Taylor Projects Group P/L v Brick Dept. P/L, John L O'Brien & Mediate Today P/L

JUDGMENT : Einstein J : New South Wales Supreme Court : 17th June 2005

The state of these proceedings

1 Proceedings 55017/05 ["the first proceedings"] were brought by Taylor Project Group Pty Ltd ["Taylor"] against Brick Department Pty Ltd ["Brick"] in the Technology and Construction List seeking to impugn an adjudication determination made under the *Building and Construction Industry Security of Payment Act 1999 (NSW)* ["the Act"].

2 Taylor had been the head contractor and Brick the subcontractor to a construction contract for the carrying out of brick and block laying work in Ashfield.

3 The proceedings were heard on 5 May 2005 and an ex tempore judgment [2005] NSWSC 439 was delivered on the same day. The decision was that the adjudication determination was valid. The proceedings were stood over for argument as to costs, orders and questions concerning a stay of orders.

4 It became apparent at various directions hearings thereafter that major issues continued to separate the parties. The issues were clarified by notices of motion filed by each of the parties on 2 June 2005 and by a further Summons filed by Brick in proceedings 3346/2005 commenced in the Equity Division ["the second proceedings"]. Both motions as well as the second proceedings were heard together

5 The issues requiring present determination are as follows:

- *whether the restraint on Brick from filing its adjudication certificate as a judgment, imposed on an interim basis by the Court on 11 March 2005, should be lifted;*
- *how the Court should deal with the funds paid into Court by Taylor in accordance with order 1 made by the Court on 11 March 2005;*
- *the making of formal orders following the judgment delivered in the first proceedings.*

The new summons

6 The summons in the second proceedings seeks:

- *a declaration that the parties entered into an agreement pursuant to which Taylor paid the subject funds into Court on the basis that in the event that Taylor was unsuccessful in the first proceedings, that amount would be released to Brick;*
- *specific performance of the subject agreement and an order for the payment out to Brick of the funds presently held by the Court;*
- *in the alternative:*
- *a declaration that the parties entered into an agreement pursuant to which Taylor agreed to pay the funds into Court on the basis that that amount would be released to Brick forthwith upon it filing the adjudication certificate as a judgment in a Court pursuant to s 25 of the Act;*
- *an order for the specific performance of the alleged agreement;*
- *an order for the payment out of the monies held by the Court upon Brick filing the adjudication certificate as a judgment or filing a certificate of the judgment constituted by the filing of the adjudication certificate as a judgment in the District Court.*

Brick's motion

7 The notice of motion filed by Brick seeks:

"1. The first defendant be released from the restraint constituted by Order 1 made by the Court on 11 March 2005.

2. The sum of $109,897.80 paid into Court by the plaintiff in accordance with Order 1(a) made on 11 March 2005, together with any interest accrued on that sum, be released to the first defendant.

3. Alternatively to order 2, the sum of $109,897.80 paid into Court by the plaintiff in accordance with Order 1(a) made on 11 March 2005, together with any interest accrued on that sum, be released to the first defendant forthwith upon the first defendant filing the adjudication certificate dated 10 March 2005 as a judgment in this Court pursuant to s25 of the Building and Construction Security of Payment Act 1999.

4. Alternatively to order 3, the sum of $109,897.80 paid into Court by the plaintiff in accordance with Order 1(a) made on 11 March 2005, together with any interest accrued on that sum, be paid into the District Court:

(a) forthwith upon the first defendant filing in this Court a certificate of the judgment constituted by the filing of the adjudication certificate dated 10 March 2005 as a judgment in the District Court pursuant to s25 of the Building and Construction Security of Payment Act 1999; and

(b) to abide such orders as the District Court may make in the proceedings commenced by the said filing of the adjudication certificate."

Taylor's motion

8 The notice of motion filed by Taylor to the extent pressed seeks:

"An order that the order numbered 1 in the Short Minutes of Order dated 11 March 2005 continue until further order.

An order that until further order the First Defendant be restrained from taking any steps to enforce the judgment obtained by the First Defendant in this matter on 5 May 2005.

An order that until further order, the First Defendant be restrained from filing any adjudication certificate as a judgment in any court of competent jurisdiction."

Grosvenor Constructions (NSW) Pty Ltd (in administration) v Musico

9 Central to the remaining dispute is the proposition put by Taylor that if the funds which were paid into Court were now to be paid out to Brick, Taylor, if successful in final proceedings, would suffer irreparable prejudice as payment pursuant to a judgment debt entered could never be recouped. The contention was that in effect a Court imposed regime permitting such payment to be made would in practice, convert an amount which ought to be an interim payment into a final payment. Taylor relies upon the decision in ***Grosvenor Constructions (NSW) Pty Ltd (in administration) v Musico*** [2004] NSWSC 344 in which it was held that where a claimant clearly being insolvent had obtained an adjudication certificate and had filed that certificate as a judgment debt in accordance with s 25 of the Act, it was appropriate to order a stay of the execution of the judgment debt.

