under Pt 3 of the BCIP Act. On 28 March 2007 it was adjudicated that Ainsworth was obliged to pay Neller the sum of \$50,771.74.

- [4] On 3 May 2007 the adjudication certificate was filed in the District Court at Maroochydore. By virtue of s 31 of the BCIP Act, the adjudication certificate thereupon took effect as a judgment of the court.
- [5] On 2 May 2007 Ainsworth commenced action BD 1247 of 2007 against Neller in the District Court at Brisbane. In this action, Ainsworth seeks an order that the adjudication be set aside as invalid. Ainsworth also seeks damages for breach of contract in respect of the allegedly defective building work performed by Neller on Ainsworth's Noosa Heads property. These proceedings may be brought, notwithstanding the adjudication in Neller's favour, because of the provisions of s 100 of the BCIP Act.
- [6] On 6 March 2008 Neller sought and obtained an enforcement warrant in relation to Ainsworth's property at Noosa Heads based upon the adjudication certificate filed in March 2007.
- [7] Ainsworth then applied to the District Court seeking to have the enforcement warrant set aside. Ainsworth also applied to the District Court for a stay of the enforcement warrant under r 800 of the *Uniform Civil Procedure Rules 1999* (Qld) ("the UCPR") pending the determination of his claim in BD 1247 of 2007.
- [8] On 25 June 2008 both of Ainsworth's applications were dismissed by the District Court. In rejecting Ainsworth's application for a stay of the enforcement warrant pending the determination of BD 1247 of 2007, the learned primary judge, Dodds DCJ, concluded:

"The relief sought by Ainsworth requires the exercise of the [court's] discretion in his favour. In that regard it is submitted he is a person of substance with a substantial equity in the property at the centre of the dispute and will undertake not to diminish that equity below \$150,000 whereas Neller is a \$2 private company registered since 2001 operating an overdraft secured over real property where the security is not provided by it and with a charge registered over its assets and undertakings. Although the principal, Mr Neller may be a registered builder for many years with a relatively large annual turnover, there is a risk that if ultimately successful in 1247 of 2007, Ainsworth may not recover the adjudicated amount from Neller if it is paid to Neller now.

No doubt execution of a judgment upon an adjudication under the Act could in an appropriate case be stayed even though the policy of the Act is for progress payments with a minimum of delay and court involvement (*Brodyn Pty Ltd v Davenport & Anor* (2004) NSWCA 394 at paragraph 87). 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.

I am not persuaded Ainsworth has done so. I am simply asked to infer that if Ainsworth is successful in 1247 of 2007 he may not recover the paid over adjudicated amount. Nothing other than that mentioned above to support that inference has been provided.

On the other hand, a stay of the judgment based upon the adjudication will defeat the plain policy of the Act."¹

The applications to this Court

- [9] Ainsworth seeks leave to appeal to this Court against these decisions, leave being necessary under s 118(3) of the *District Court of Queensland Act 1967* (Qld) because the decisions in question were interlocutory.²
- [10] In relation to the proposed appeal, the grounds of appeal which Ainsworth originally sought to advance were in the following terms:
- "(1) The learned judge erred as a matter of law and fact in failing to determine [Ainsworth] to be a 'resident owner' for the purposes of the *Building and Constructions Industry Payments Act 2004* (Qld) ('the Act')
- (2) The learned judge erred as a matter of law in determining the Act as applying to [Ainsworth];
- (3) Alternatively, the learned judge erred as a matter of law as to the proper construction and effect of section 100 of the Act."
- [11] Ainsworth seeks leave to amend his notice of appeal in order to bring the grounds of his proposed appeal into conformity with the arguments which he actually seeks to advance on that appeal. It may be that this application is unnecessary or inappropriate given that, in the absence of a grant of leave to appeal, there is currently no live appeal. It is not necessary to determine this question. In this Court, Ainsworth seeks leave to abandon the grounds of appeal originally advanced and, in their place, to propound the following:
- "(1) The learned Judge erred in failing to give any or any sufficient weight to [Ainsworth's] prospects of successfully advancing, in the separate proceedings commenced by him in the District Court, that:
- (a) he was not a 'resident owner' for the purposes of [the Act];
- (b) he was not liable to [Neller] under the Act or otherwise;
- (2) The learned Judge failed to give any or any sufficient weight to his finding that ([2008] QDC 129 at para 19) 'there is a risk that if ultimately successful in [the separate proceedings] [Ainsworth] may not recover the adjudicated amount from [Neller] if it is paid to [Neller] now';
- (3) The learned Judge erred in failing to exercise his discretion to stay the operation of the enforcement warrant."
- [12] Ainsworth does not now seek from this Court an order that the learned primary judge erred in failing to set aside the enforcement warrant. The only substantive order now sought by Ainsworth in his proposed appeal is that:

