RJ Neller Building P/L v Kjerulf David Ainsworth [2008] Adj.L.R. 08/20

JUDGMENT : JUDGE ROBIN QC, DISTRICT COURT New South Wales. 20th August 2008

The Court has made an order in terms of the initialled draft. It consists essentially of directions agreed upon by the parties after it was intimated last Thursday that there ought to be a separate determination of the question of whether the plaintiff is a resident owner of property where building work was done, within the meaning of that term in the Building and Construction Industry Payments Act 2004. Much is thus achieved in the plaintiff's application, filed on the 24th of July 2008, which establishes a two-track process: one track relating to the preliminary issue, the other to the much broader building dispute in which the parties find themselves engaged.

Nearly all of the time today has been taken up in argument about costs. Mr Anderson for the plaintiff wants costs reserved, Mr Alford for the first defendant, the builder, seeks his costs. If costs are reserved, the likelihood may be that it is another Judge rather than myself who will have the task of determining costs issues, although I have indicated to the parties and confirmed that, when more is reliably known of the facts, I will be prepared to make necessary decisions about costs which are reserved. It seems to me useful to indicate that, as things stand, the first defendant appears to occupy a favoured position, although I think it's premature, given that so much is still unknown to the Court, to make any final determination.

I am aware that Judge Dodds has already made an order against the plaintiff for costs of his unsuccessful application to stay an enforcement warrant obtained in the Court at Maroochydore in respect of an adjudicator's order under the Act mentioned for payment of a sum of the order of $60,000 by the plaintiff to the first defendant. Judge Dodds' decision to refuse the stay is the subject of proceedings in the Court of Appeal at the moment, presumably far from determination.

In my assessment, it is not appropriate to land on Mr Ainsworth, in all the circumstances, another blow by way of a costs order making it difficult, for obvious reasons, for him to pursue the case he wants to present in the Court. There is, at least, a distraction. I think Judges ought to be careful about this sort of thing, which may make litigants lose heart and, perhaps, inappropriately, give up.

The order that I have made in relation to costs is as follows:

- The costs of the application of both parties be reserved, except for the costs of preparation by and appearance by counsel on the 14th of August, 2008, in respect of which the question of who should pay the costs of the first defendant only is reserved.

I thought it important, as I've indicated, to get some sort of signal in the form of a Court order which might assist another Judge at some time in the future. The form of order I settled upon ought not to be taken as any criticism of Mr Anderson, whose costs happen to be the ones not reserved. His performance of his retainer has been of considerable assistance to the Court and to his client who, it might be said, appears to have been in considerable confusion and uncertainty about what ought to be done when, following the commencement of this proceeding, the first defendant sought an enforcement warrant in respect of the adjudicator's order.

Mr Alford has asserted from the Bar table that Mr Ainsworth is no innocent in respect of the workings of the Act. There is nothing formally before the Court to demonstrate that. There might have been, had Mr Ainsworth been available for cross examination when his application came on for a lengthy hearing on the 14th of August. He was unavailable, being overseas, which attracted what seems a just criticism from Mr Alford that that was an inappropriate date for the return of the application when the principal issue was almost certain to be whether Mr Ainsworth was a resident owner within the meaning of the Act, something which depends on intentions.

The premises he says were ones in which he proposed to live, but in the circumstances he has never lived there, and which may explain why he indicated in contractual documents (which I have previously suggested may have no standing so far as the Act is concerned) that he was not a resident owner by ticking a particular box.

Criticism of the steps that have been taken in the litigation cannot be limited to criticism directed at the plaintiff. It seems that, having abandoned prospects of taking any point pursuant to a conditional notice of intention to defend, Mr Neller, the principal of the first defendant, elected to put in a pleading of his own. Without legal assistance, the document is woefully inadequate, and Mr Anderson was justified in saying that it provided warrant for the plaintiff seeking, amongst the long list of relief specified in his application, the striking out of that pleading.

Only the future will show whether the opposing contentions regarding Mr Ainsworth as a resident owner and regarding the competence and value of the first defendant's building work - where the truth matter lies. I do not feel comfortable about making any final decisions in relation to costs at a time when things are uncertain, as they are, but there is a prospect that, in the not-too-distant future, depending on what happens in the Court or by agreement of the parties, sound judgments can be made about whether one side or the other was mischievously taking particular stances. Those are the reasons for today's order.