The approach taken by Brick

10 The approach taken by Brick is put in a number of ways including the following:

Stay of Proceedings

- Taylor seeks an order restraining Brick *"from taking any steps to enforce the judgment obtained by [Brick] in this matter on 5 May 2005",* apparently on the grounds set out in ***Grosvenor Constructions (NSW) Pty Ltd (in administration) v Musico*** [2004] NSWSC 344. Taylor effectively seeks a stay.
- The application is misconceived. Brick does not seek any order consequent upon the Court's judgment of 5 May 2005 capable of being stayed. The only judgment obtained by Brick was the dismissal of the Summons. Lifting of the interim restraint and costs follow.
- ***Grosvenor*** concerned an application for the stay of a judgment constituted by the filing of an adjudication certificate. In this case, the adjudication certificate has not been filed – Brick has been restrained from doing so.
- Until the adjudication certificate is filed no question of a stay arises. If and when the certificate is filed then the issue of whether or not a stay should be granted is a matter for the Court in which it is filed, since that is the Court in which the judgment is given by virtue of s25(1) of the *Act*.
- Thus ***Grosvenor*** is not relevant to the matters remaining to be dealt with by this Court. Once the Summons has been dismissed and the interim restraint lifted the only remaining matter is the disposition of the funds in Court.

Funds in Court

- Part 50 rule 7 of the *Supreme Court Rules* prohibits the payment out of funds in Court except to *"the party entitled"*. [See also rules 6B, 9 and 12, each of which use the concept of "entitlement"] Brick has been unable to find any authority on the meaning of that phrase. Brick submits that the entitlement is one which must exist prior to and outside the order for payment out.
- Brick submits:
  (a) the money in Court should be paid out to it, either pursuant to the agreement of the parties which formed the basis for the consent order or, in any event, consistently with the intent of the consent order;
  (b) alternatively, the money should be paid out to it when it files the adjudication certificate as a judgment in a Court of appropriate jurisdiction pursuant to s25 of the *Act*.

Evidentiary matters

11 It is necessary to deal shortly with the evidence placed before the Court on the matters presently in issue. This comprises:

- evidence as to the history leading to the payment into Court by Taylor of $109,897.90 on or about 14 March 2005, there being an issue between the legal advisers as to whether or not the payment was made pursuant to an enforceable agreement reached by the parties [Brick contends firstly that the agreement was express as reached between the legal advisers, but that in the alternative, the very terms of the Court Order reflects an implied agreement by Taylor to pay the adjudicated amount to Brick if the issues in the expedited final hearing were determined adversely to Taylor];
- evidence as to the financial position of Brick, both parties having retained experts to give evidence in this regard.

The payment into Court

12 The following represents the Court's findings as to the material history:

- on 4 March 2005, Taylor's solicitor wrote to Brick asserting that the adjudication determination was void for various reasons as set out in that letter and sought undertakings that the adjudication determination would not be enforced. It noted that in the absence of such undertakings an injunction would be applied for;
- on 8 March, Brick through its construction manager (Graham Pohle) responded to Taylor's solicitor's letter of 4 March declining to provide the undertakings sought;
- following receipt of that letter, Mr Singh (solicitor for Taylor) had at least one and possibly two conversations with Ms. Carney, a solicitor acting for Brick in related proceedings. There is an issue between the parties as to precisely what was said in those conversations;
- the finding of the Court is that although there is some question as to the precise words which were used, the effect of what was said was that Taylor was prepared to agree to refrain from seeking an injunction [preventing Brick from entering judgment for the adjudicated amount or otherwise enforcing the Determination] if Mr Singh's client paid the moneys into court, such moneys to be paid to Brick if it succeeded in the Supreme Court;
- discussion also took place concerning Brick's desire to have the case dealt with by expedition. At about this time instructions were received from both Brick and Taylor confirming their satisfaction with this agreement;
- following those conversations, and on the same day, Mr Singh sent a letter to Ms. Carney. The letter was in the following terms:

"I refer to our conversations this morning.

I confirm my advice to you that my client agrees to pay into Court the adjudicated amount of $101,459.31 (inclusive of GST) on the basis that if (sic) in the event TPG is unsuccessful in the foreshadowed application then this amount will be released to the Brick Dept. Of course if TPG is successful, then the amount will be returned to TPG.

In the circumstances, it would then be unnecessary for TPG to seek an interim injunction today as I foreshadowed to you in our earlier conversation this morning.

As advised to you I intend to approach the Duty Registrar today with a view to getting leave for short service and if possible, by facsimile, so that the matter can be put into the Technology and Construction List before Her Honour Justice Bergin on Friday for directions and the appointment of a hearing date as soon as possible.

I await your advice as to whether you have instructions to accept service."

- as a result of the arrangements made between Mr Singh and Ms Carney on 8 March, Mr Singh did not seek ex parte relief from the Court on that day, but instead sought leave to file a Summons on short notice. That leave was obtained from the duty registrar on 8 March, and time for service was abridged to 5pm on 9 March;
- on 8 March, Mr Singh served the Summons upon Ms Carney under cover of his letter of 8 March. The matter was to come back before the Court on 11 March for the making of orders and directions concerning the hearing of the matter. The letter from Mr Singh of 8 March was in the following terms:

  "On the basis of the undertaking of Brick Dept that in return for TPG's agreement to pay into court of (sic) the Adjudicated amount pending the outcome of TPG's application it would not seek to enter judgment for the Adjudicated amount or otherwise enforce the Determination, I have issued the Summons in court and obtained an order for short service. I assume you had instructions to act for the Brick Dept. in that regard.

