

JUDGEMENT : K S Dodds, DCJ. Queensland District Court, at Maroochydore. 25th June 2008

[1] This application by Kjerulf David Ainsworth sought:

A declaration:

- that RJ Neller Building Pty Ltd had notice that proceedings in the District Court at Brisbane (BD1247/2007) had been commenced prior to obtaining judgment on 3 May 2004 by filing an adjudication certificate pursuant to section 31 of the Building and Construction Industry Payments Act 2004 (the Act);

Orders:

- that the enforcement warrant issued by the District Court at Maroochydore on 6 March 2008 be set aside pursuant to rules 667 and 791 of the Uniform Civil Procedure Rules (UCPR);
- that enforcement of the judgment of 3 May 2007 be stayed until further order pursuant to rule 800 of UCPR;
- for costs on the indemnity basis.

[2] At the hearing, counsel for the applicant proposed that orders be made staying the enforcement warrant, granting liberty to apply and that the costs of the application be part of the parties costs in proceeding 1247 of 2007 upon the applicant's undertaking not to encumber transfer assign or otherwise deal with certain real property upon which the respondent had performed building or construction work so as to reduce his equity therein below \$150,000 pending final determination of proceeding 1247 of 2007.

Proceeding BD 1247 of 2007

[3] On 2 May 2007 Ainsworth filed a claim and statement of claim in the District Court at Brisbane. The claim sought:

Declarations:

- he was not indebted to RJ Neller Building Pty Ltd (Neller) in any amount;
- an adjudicator appointed under the Act one, Philip Martin (Martin) had no jurisdiction to make a determination pursuant to the Act;
- the adjudicator wrongfully determined liability pursuant to the Act;
- the adjudication was invalid.

Orders:

- that the adjudication be set aside;
- for damages for loss suffered by Ainsworth due to defective and unfinished work of Neller;
- for damages for legal expenses incurred by Ainsworth responding to the payment schedule (it should be the payment claim) and application for adjudication issued by Neller;
- interest and costs.

The Adjudication

[4] Neller was a registered builder. On 31 October 2005 a minor works contract was entered into by Neller and Ainsworth for alterations to a residential property owned by Ainsworth at Noosa Heads (the property). Neller and its subcontractors performed work on the property from October 2005 to 12 December 2006 when they were locked out of the property. On 26 February 2007 Neller issued a payment claim for progress payment under section 17 of the Act for \$59,907.09. On 28 February 2007 Ainsworth provided a payment schedule pursuant to section 18 of the Act indicating he proposed to pay nil. As required by section 18 reasons were included viz:

- the claimed amount was not due and owing;
- the work was unfinished and needed to be remedied to meet industry standards;
- Neller had not provided details of how the claim was calculated in reference to agreements with Ainsworth;
- the claim did not account for Neller's income tax credits which Ainsworth did not agree to pay;
- the claim was not made in good faith.

[5] The adjudicator addressed each of Ainsworth's reasons set out in the payment schedule. He reduced the amount claimed by refusing a 20% margin on variations to the contract. Additionally although not included in Ainsworth's reasons for refusal in his payment schedule, he considered a contention by Ainsworth in submissions in response to Neller's submissions at the adjudication that he intended to live in the property. Section 3(2)(b) of the Act has the effect that the Act does not apply to a construction contract for carrying out 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 intends to reside. He noted that the written contract between the parties in item 1 stated that the owner of the property was not the resident owner. He concluded he was not satisfied the provisions of the Act exempting resident owners from its application applied to Ainsworth. He concluded Neller was entitled to a progress payment of \$50,771.74.

The Enforcement Warrant

[6] The adjudicator's decision was given on 28 March 2007. On 30 April 2007 the adjudicator's certificate was served on the plaintiff with a demand for payment.¹ On 2 May 2007 Ainsworth filed the claim and statement of claim earlier referred to. On 3 May 2007, Neller filed the adjudicator's certificate in the District Court at Maroochydore. By this action the certificate operated as a judgment in favour of Neller against Ainsworth for

¹ Section 29 of the Act.

\$55,644.13 (\$1,022.39 for interest and \$3850 for costs was included).² On 6 March 2008 Neller sought and obtained an enforcement warrant from the District Court at Maroochydore.