¹ *R J Neller Building Pty Ltd v Ainsworth* [2008] QDC 129 at [19] – [22] (citation footnoted in original).

² *Deputy Commissioner of Taxation (Vic) v Yosemite Afforestation Pty Ltd* (1988) 19 ATR 1326.

"The order of the District Court ... made on 25 June 2008 be set aside and **in lieu thereof it be ordered that the enforcement warrant issued by the District Court at Maroochydore on 6 June 2008 be stayed pending the determination of proceedings in the District Court at Brisbane, no 1247 of 2007 or further order**".
(emphasis in original)

- [13] Accordingly, the sole purpose of the proposed appeal to this Court is to seek an order for the stay of the enforcement warrant pending the determination of the action BD 1247 of 2007 commenced by Ainsworth.
- [14] Alternatively, Ainsworth seeks from this Court, pursuant to r 800 of the UCPR, a stay of the enforcement warrant pending the determination of the District Court action.
- [15] On 3 November 2008 in BD 1247 of 2007, Robin DCJ determined a separate question in that action, namely "whether [Ainsworth] was 'a resident owner' of the property the subject of this proceeding, within the meaning of the [BCIP Act]." The effect of his Honour's determination was that Ainsworth was a resident owner of the property in question at the time of the making of the contract between the parties.
- [16] Ainsworth's applications pending in this Court came on for hearing on 5 November 2008. At this time, without objection from Counsel for Neller, Ainsworth adduced evidence of the decision of Robin DCJ, and sought to rely upon this decision as fresh evidence in his proposed appeal and as evidence of new circumstances supporting Ainsworth's application to this Court under r 800 of the UCPR.
- [17] One cannot contemplate this welter of litigation without reflecting uneasily upon the irony that the parties should have become so embroiled in disputation, delay and expense over such a modest amount of money as a result of the invocation of legislation the evident purpose of which was to provide "a mechanism to ensure that disputes concerning the amount of such payments are resolved with the minimum of delay."³

The application for leave to appeal

- [18] Both parties were content to treat the arguments advanced in support of the application for leave to appeal as their arguments on the merits of the proposed appeal. Those arguments may be discussed by reference to Ainsworth's prospects of success in action BD 1247 of 2007 and the concern that, without a stay, success in that action may be rendered nugatory.

Ainsworth's prospects of success in BD 1247 of 2007

- [19] In *Cook's Construction P/L v Stork Food Systems Aust P/L*,⁴ I observed, albeit in the context of a discussion of the discretion to grant a stay of an order of the court pending a decision on appeal:

"In cases where this Court is able to come to a preliminary assessment of the strength of the appellant's case, the prospects of success on appeal may weigh significantly in the balance of relevant considerations. The prospects of success will obviously tend to favour the refusal of a stay if the prospects of the appeal can be seen

³ *Brodyn Pty Ltd v Davenport* [2004] NSWCA 394 at [51].

⁴ [2008] QCA 322 at [13] (citation footnoted in original).

to be very poor (*Alexander v Cambridge Credit Corp Ltd* (1985) 2 NSWLR 685). That is because, if there is obviously little prospect of ultimate reversal of existing orders, the concern to ensure that the existing orders can be overturned without residual injustice will have less claim on the discretion than might otherwise be the case."