  I confirm your advice to me that you have instructions to accept service and that service by facsimile would be sufficient.

  Enclosed is a copy of a Summons, orders made by the Court for short service and an unsealed affidavit of Clive Wickham sworn today. I will file the affidavit after the Court issues directions on Friday for this to occur.

  Also enclosed are copies of the Notice of Motion and my supporting affidavit filed in Court today.

  Please note the directions hearing on 11 March. Please forward to me your notice of appearance. I will forward to you a draft timetable for your approval before Friday."
- on 10 March 2005, Brick obtained (without reference to Taylor) an adjudication certificate for the adjudicated amount plus interest and fees of $109,897.90;
- on 10 March 2005 Ms Carney wrote to Mr Singh inter alia in the following terms:

  "We refer to your letter dated 8 March 2005 which appears does not address each of the issues discussed and agreed in our previous telephone conversations regarding the payment into Court and the undertakings by our client.

  It was agreed that our client will not seek to enter judgment for the amount of $109,987.80 (the Adjudicated Amount) for a limited period of time pending the outcome of the Supreme Court proceedings (the Proceedings).

  The Proceedings are to be treated as urgent by your client and the undertaking is to expire on the earlier of either:

  1. the decision of the Supreme Court on the matter; or

  2. three weeks from the date of the payment in.

  The undertaking does not take effect until the monies have been paid and our client must be free to obtain an Adjudication Certificate at any time.

  Please note the full Adjudicated Amount to be paid in of $109,897.80.

  The Adjudicated amount is to be released to my client immediately if your client is not successful in its application to the Supreme Court and regardless of any appeal proceedings.

  Interest continues to be payable on the original adjudicated amount at 9%per annum."
- on the same day Mr Singh responded in the following terms:

  "I refer to your letter of 10 March 2005 received by this office at 12.22pm today.

  The terms of the agreement that we reached in our conversations and correspondence of 8 March 2005 were that:

  - *your client would (to use the expression that we both used in our conversations) "cease and desist" from entering judgment in relation to the disputed adjudication determination until a final determination by the Court of TPG's application to declare the Determination void;*
  - *in return my client would pay the adjudicated amount of $101,459.31 into Court pending resolution of the matter.*

  I mentioned to you that we would do everything to seek expedition of the mater but this was never a condition of the agreement.

  On the basis of the above, TPG did not seek an interim injunction on 8 March. Instead, TPG obtained an early listing of the matter in the Technology and Construction List on 11 March (as I advised you).

  As for payment in, this requires a bank cheque or a solicitors trust cheque. TPG is transferring the funds to my trust account today and soon as those funds clear I shall be lodging the money with the Court.

  I reject terms that you are seeking to now impose in your letter of 10 March 2005. It appears from this letter that your client is now seeking to resile from the terms of the agreement reached on 8 March.

  In the circumstances, if I do not receive written advice from you by 9.30am on 11 March 2005 that the terms asserted in your letter of today are unreservedly withdrawn then TPG will have no option but to approach the Court without further notice to you. In that event, TPG will place before the Court the letters we have exchanged on this matter since 8 March."
- on the 11 March Mr Singh again wrote to Ms Carney this time in the following terms:

"I refer to our conversation this morning and confirm as follows:

1. *I called you because I had not received from you a response to my letter to you of yesterday. I advised you at the outset of our conversation that the purpose of the call was to ascertain your client's position as this may be relevant for any affidavit that I may need to put on in relation to any application to the court.*
2. *You advised me that the purpose of your letter was to seek to "clarify" some of the issues because you thought my letter had not covered all relevant matters. When prompted by me, you advised me that you considered that the agreement that was reached by the parties was in the terms contained in my letters to you of 8 March and that you did not seek to resile from it but to clarify some issues.*
3. *I have advised you that as far as TPG is concerned, the agreement is in the terms as set out in my letters of 8 March 2005 to you and that it does not include any of the terms in your letter because they were not discussed by us on 8 March and we had reached no agreement in those terms. Specifically, TPG does not agree:*
   - *that the adjudicated amount is $109,897.80*
   - *that your client's undertaking would expire at any time before the final outcome of TPG's application.*
   - *that any interest is accruing on the Adjudicated amount.*
4. *I rejected your assertion that at any time in our conversation you said to me that there had to be a time limit. TPG has no control over when this matter will be heard as this will be a matter for the convenience of the Court. I had offered to seek expedition and consistent with my advice to you, TPG has sought to bring the matter on as early as possible.*
5. *For the time being it appears that you have conceded at least that the agreement is as set out in my letters to you of 8 March 2005, subject to whatever you consider is the status of your letter of yesterday – the terms of which I have rejected."*

- on 11 March 2005, when the matter came back to Court, consent orders were made. Some evidence was placed before the Court of the conversations between the legal advisers to the parties prior to the making of the orders.
- Order 1 of those consent orders was in the following terms:

  "1. On the basis that:
  (a) the plaintiff pay $109,897.90 into Court by 4pm on 14 March 2005;
  (b) the plaintiff providing the usual undertaking as to damages;
  (c) the proceedings proceed to expedited final hearing.
  by consent, the Court orders that the first defendant be restrained from filing the Adjudication Certificate, a copy of which is annexed and marked "A", pursuant to section 25 of the Building and Construction Industry Security of Payment Act 1999, until further order of the Court.

