[2011] QSC 343

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

FRYBERG J

No 3812 of 2011

WARE BUILDING PTY LTD	Appellant
and	
CENTRE PROJECTS PTY LTD	First Respondent
and	
THOMAS WILSON	Second Respondent

BRISBANE

..DATE 14/10/2011

ORDER

HIS HONOUR: Yesterday I heard an application pursuant to the Building and Construction Industry Payments Act by the present applicant for an injunction restraining the enforcement of an adjudication order which had been obtained by the respondent.

I gave reasons indicating that I proposed to order that the application be dismissed and that a sum of money paid into Court by the applicant be paid out to the first respondent.

I asked that a draft be brought in. A draft has been brought in today.

The applicant now seeks a stay of the order that the money paid into Court be paid out to the first respondent.

The applicant puts the application on four bases. First, it submits that it has good prospects of success in an arbitration which is to be held shortly and which will determine the merits of the dispute between the parties. As is well known, the proceedings under the Act, to which I have referred, to do not finally determine the merits of building disputes.

Second, the applicant submits that the imminence of the arbitration is a factor which ought to encourage me to preserve the status quo.

Third, it submits that it has worked diligently since October of 2010 to get the arbitration on.

Finally, it submits that on the evidence I ought to find that if it is successful in the arbitration its success will be rendered nugatory because the respondent is likely to dissipate the money or be in such a state of insolvency as to render its success nugatory.

As to the first of these matters, the evidence which was before me yesterday indicated that the applicant had an arguable case in relation to an amount of $30,800 as one distinct item in the matters in dispute. The amount in dispute in the arbitration is about a $145,000.
I am, on the evidence, as I have it, unable to form an opinion about the balance of the dispute.

As to the single item of $30,800, the applicant's prospects of success in relation to that item depend its upon being able to show that the work which is the subject of the item was not done by the respondent. The respondent asserts that the work was done. I cannot determine the prospects of that being resolved favourably to the applicant. I note, however, that the assertion that the work was actually not done is of relatively recent origin. Originally the applicant's contention was that the scope of the work had changed and the respondent did the extra work without being required to do it.

Overall, I do not think that the evidence before me establishes that the applicant has good prospects of success in the arbitration.

I will return to the question of the imminence of the arbitration shortly.

It is true that in October last year the applicant nominated its arbitrator and sought to initiate arbitration proceedings. The respondent did not nominate its arbitrator and the matter then proceeded no further until the respondent made a claim pursuant to the Act. It is, therefore, not in evidence what efforts the applicant made after October 2010 to expedite the holding of an arbitration and nor is the course of proceedings to establish the arbitration in evidence. In particular, the evidence does not establish that the applicant has done anything out of the ordinary. More importantly, it certainly does not establish that the respondent has done anything which could be characterised as delay. The arbitration was to have been heard in August and it was adjourned on the application of the respondent but the reasons for the adjournment are not before me. One assumes on the face of things that the arbitrators would not have ordered an adjournment unless there was a good reason. The circumstances not being before me in evidence I cannot find that there has been any attempt at delay by the first respondent.

As to the argument that in the absence of a stay the applicant's success of the arbitration will be rendered nugatory, the only evidence is that the first respondent is a corporation, that there are a bank charges over it, that its paid up share capital is $20 and that it does not own any land in Queensland or New South Wales. That is an insufficient

basis for a finding that the respondent is insolvent or in financial difficulty. Certainly there is no evidence of current indebtedness which would absorb the amount of any payment and it is not open, in my judgment, to make a finding that success in the arbitration would be rendered nugatory if the money in Court ceased to be available as a fund to satisfy any arbitration order.

That brings me back to the fact that the arbitration is to be held shortly. It is in fact scheduled to be heard in about a fortnight. One would suppose that an arbitration decision would be reached within two or three months after that. In the scale of time that this application has taken that is a relatively short period. The application itself was brought only a few months ago but the dispute and the claims for payment and the alleged indebtedness upon which the claims for payment are based arose in the middle of last year for the most part. The respondent has been dilatory in pursuing its remedies and while that in itself is not a direct factor influencing me the fact that the arbitration is to be held shortly is given more weight by it.

On balance, however, it does not seem to me that that is a sufficient reason to outweigh the prima facie position under the Act. That prima facie position is that the legislative policy is to ensure the risk of loss in the event of an insolvency falls upon the head contractor or owner rather than

the subcontractor or contractor.

To order a stay at the present time would fly in the face of that policy. In my view the fact that there is to be an arbitration shortly, even in the scheme of timings in the present case, is insufficient to warrant a departure from that accepted policy. Consequently the application is refused.

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HIS HONOUR: There will be an order in accordance with the draft, initialled by me and placed with the papers.