- [20] The principal substantive argument on which Ainsworth relies is that the adjudication of 28 March 2007 was of no effect because the operative provisions of the BCIP do not apply to a contract between a builder and a "resident owner". In this regard, it is said that Mr Ainsworth is, and was at all material times, a resident owner because of his intention to live in his Noosa Heads property.⁵
- [21] At this point it is necessary to refer briefly to some of the relevant provisions of the BCIP Act.
- [22] Section 3(2)(b) of the BCIP Act provides relevantly that the BCIP Act does not apply to:
- "a construction contract for the carrying out of domestic building work if a resident owner is a party to the contract, to the extent the contract relates to a building or part of a building where the resident owner resides or intends to reside ..."
- [23] Section 3(5) of the BCIP Act provides relevantly that in s 3 of the BCIP Act: "**resident owner**, in relation to a construction contract for carrying out domestic building work, means a resident owner under the *Domestic Building Contracts Act 2000*, schedule 2 ..."
- [24] By Sch 2 of the *Domestic Building Contracts Act 2000* (Qld), a "resident owner" is a building owner who:
- (a) is an individual; and
- (b) intends to reside in the building—
- (i) on completion of the domestic building work; or
- (ii) within 6 months after the completion of the work."
- [25] It is common ground between the parties, and it is clearly the case that, whether or not Ainsworth is a "resident owner" for the purposes of the BCIP Act is a matter to be established at the time of the making of the contract between the parties.
- [26] That Mr Ainsworth may also have been resident elsewhere is said to be no obstacle to the success of this argument because it is trite law that an individual may reside in more than one location. Mr Ainsworth argues that the learned primary judge failed to appreciate this simple point. In fairness to the learned primary judge, though, one should observe that it does not appear that any attempt was made to argue this point before his Honour. It is difficult to see how his Honour can sensibly be said to have proceeded on a contrary view. The major problem for Mr Ainsworth, in terms of the argument presented below, is that the evidence of his intention to reside in the unit once it is completed was left in an unsatisfactory state.
- [27] Mr Ainsworth swore an affidavit, which was before the learned primary judge, to the effect that, although he currently lives in Victoria, he intends to reside in the

⁵ Section 3(2)(b) and s 3(5) of the BCIP Act and Sch 2 of the *Domestic Building Contracts Act 2000* (Qld).

Noosa Heads property "once the property is certified complete ... as was always my intention". One can readily understand why the learned primary judge would have been disposed to accord little weight to this assertion. Ainsworth's affidavit did not explain how he came to sign the contract with Neller which described him as **not** a resident owner. He did not, for example, suggest that he signed the contract with Neller (which affirmed that he was not a resident owner) by mistake. It must inevitably have detracted seriously from the weight to be accorded to Ainsworth's evidence of his intention to reside in the unit that he proffered no explanation of the inconsistency between the terms of the contract he signed and the affidavit he has sworn.

- [28] Neller argues that, apart from the weakness of Ainsworth's evidence of his intention to reside in the unit, it is not now open to Ainsworth to advance the contention that he is a "resident owner" in order to invalidate the adjudication of 28 March 2007 and so defeat the enforcement warrant. First, Neller argues that, in the context of the BCIP Act, an owner may have only one residence.
- [29] In my respectful opinion, it is not possible to detect in the provisions of the BCIP Act an intention on the part of the legislature that the concept of "resident owner" should be confined in the way urged by Neller. The evident concern of the legislature in excluding contracts between builders and resident owners from the scope of the BCIP Act is to ensure that the ultimate consumers of the goods and services provided by the building and construction industry should not be subject to a regime which, among other things, imposes certain financial risks upon building owners who are participants in that industry to the advantage of the builders who contract with them. I shall discuss the effect of the BCIP Act upon the allocation of these financial risks in due course, but for the moment it is sufficient to say that, this being the concern which can be seen to inform the exclusion of "resident owners" from the scope of the legislation, there is little reason to think that it was any part of the legislative intention to alter the usual understanding that a person may be a resident of several locations at the same time.
- [30] It is convenient at this point to note that Ainsworth argues in written submissions to this Court that the effect of the decision of Robin DCJ on 3 November 2008 is conclusively to uphold his contention that the BCIP Act does not regulate the relationship between the parties, and that as a result it has been established that the adjudicator had no jurisdiction to make the determination on which the enforcement warrant depends. It must be said immediately that the decision of 3 November 2008 does not have the effect attributed to it by this argument.
- [31] As was rightly conceded on Ainsworth's behalf at the hearing of the application in this Court, it remains arguable that, by reason of Ainsworth's execution of the contract which stated that he was not a resident owner, he is precluded from asserting, as against Neller, that he was not a resident owner when the contract was made. In this regard, in the contract signed by the parties on 31 October 2005, Ainsworth "ticked the box" in the contract form which declared that he was not "a resident owner". In other words, it is arguably the case that Ainsworth contracted with Neller on the footing that, for the purpose of their respective rights and duties under the contract, Ainsworth agreed that he was not to be regarded as a "resident owner". On this basis Ainsworth's private intentions as to his future residence are irrelevant to the question whether the contract between the parties engaged the operation of the BCIP Act.