- the plaintiff paid the amount of $109,897.90 into Court by 4pm on 14 March 2005.

13 The Court's holding is that Taylor's payment into Court was pursuant to the above-described agreement which had been reached between Taylor and Brick to regulate the conduct of the dispute between them concerning the determination. The agreement was made in part in writing and in part during conversations between the instructing solicitors during the period between 8 and 11 March 2005.

14 The critical term of the agreement is set out in the letter from Taylor's solicitor dated 8 March 2005 to the effect: *[Taylor] agrees to pay into Court the adjudicated amount … on the basis that in the event [Taylor] is unsuccessful in the foreshadowed application then this amount will be released to the (sic) Brick Dept. Of course if [Taylor] is successful then that amount will be returned to [Taylor].*

15 Whilst not a matter of particular moment the balance of probabilities supports a finding that the agreement included a term that the funds would be released to Brick forthwith upon Brick filing the adjudication certificate as a judgment.

16 To the extent that the solicitors have differing recollections of the terms of their conversations it was not suggested that either of the solicitors had done otherwise than to give their best recollection of what had been said. The Court's holding is based upon the probabilities and takes into account the precise terms of the correspondence as well as the terms of the agreed short minutes of order already referred to.

17 I reject the submission that the agreement fails for want of consideration. Plainly enough and as Brick has submitted, the quid pro quo for Taylor's payment into Court was that Brick would refrain from entering judgment.

18 The *"foreshadowed application"* was Taylor's application to have the determination declared void. [See letter from Mr Singh dated 10 March 2005 at page 35 of Mr Singh's affidavit sworn on 5 May 2005]. The *quid pro quo* for Taylor's payment into Court was that Brick would *"cease and desist"* [to use Mr Singh's language in his 10 March 2005 letter] from entering judgment. Clearly some dispute took place on 10 March 2005 about the period for which Brick was to *"cease and desist"* but as counsel for Brick has submitted, it is clear from both Taylor's solicitor's letter dated 10 March 2005 and order 1 made by the Court by consent on 11 March 2005 that it was for the period *until the Court determined the foreshadowed application.* [Brick had suggested a shorter period of 3 weeks but that was rejected by Taylor. As counsel for Brick has contended, no doubt Brick's concern was assuaged by order 1(c), providing for expedition of the proceedings].

19 As Brick has submitted, at no time between 8 and 11 March did Taylor retract the proposal that the amount in Court was to be paid to Brick if Taylor was unsuccessful in the proceedings. Taylor's solicitor confirmed in his letter dated 11 March 2005 that the agreement between the parties *remained* as set out in his letters of 8 March 2005.

Finding as to agreement

20 The finding is that the parties between 8 and 11 March 2005 entered into an agreement in the terms contended for by Brick as earlier set out.

21 If it be necessary to go further I accept as correct the proposition that the order made on 11 March 2005 is *itself* a clear indicator of an implied agreement by Taylor to pay the adjudicated amount to Brick if the issues in the expedited final hearing were determined adversely to Taylor. It seems clear that the amount was to be deposited into Court as security for Taylor's alleged obligation to pay. As counsel for Brick has contended the order incorporated no conditions upon the payment out to Brick. In particular, there was no qualification based upon either the outcome of the District Court proceedings, which had been commenced on 21 December 2004 or on Brick's "capacity to repay".

22 hat agreement is capable of enforcement subject only to dealing with the Grosvenor related issues, the agreement should be entered. These issues are dealt with below.

Proper approach

23 It is important to appreciate that the exercise in hand concerns a determination of the probabilities that:

- Taylor will ultimately succeed in the District Court [and upon any appeals from the decision of that Court] in establishing that Brick in terms of the *final* determination of legal rights, was disentitled to the moneys to which, by the provisions of the Act, it had established an interim entitlement ["the ultimate success factor"];
- at *the time when Taylor so succeeds*, Brick will prove unable to repay the moneys which, on this hypothesis will have been presently paid to it out of the funds held by the Court ["the posited repayment date"].

The ultimate success factor

24 The limited evidence presently before the Court as to the respective positions taken by the parties in the District Court proceedings cannot be said to establish that for which Taylor contended before me. That contention was that the overwhelming likelihood was that Taylor would succeed in the District Court for the reason that Brick had in breach of contract, 'walked off the job'. An affidavit made by Mr Zardo, a project manager employed by Taylor, was relied upon in this regard.

25 However the position in terms of the somewhat unsatisfactory state of the evidence presently before this Court includes the terms of the Amended Statement of Claim before the District Court as well as the terms of the Grounds of Defence. Those pleadings record the cross contentions, Taylor alleging that its termination of the contract in early September 2004 was properly grounded upon breaches of contract by Brick, and Brick contending that Taylor's purported termination was invalid and constituted a repudiation of contract.