The Act

- [7] The plaintiff was entitled to bring civil proceedings against the first defendant arising out of the contract. The adjudication proceeding does not effect those proceedings except that the court hearing those proceedings must make allowances for it in any orders it makes in those proceedings.³
- [8] Where, as here, the filing of the adjudicator's certificate had resulted in a judgment for a debt enforceable in the District Court,⁴ the Act provides a proceeding may be brought to have the judgment set aside.⁵ In any such proceeding the applicant is not entitled to bring any counterclaim against the claimant, to raise any defence in relation to matters arising under the construction contract, to challenge the adjudicator's decision and is required to pay into court as security the unpaid portion of the adjudicated amount pending the final decision in those proceedings
- [9] The object of the Act is "to ensure that a person is entitled to receive and is able to recover progress payments" if the person undertakes to carry out construction work under a contract or to supply related goods and services under a construction contract.⁶
- [10] Section 8 of the Act provides that "the object is to be achieved by---
(b) establishing a procedure that involves--
(i) the making of a payment claim by the person claiming payment; and
(ii) the provision of a payment schedule by the person by whom payment is payable; and
(iii) the referral of a disputed claim or a claim that is not paid to an arbitrator; and
(iv) the payment of the progress payment decided by the adjudicator".
- [11] The explanatory notes to the Bill which became the Act describe the objective of the legislation as entitling certain persons who carry out construction work or who supply related goods and services, to a timely payment for the work they carry out and the goods and services they supply. A reason for the bill was that common law and contract law remedies were not sufficient to address security of payment issues. The construction industry was particularly vulnerable to security of payment issues. "The failure of any one party in the contractual chain to honour its obligations can cause a domino effect on other parties resulting in restricted cash flow, and in some cases, insolvency.
- [12] The Bill establishes a statutory based system of rapid adjudication for the interim resolution of payment on account disputes involving building and construction work contracts.
- [13] Rapid adjudication will be conducted by an independent arbitrator with relevant expertise. If the decision of the adjudicator is in whole or in part in favour of the applicant, the respondent is required to pay the specified amount directed by the adjudication to the applicant ----
- [14] Rapid adjudication does not extinguish a party's ordinary contractual rights to obtain a final resolution of a payment dispute by a court or tribunal of competent jurisdiction".
- [15] The Act is in similar terms to the Building and Construction Industry Security of Payment Act 1999 (NSW). In *Brodyn Pty Ltd v Davenport & Anor* (2004) NSWCA 394 at 440-1, paragraph 51 the New South Wales Court of Appeal in a unanimous judgment considered the Act disclosed a legislative intention to give an entitlement to progress payments. It provided "a mechanism to ensure that disputes concerning the amount of such payments are resolved with a minimum of delay. The payments themselves are only payments on account of a liability that will be finally determined otherwise: sections 3(4) and 32.⁷ The procedure contemplates a minimum of opportunity for court involvement: sections 3(3) and 25(4).⁸ The remedy provided by section 27⁹ can only work if a claimant can be confident of the protection given by section 27(3)¹⁰ if the claimant faced the prospect that an adjudication determination could be set aside on any ground involving doubtful questions of law, as well as of fact, the risks involved in acting under section 27 would be prohibitive and section 27 could operate as a trap."

The Statement of Claim in BD 1247 of 2007

- [16] The statement of claim in proceeding 1247/2007 refers to the contract for Neller to undertake renovation and construction work on the property owned by Ainsworth. It asserts Ainsworth was a resident owner of the property within the meaning of the Acts. It claimed that Neller breached the contract by:
- failing to adhere to plans and specifications;
 - invoicing Ainsworth for works for which there had been no agreement in addition to the contracted work;

² Section 31 of the Act.

³ Section 100(1) of the Act. 4 5 6

⁴ Section 31(i) of the Act.

⁵ Section 31(4) of the Act.

⁶ Section 7 of the Act.

⁷ Sections 5 and 100. (Equivalent sections in the Act).

⁸ Sections 8 and 31(4). (Equivalent sections in the Act).

⁹ Section 33 (Equivalent section in the Act).

¹⁰ Section 33(4). (Equivalent section in the Act).

- purporting to charge Ainsworth for additional work on a cost plus basis imposing a 20% margin on the GST inclusive price of supplier invoices for which there was no agreement;
- seeking and being paid a deposit of more than the agreed 5% of the contract price;
- failing to complete the works by the agreed completion date;
- charging for labour for which there was no agreement under the contract;
- despite demand, failing to provide evidence of prime cost items or provisional sums;
- failing to carry out the works in an appropriate or skilful way or with reasonable care and skill in accordance with Australian Standards.

[17] It claimed that by reason of the breaches Neller was not entitled to seek any payment outside the contract and therefore wrongly issued a payment claim under the Act and sought adjudication. Further, because Ainsworth was a resident owner in terms of the Act, Neller was not entitled to payment for any additional works which may have been undertaken, the adjudicator had no jurisdiction to issue his adjudication and the adjudication decision was invalid.

[18] Neller responded to the claim with a defence and counterclaim. The counterclaim sought that the adjudication and the amount found due by the adjudicator be upheld.

Decision

[19] The relief sought by Ainsworth requires the exercise of the courts 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.

[20] 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.¹¹ 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.

[21] 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.

[22] On the other hand, a stay of the judgment based upon the adjudication will defeat the plain policy of the Act.

[23] The application is refused with costs.

L C Alford for the plaintiff/respondent instructed by Ray Barber
P W Hackett for the defendant/applicant instructed by Morgan Conley Solicitors

¹¹ *Brodyn Pty Ltd v Davenport & Anor* (2004) NSWCA 394 at paragraph 87.