- [32] Neller's second argument is that Ainsworth cannot now be heard to say that, for the purposes of this contract, he is a "resident owner". Questions might arise as to the application of the doctrine of estoppel in this case, for example, as to whether Neller was actually induced to act in reliance on Ainsworth's "ticking the box " in a way which would now constitute a detriment to Neller if Ainsworth were now allowed to assert that he is a "resident owner"; but it cannot be said that this point is not arguable on Neller's behalf in BD 1247 of 2007.
- [33] It is arguable that the BCIP Act does not intend that a building owner may not make a binding statement of his intention, one way or the other, as to residence at the time of contract, or that the parties may not bargain on the footing that the owner's statement of intention is binding upon the parties so as either to attract or to exclude the operation of the BCIP Act. Indeed, it may be said that it would be odd if the legislature intended that whether or not the BCIP Act should apply to any given contract should depend upon the private and subjective intention of one party, which might be kept as a secret from the other party, to be announced so as to either attract or exclude the operation of the BCIP Act as it might suit the first party, when the contract had been performed wholly or in large part.
- [34] At this point it is necessary to note the terms of s 99 of the BCIP Act. It provides as follows:
- "No contracting out**
- (1) The provisions of this Act have effect despite any provision to the contrary in any contract, agreement or arrangement.
 - (2) A provision of any contract, agreement or arrangement (whether in writing or not) is void to the extent to which it–
 - (a) is contrary to this Act; or
 - (b) purports to annul, exclude, modify, restrict or otherwise change the effect of a provision of this Act, or would otherwise have the effect of excluding, modifying, restricting or otherwise changing the effect of a provision of this Act; or
 - (c) may reasonably be construed as an attempt to deter a person from taking action under this Act."

- [35] It is arguable that an agreement to contract on the footing that the owner is not a resident owner does not purport relevantly to "annul, exclude, modify", etc, the effect of a provision of the Act. It is also arguable, I think, that the BCIP Act does not purport to prevent the parties to a contract agreeing that, as between them, the owner is not a resident owner so that the BCIP Act applies to their contract.
- [36] For these reasons, I do not consider that the principal substantive argument to be advanced by Ainsworth in action BD 1247 of 2007 can be said to enjoy such strong prospects of success as to displace the consideration that the evident intention of the BCIP Act that an adjudication should have effect unless and until an inconsistent decision is made by a court of competent jurisdiction.⁶

Will Ainsworth's action in BD 1247 of 2007 be rendered nugatory?

- [37] Ainsworth seeks to support the proposed appeal on the basis that there should have been a stay of the execution warrant pending the determination of Ainsworth's

⁶ Cf *Alexander v Cambridge Credit Corp Ltd* (1985) 2 NSWLR 685 at 695; *Cook's Construction P/L v Stork Food Systems Aust P/L* [2008] QCA 322 at [12] – [13].

action for damages for defective work because of the risk that his action may be rendered nugatory by the possible inability of Neller to meet a judgment in its favour. This issue resolves itself into the question whether the learned primary judge's discretion miscarried because his Honour failed to take that consideration into account.