26 There is also before the Court evidence given by Ms Carney, albeit on information and belief, setting out her instructions relating to the evidence proposed to be filed by Brick in the District Court proceedings. The outline she has given of the proposed evidence is as follows:

- *Prior to 1 September 2004 the plaintiff requested additional work to be done under the Subcontract.*
- *The plaintiff refused to confirm instructions in writing and to pay for the additional works or to allow an extension of time for the additional works.*
- *As a result of the failure or refusal by the plaintiff to pay the first defendant, the first defendant was unable to pay its employees who were also CFMEU Union members.*
- *On 1 September 2004 there was a meeting between Graham Pohle of the first defendant, Peter Zardo of the plaintiff and Duncan McLaren representing the CFMEU (the Union) at the site of the Subcontracted works. At that meeting the first defendant confirmed its request for payment of its outstanding invoices. Peter Zardo indicated that the first defendant was no longer required for the work and that it was being replaced by another contractor.*
- *As a result of the meeting the first defendant believed the Subcontract to have been terminated by the plaintiff.*
- *Given that the first defendant was being asked to leave the site and would not be permitted to complete its Subcontract, the first defendant sought and followed the advice of Duncan McLaren regarding the best way to ensure payment of its employees (and notwithstanding the dispute about the payment claims under the Subcontract).*
- *On the advice of Duncan McLaren, the first defendant arranged for the preparation of the letter from Robert Wallace (incorrectly dated 1 October 2004). That letter is referred to in paragraph 12 of the Zardo Affidavit.*
- *The letter dated 1 October 2004 was not accepted by Duncan McLaren so the first defendant briefed a new accountant to send to Duncan McLaren a further letter dated 1 September 2004. That letter is referred to in paragraph 17 of the Zardo Affidavit. The purpose of the letters was to enable the Union, in turn, to prepare a request for direct payment of employees (for approximately $16,000) under section 127 of the Industrial Relations Act.*
- *In the Adjudication Determination made on 28 February 2005 the Adjudicator ordered the plaintiff to pay the first defendant for the additional work.*

27 In those circumstances the Court can only accept for present purposes that the District Court proceedings will be strenuously litigated, each party having prospects of success. The claims for relief the subject of this judgment cannot be determined upon the assumption that either party is shown to be more likely than the other, of ultimate success in the District Court proceedings.

Brick's financial position

28 One issue between the parties concerns whether Brick is solvent. The argument put forward by Taylor is that, first, Brick is insolvent, and secondly, that its insolvency means that it will not be able to recover any funds paid by it to

Brick in the event that it later succeeds in the proceedings scheduled to be heard before the District Court. Alternatively Taylor relies upon the suggested 'shaky' financial position of Brick.

29 Both Brick and Taylor have engaged experienced accountants to examine the issue. Both have written reports that come to polar opposite conclusions: Brick's accountant giving evidence that it is solvent, whilst Taylor's giving evidence that it is not. There are methodological problems in the approaches taken by *both* experts. As also highlighted, many of these problems are a result of the external restraints placed on the experts, and I accept that they have used their best endeavours in assisting this Court.

30 Taylor's case additionally addresses 3 particular matters:

· that in September 2004, Brick commenced taking steps to be wound up or be deregistered;

· that Brick's BAS returns for the period July 2003 to March 2005 show money expended on purchases and wages exceeded money received from sales by $548,198; and

· that the Tax Office might commence proceedings to recover an outstanding debt of $101,380.

31 The appropriate way forward is to turn to the approaches taken by the accountants.

The report prepared for Brick

32 The report for Brick was prepared by Mr Kerry LeCroix Warner of Affinity Business Solutions Pty Limited.

33 He gave evidence that these are two accounting methods to determine whether or not a company is solvent: the cash flow test and the balance sheet test.

34 Under the cash flow test, one considers the time at which debt amounts are to be paid and whether the company is able to meet such debts at those times. Such an approach takes into account debt arrangements whereby a structured repayment scheme is adopted by both debtor and creditor.

35 Under the balance sheet test, total liabilities are compared against total assets. If total assets are less than total liabilities, then a company is considered insolvent.

36 Mr Warner concludes that Brick passes both tests, and is therefore solvent.

37 Mr Warner has, on instructions from Brick, prepared a Balance Sheet as at the end of May 2005. The balance sheet has not been audited and the accounts are not up to date. Nonetheless, even with those qualifications, Mr Warner's view, based on verification of certain balance sheet items from outside sources and instructions from Brick's manager, is that Brick is solvent whether or not the adjudication certificate is included as an asset. Particularly important is the recognition of the deferred payment aspect of the Tax Office debt and the subordinated nature of the director's loans.

38 I have some misgivings as to the manner in which some of his conclusions are reached. These misgivings essentially stem from his reliance on advice on certain matters given to him by Mr Pohle the Manager of Brick. However, the evidence was admitted and includes the fact that the company is meeting all debts on a timely basis.

