

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

MULLINS J

No BS51 of 2007

ACN 060 559 971 PTY LTD
(ACN 060 559 971)
(FORMERLY ABEL POINT MARINA
(WHITSUNDAYS) PTY LTD)

Applicant

and

JOHN O'BRIEN

First Respondent

and

SEA-SLIP MARINAS (AUST) PTY LTD
(ACN 103 644 640)

Second Respondent

BRISBANE

..DATE 23/04/2007

ORDER

HER HONOUR: On 19 April 2007, I published my reasons in this matter. On the hearing today, the applicant and the second respondent made submissions on the terms of orders that should be made as a result of the published reasons.

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A draft order was provided by the applicant. The parties are agreed on orders 1, 3 and 4 as set out in the draft.

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Order 1 provides for the decision of the first respondent to be quashed. Order 3 deals with the payment out to the applicant of the moneys that had been paid into Court by the applicant in accordance with the order of his Honour Justice Byrne made on 19 January 2007. Order 4 deals with costs.

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Order 2 is controversial between the parties. The applicant seeks an injunction restraining the first respondent from further considering the adjudication application dated 28 November 2006 or any further adjudication application made by the second respondent in relation to the same subject matter of the adjudication application dated 28 November 2006.

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The rationale that the applicant puts forward for making the injunction is that the applicant is concerned that the first respondent may not be able to decide fairly any further adjudication application (or the adjudication application dated 28 November 2006 if it were to be remitted to the first respondent) because the first respondent had been persuaded by erroneous submissions that were made by the second respondent and the first respondent decided the adjudication application

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against the applicant on every point that was raised in the application.

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The first respondent has not participated in the proceeding before me. That was appropriate. I am not prepared to make orders against the first respondent personally.

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Without an order remitting the matter to the first respondent again, I am satisfied that setting aside the decision of the first respondent dated 20 December 2006 does not, without further order, give any further authority to the first respondent to proceed on the adjudication application dated 28 November 2006.

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In view of the fact that I have decided that the first respondent made a decision under an enactment that was amenable to part 3 of the Judicial Review Act 1991, the position would be different if I were to remit the subject matter of the decision that has been set aside to the first respondent.

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The applicant's submissions deal with the difficulty in the current adjudication application proceeding further in any case in view of the fact that the second respondent did not endeavour to deal with the issue of what extensions of time should have been granted by the superintendent under clause 35(5)(b)(1) of the contract for the purpose of clause 36 of the contract. That appears to be made out on the material and would leave the current adjudication application in the position that it would not be able to be resolved because of the

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need for the parties to provide further material rather than merely submissions on the matters that need to be addressed to resolve the issue of costs of delay and disruption claimed under clause 36 of the contract by the second respondent.

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The desirable course for this matter to proceed in view of the indication by Mr Scott, the solicitor for the second respondent, that the second respondent wishes to pursue rights under the Building and Construction Industry Payments Act 2004 is for a further adjudication application to be made by the second respondent.

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The second respondent does not wish to limit the authorised nominating authority's discretion to appoint the first respondent as the adjudicator for the purpose of any further adjudication application. Time is very important to the second respondent as it wishes to access the funds which it considers should have paid to it by now by the applicant under the contract for costs of delay and disruption.

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The second respondent considers that the first respondent would be in the best position to determine an adjudication application in the speediest way. As the applicant points out on this hearing, any further adjudication application will be subject to the tight time frames that apply under the Building and Construction Industry Payments Act 2004.

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The applicant relies on the power the Court has under section 30 subsection (1) paragraph (d) of the Judicial Review Act to

make an order directing any of the parties to do or to refrain from doing anything that the Court considers necessary to do justice between the parties.

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During the course of the hearing, I foreshadowed to the parties that I was considering making an order in these terms: the second respondent is directed to accompany any further adjudication application which covers the issues that were the subject of the adjudication application dated 28 November 2006 with a request that the authorised nominating authority not appoint the first respondent as adjudicator and to provide the authorised nominating authority with a copy of this order.

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The applicant was prepared to accept a direction in those terms. The second respondent opposed it because of its desire that any further adjudication application go before the first respondent for the reasons that I have already mentioned.

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The second respondent did not consider that the making of such a direction was outside the power that the Court has under section 30 subsection (1) paragraph (d) of the Judicial Review Act.

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In view of the history of this matter and the submissions that were made today, I am concerned that if I do not make a direction in terms of that which I have foreshadowed, the further progress of an adjudication application that covers the subject matters that were the subject of the decision dated 20 December 2006 that has been set aside, will be impeded by further proceedings between the parties to have the

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first respondent disqualified as adjudicator for any further adjudication application.

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I consider that the breadth of the power conferred by the Court under section 30 subsection (1) paragraph (d) of the Judicial Review Act is such that it does not depend on a finding made by me that the first respondent would be so disqualified. It is sufficient, if I am satisfied, that it is desirable in the interests of justice that the further adjudication application not be referred to the first respondent.

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The applicant referred me to the approach that is often taken on judicial review applications where the matter has come from a tribunal where there are other tribunal members who are able to hear the remitted matter, that justice is, in general, better seen to be done if a different member of the tribunal is given the remitted matter. Reference was made to Northern NSW FM Pty Ltd v. Australian Broadcasting Tribunal (1990) 26 FCR 39 at 43.

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Having regard to the terms of the reasons that were given by the first respondent, and in the circumstances of the history of disputation between the applicant and the second respondent, I consider that it is in the interests of justice to give the direction that I have foreshadowed in relation to the matter that any further adjudication application not be given to the first respondent by the authorised nominating authority.

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I, therefore, make an order in terms of the amended draft,
initialled by me and placed with the file.

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