- [38] In my respectful opinion, it is not a fair statement of his Honour's reasons to say that he did not take this consideration into account, or that he gave it insufficient weight. It is clear from his Honour's reasons that he took the view that he regarded this consideration as displaced in importance by the policy of the BCIP Act and his view that the intention of the legislature should not be thwarted by the exercise of judicial discretion.
- [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.
- [41] The mere existence of the very kind of risk on which the provisions of the BCIP Act in favour of the builder are predicated would not ordinarily be sufficient of itself to justify a stay of an execution warrant based on the registration of a certificate of adjudication. There may, of course, be other circumstances, which, together with this risk, justify the staying of a warrant of execution based on the registration of an adjudication certificate. For example, the builder may have engaged in tactics calculated to delay the ultimate determination of the rights and liabilities of the parties so as unfairly to increase the owner's exposure to the risk of the builder's insolvency. Or the builder may have restructured its financial affairs after the making of the building contract so as to increase the risk to the owner of the possible inability of the builder to meet its liabilities to the owner when they are ultimately declared by the courts. In this case there are no such circumstances.
- [42] While addressing considerations relevant to the exercise of the discretion to order a stay, one may also mention the consideration that the adjudication of Neller's claim resulted in a favourable outcome for Neller. While this adjudication is provisional, and, indeed, may ultimately be held to be devoid of legal effect, it is not irrelevant

that an independent and expert arbiter has assessed the merits of the building dispute between the parties and concluded that the merits of that dispute lie very much in Neller's favour. This is a consideration which tends to lessen the weight to be accorded to the concern that Ainsworth might be deprived of the fruits of ultimate vindication by the refusal of a stay.

- [43] For these reasons, I have come to the conclusion that the decision of the learned primary judge was not affected by error. Indeed, even taking into account the decision of Robin DCJ on 3 November 2008, I consider that the decision of Dodds DCJ was clearly correct. On the footing that the decision of the learned primary judge is not attended with any real doubt as to its correctness, I would refuse Ainsworth's application for leave to appeal.

The application to this Court under r 800 of the UCPR

- [44] Rule 800 of the UCPR provides:

"Stay of enforcement

- (1) A court may, on application by an enforcement debtor—
 - (a) stay the enforcement of all or part of a money order, including because of facts arising or discovered after the order was made; and
 - (b) make the orders it considers appropriate, including an order for payment by instalments.
- (2) The application must be supported by an affidavit stating the facts relied on by the enforcement debtor.
- (3) The application and affidavit must be served personally on the enforcement creditor at least 3 business days before the hearing of the application."

- [45] The terms of r 800 may be contrasted with the terms of r 761(2) of the UCPR which provides for the stay of the enforcement of orders "subject to an appeal" to this Court as an adjunct of this Court's jurisdiction to hear and determine appeals from the decisions of lower courts. Rule 800 of the UCPR authorises "a court" to stay the enforcement of a "money order". The ordinary and natural reading of this provision would suggest that the power conferred by r 800 is conferred on the court which made the money order in question. This reading is supported by r 3(2) of the UCPR which states that "[i]n a provision of these rules, a reference to 'the court' is a reference to the court ... that is appropriate in the context of the provision." In this case the appropriate court is the District Court.

- [46] Having regard to the terms of r 800 and to this Court's function as a court of appeal, I have grave doubts as to whether r 800 authorises this Court to grant the stay sought by Ainsworth; but even if I were satisfied that this Court is authorised to grant Ainsworth's application, and that the change in circumstances since the decision of Dodds DCJ are sufficient to warrant a fresh exercise of the discretion, I would decline to exercise the discretion in his favour for the reasons already discussed.

Conclusion and orders

- [47] The application for leave to appeal must fail on the basis that the decision of Dodds DCJ was correct.

- [48] The application for leave to appeal and the application for leave to amend the notice of appeal should be struck out.
- [49] The application to this Court under r 800 of the UCPR should be refused.
- [50] Ainsworth should be ordered to pay Neller's costs of each of the applications to be assessed on the standard basis.
- [51] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Keane JA. I agree with the orders proposed by his Honour, and with his reasons for those orders.
- [52] **FRYBERG J:** I agree with the orders proposed by Keane JA and with his Honour's reasons for them.