39 Mr Warner finds that the cash flow test is passed.

40 The application of the balance sheet test also raises some concerns:

· about 22% of the assets of Brick, as at May 2005, consists of "Office Equipment" and "Building Equipment". These items are recorded on the balance sheet as assets, and valued at cost. No provision has been made for depreciation. This is a curiosity, as accounting practice and accounting standards require that the cost value of assets be adjusted for depreciation or to fair value over time;

· In considering the solvency position in the event that the "Judgment Granted" amount of $109,897.80 is paid to Brick within 12 months, Mr Warner concludes that, based on budget and cash flow numbers, Brick will remain solvent. The following should be noted:

· First, Mr Warner compares the 12-month budgetary projection [to July 2006] regarding forecast income against a profit and loss report for the financial year 2002. He makes such a comparison to determine whether the forecast income amounts are likely to be achieved. These forecast income amounts are derived from Mr Pohle's estimate. The comparison is made with the 2002 income report because none more recent are available. The inherent risk in this type of verification, though it might be the best available in the circumstances, is unsatisfactory.

· Second, Mr Warner relies on Mr Pohle's assertion "*that the company has contracts in place to generate this revenue up to September 2005*".

41 Returning to the detail, the above-described steps to wind up were not taken. Nine months later Brick continues to trade. Indeed, the mere fact of winding up does not indicate insolvency. Further, Brick contends that it commenced taking those steps as a result of Taylor's failure to make the very payments the subject of the adjudication determination and to ensure Brick's employees were paid. It is put with some substance that Taylor should not be permitted to benefit from its own default: ***Brodyn*** at [87].

42 As for the debt to the Tax Office, Brick has an instalment payment arrangement in place so that as long as that is met there is no appreciable risk of winding up proceedings being commenced by the Tax Office.

The report prepared for Taylor

43 The report for Taylor was prepared by Mr William Moyes of Bentley MRI. His conclusion in the report was that Brick is insolvent, and has been so for some period of time. It appears that Mr Moyes has also had to deal with short time deadlines and also an inability to communicate with the managers of Brick.

44 The principal approach adopted by Mr Moyes is to construct a picture of the financial situation of Brick by examining Business Activity Statements ['BASs'] filed for it to the Australian Taxation Office.

45 In my view, one must be particularly careful in attempting to assess the solvency of a company by examining its BASs prepared for the purpose of reporting Goods and Services Tax. This is primarily for two reasons. First, the concept of income is different in accounting and taxation. Second, the accounting reports of Brick were prepared on an accrual basis, while the BASs were prepared on a cash basis. Solvency requires one to assess the capacity of a company to pay debts as and when they fall due. A company may generate trading losses for a period but remain solvent for a number of reasons. Expenses may be outlaid in advance of the corresponding income. The company may have cash support of its shareholders or lenders to enable it to sustain trading losses for a period of time.

46 The test, in cases like the present, is a high one. One exchange between Mr Kerr, representing Brick, and Mr Moyes was as follows:

"*Mr Kerr: Now, leaving aside whether or not the claimant makes that contention, would you agree that proper accounting treatment would be to record that amount as a current asset, taking account of the fact that the respondent has an adjudication certificate under the Act for that amount?*

Mr Moyes: Yes, but with a qualification….that if the debt was to be brought to account as an asset, there should be a corresponding liability in the balance sheet.

Mr Kerr: What is that liability?

Mr Moyes: The liability would be a contingent liability.

Mr Kerr: And is that because there is a possibility that that may have to be refunded…to reflect that possibility?

Mr Moyes: Yes.

Mr Kerr: Now, if that possibility is the subject of court proceedings, i.e. the possibility that it might have to be refunded is subject to court proceedings which are in dispute and are a long way from resolution, whether by agreement or judgment-…is it, in those circumstances, appropriate to record that potential debt as a liability?…Assume for a moment that the contingent liability, the form of the contingent liability is a claim Taylor has in some court proceedings—..[is] yet to be determined…

Mr Kerr: If that is the nature of the potential liability, is it appropriate to record in the accounts of the company an amount reflecting that claim as a liability?

Mr Moyes: I believe it is. …

Mr Kerr: Hard to quantify, I appreciate, but with that qualification, you will agree with me, will you not, that if the $109,000 is included as a current asset, the company is, on the current ratio test at least, solvent?

Mr Moyes: Yes.

Mr Kerr: And your position is if that is not included, the company is insolvent on the current ratio test?

Mr Moyes: Yes.

Mr Kerr: So the effect of what you have just said is a denial, on your analysis at least, to deny Brick the receipt of that $109,000 would be to drive it from a solvent situation into an insolvent situation?

Mr Moyes: If you took the view that the company was currently solvent, then that would be correct.

Mr Kerr: Yes, if you take that view, and you have already accepted, subject to those two qualifications you earlier mentioned, that by including the $109,000 as an asset, which would be an appropriate accounting treatment, subject to those qualifications, the company is solvent on the current ratio test?

Mr Moyes: On the current ratio test, yes."

47 Clearly Mr Moyes ought to have included the $109,897.80 as an asset in the balance sheet which he prepared. This is because the Court is considering whether Brick will be able to repay this $109,897.80 should it be unsuccessful in the District Court. This necessarily assumes that it has been granted the funds.

48 I reject the qualification put forward by Mr Moyes that such an inclusion would necessarily entail a likewise inclusion of a liability in the same sum in the balance sheet. Accounting practice does not require a company to record, as a liability, any and all claims made against it in court proceedings. It would be highly unusual for a contingent liability to be recorded on a balance sheet at its face value. This is because contingent liabilities, like the one in this case, neither meet the accounting requirements of probability of occurrence nor reliability of measurement.

49 For the above reasons, and despite my general misgivings about the reliability of some of the information which Mr Warner relied upon, I cannot be satisfied with any certainty that Brick is either *currently* insolvent, or that it *will be* insolvent in the near term (when it is presumed that the District Court proceedings will be resolved). Although Brick is clearly a fair distance from being described as being in a *comfortable* financial position, applying the above-described 'proper approach' the evidence is insufficient to warrant a withholding of the funds.

Brick's alternative submissions

50 As will be seen from what follows Brick has addressed submissions on a number of fronts. A close technical analysis is based upon the proposition that until Brick files the adjudication certificate, there is no judgment the execution of which can be stayed. A further set of contentions is advanced to the effect that Taylor is presently pursuing interim

relief and not substantive relief, Brick's proposition being that interim relief can only be given in support of final relief.

51 Whilst there may well be substance in a number of these submissions I prefer to deal directly with the basal question in terms of determining the probabilities described above as the proper approach. This requires close attention to the evidence before the Court as to 'the ultimate success factor' and as to the probabilities that if Taylor ultimately succeeds, Brick will prove unable to repay the moneys on the 'posited repayment date'.

Brick's financial position – placed into the correct perspective

52 The principle to be derived from *Grosvenor* is that where there is certainty that the defendants' rights will be otherwise rendered nugatory, and that it will suffer irreparable prejudice, because moneys paid would be irrecoverable as a result of the claimant's insolvency or liquidation, then the proper and principled exercise of the Court's discretion (under Part 44 rule 5) is to grant a stay (at [15] and [32]). Such a stay is to *"prevent injustice"* (at [17]).

53 As earlier observed, the Court is involved in the exercise of balancing the risk that a respondent's payment may be irrecoverable because of a claimant's insolvency, in the event the final rights are determined in the respondent's favour, against the policy of the *Act* that successful claimants be paid (*Grosvenor* at [31]).

54 Stays in relation to debts under the *Act* ought be less readily available than stays in relation to appeals from curial proceedings (***Grosvenor*** at [31]; ***Herscho v Expile Pty Limited*** [2004] NSWCA 468 at [3]). In ***Herscho*** Hodgson JA suggested the risk of prejudice must be *"a very high risk"* and certainly more than merely a real risk to justify a stay (at [3] and [9]).

55 Since ***Grosvenor*** the Court of Appeal has emphasised that the policy of the *Act* militates against the grant of stays: ***Brodyn*** at [85]-[87]. [See also ***Transgrid v Siemens Ltd*** [2004] NSWCA 395 at [37] where the Court indicated that the fact that payments are provisional only would not normally be a ground for withholding relief.]

56 The present case is far removed, on a factual level, from ***Grosvenor***. A refusal to pay out the funds in Court to Brick is not necessary to "prevent injustice" (cf ***Grosvenor*** at [17]). Based on the evidence before the Court their is neither *"certainty"* (to adopt the language used in ***Grosvenor*** at [32]) nor *"a very high risk"* (to use Hodgson JA's language in ***Herscho*** at [9]), that Taylor will not be repaid if it becomes so entitled.

57 In ***Grosvenor*** the compelling facts, not present in this case, were:

- the claimant was in administration (at [2]);
- the claimant had a deficit exceeding $4 million to unsecured creditors, and a projected return of 11 cents in the dollar (at [3]);
- the respondents' counter claim was for $550,839 (at [11]).

58 Conversely, in this case:

- Brick is not in any form of insolvency administration;
- Upon the necessary assumption that the funds held by the Court are included in the calculation, the evidence permits a finding that Brick is in a positive net asset position of at least $50,000;
- Taylor's counter claim, which is for $221,900, is disputed and being defended.

59 The principle in ***Grosvenor*** is only applicable where the claimant is either actually, or very close to, insolvent. Were it otherwise then the stay itself may drive the claimant into the very insolvency which the interim payment regime of the *Act* is designed to prevent. Such a result would be unjust in circumstances where:

- prima facie there is a debt due from the respondent to the claimant;
- the final amounts due between the parties may not be ascertained for weeks, months or years;
- the Court is in no position to assess the relative merits of the parties on the final claims;
- the financial situation of the respondent may itself deteriorate so that the claimant loses for all time the benefit of the right which is now prima facie enforceable;
- there is nothing in the *Act* which suggests a claimant's entitlement to receive the interim payments depends upon it establishing a capacity to repay those sums if there is a final determination unfavourable to it;
- the claimant is deprived of *the very funds* the *Act* contemplated would be made available to it to pay its own employees and suppliers.

60 As counsel for Brick case contended, to grant a stay in circumstances short of actual or imminent insolvency would be to turn the *Act* on its head. Rather than providing a statutory regime which ensures progress payments, and thus cashflow, to permit a person undertaking construction work to continue to do so, it may then operate to prevent cashflow and bring about the very result the *Act* is designed to prevent – persons not being paid promptly for the work which they have done.

61 Notwithstanding the fact that Brick's fortunes over the past few years appear to have waxed and waned, the fact is that Brick is neither under administration nor being wound up in insolvency. Nor has Taylor demonstrated that there is either *certainty* or *a very high risk* that it would not be repaid should Taylor succeed on the final determination of legal rights. In those circumstances there is no basis to apply, by analogy, the principles in *Grosvenor* so as to prevent Brick receiving the money paid into Court by Taylor.

Brick's remaining submissions

62 I earlier adverted to the fact that Brick had put submissions on a number of alternative bases. In deference to the care with which the submissions were formulated it is appropriate to set them out.

Taylor's failure to seek substantive relief

63 Brick has submitted that the following matters in terms of the formal position should not be overlooked:

- on 10 March 2005 Brick obtained an adjudication certificate in respect of the Adjudicator's determination dated 28 February 2005;
- on 11 March 2005, by consent, the Court restrained Brick from filing the adjudication certificate as a judgment until further order;
- on 5 May 2005 the Court found that the determination was valid. Consequently Brick now seeks on order lifting the restraint;
- Brick has a statutory entitlement to file the certificate as a judgment for a debt in a court of competent jurisdiction and to enforce it accordingly: s25 *Building and Construction Security of Payment Act* 1999 (*Act*). The interim restraint prevents it from doing so;
- Taylor has identified no basis, other than those articulated during the hearing, which have now been rejected, to disentitle Brick from filing the certificate. Brick's capacity to repay the judgment debt is relevant only to the issue of the release of the funds in court. It is not relevant to Brick's entitlement to file the certificate;
- nonetheless Taylor persists in seeking an interim injunction restraining Brick from filing the certificate. Taylor seeks no substantive relief.

64 Brick contends that interim relief can *only* be given in support of final relief: ***Australian Broadcasting Corp v Lenah Game Meats Pty Ltd*** (2001) 208 CLR 199 at [15-16] (Gleeson CJ).

65 Whilst this contention is accurate as a matter of principle it seems to me that in the present circumstances the Court in the principled exercise of that discretion, may well be in a position to, for example, order the payment of the funds which are presently in this Court to the District Court. This is less a question of interim relief than a question of management of funds paid into Court where other proceedings will be determinative of the final rights of the parties and depending upon the circumstances, should arguably, in determining those final rights, hold the funds paid into Court.

The reach of the Grosvenor decision - No judgment the execution of which can be stayed

66 **Grosvenor** concerned the stay of execution of a judgment after the certificate had been filed, under Part 44 rule 5 of the Supreme Court Rules. Brick's contention is that unless and until it files the adjudication certificate, there is no judgment the execution of which can be stayed.

67 Brick further contends that:

- Taylor could have refrained from commencing these proceedings until after the adjudication certificate had been filed;
- it could then have sought an order setting aside the judgment constituted by the filing of an adjudication certificate;
- such an application can be brought on the basis that the underlying determination is not an adjudicator's determination within the meaning of the *Act*: *Brodyn Pty Ltd v Davenport* [2004] NSWCA 394 [42] and [61];
- however in such proceedings the respondent must pay the disputed amount into court "*as security*";
- if the application to set aside the judgment fails, the money in court "would normally be paid out to the builder": *Falgat Constructions Pty Ltd v Equity Australia Corp Pty Ltd* [2005] NSWCA 49 at [19];
- had Taylor done so then the principles in *Grosvenor* may have been relevant – there would then have been a judgment to be stayed;
- however, having elected to proceed in the manner in which it has, namely to challenge the determination **prior to the adjudication certificate being filed** and to provide security to permit that challenge to proceed, Taylor cannot now obtain the benefit of the Court's discretion (to stay a judgment) which is available in different circumstances and which do not, and may never, exist. Thus the Court need not concern itself with the question of Brick's capacity to repay the funds in court to Taylor.

68 In my view the Court should be wary of eschewing the need to take Grosvenor into consideration presently. An analysis of the principles set out in Grosvenor against the facts presently before the Court, reveals for reasons given in the judgment, that it is appropriate for the Court to sanction the return to Brick of the funds paid into Court.

Orders appropriate to be made

69 In my view the above reasons for judgment support the making of the following orders:

- declare that the parties between 8 and 11 March 2005 entered into an enforceable agreement for the payment into Court by Taylor of the sum of $109,897.80 on the basis that in the event that Taylor was unsuccessful in the first proceedings, that amount would be released to Brick forthwith upon Brick filing the adjudication certificate dated 10 March 2005 as a judgment in this Court pursuant to s25 of the *Building and Construction Security of Payment Act 1999* ;
- order that the agreement be specifically performed by the parties to the agreement;
- order releasing Brick from the restraint constituted by Order 1 made by the Court on 11 March 2005
- order that forthwith upon Brick filing the adjudication certificate dated 10 March 2005 as a judgment in this Court pursuant to s25 of the *Building and Construction Security of Payment Act 1999* there be paid out to Brick

the sum of $109,897.80 paid into Court by Taylor in accordance with Order 1(a) made on 11 March 2005, together with any interest accrued on that sum.

70 The parties are required to bring in short minutes of order which are to embrace all orders which remain to be made in the proceedings.

Mr MG Rudge SC Plaintiff instructed by Avendra Singh Strati & Kam
Mr VF Kerr (First Defendant)) instructed by Carbon Legal