

JUDGMENT : Einstein J. Supreme Court, New South Wales, Equity Division, T&C List. 1st March 2007

The History of the Proceedings

1 The broad history of the three sets of proceedings which have separated the parties may be gleaned from the judgments of the Court delivered on 14 November 2006 [NSWSC 1192] and 24 November 2006 *ex tempore* and revised on 6 December 2006 [NSWSC 1301]. It is unnecessary to repeat the record and the content of those judgments is taken as a given.

The Notices of Motion

2 There are before the Court presently two notices of motion, one pursued by JBK Engineering Pty Limited and the second pursued by JBK Design & Construction Pty Limited [together "JBK"]. The motions are materially identical, save for the figures in each of the motions. Essentially the burden of each motion is for the Court to order that the sums of money paid into the Court by orders entered following the second of the judgments to which I have referred, be paid out of Court to the respective JBK entities.

The threshold point

3 A preliminary point has been taken by Brick & Block as respondent to the motions. The contention is that the Court should not exercise its discretion to permit a re-opening of the orders which were made following the judgment of 24 November 2006. The essential proposition pursued by Brick & Block in that regard is that special circumstances are required to be shown before a party will be entitled to essentially re-open orders, even made at an interlocutory level, and particularly in circumstances where a different forensic approach is sought to be adopted.

The principles

4 Brick & Block has drawn the Court's attention to the principles enunciated and summarised by Heydon JA in *Nominal Defendant v Manning* (2000) 50 NSWLR 139 and in particular where his Honour in paragraph 72 said: *"The real evils to which Hayne JA referred in DA Christie v Baker [1996] 2 VR 582 at 602-603 - the risk of conflicting decisions, the unnecessary vexing of respondents, judge shopping and the diminution of certainty in the conduct of respondents of their affairs - and others - damaging public confidence and the integrity of judicial decisions, expending time and money on litigation unnecessarily, are evils which each court in its own individual discretion will rightly strain to avoid."*

5 Heydon JA said at paragraph 67 of the same judgment: *"A second application without additional evidence would smack of judge shopping and be unlikely to succeed."*

6 Those statements by Heydon JA in *Nominal Defendant v Manning* are by no means new in terms of established principle: cf *Autodesk Inc v Dyason (No 2)* (1993) 176 CLR 300 at 302 to 303.

7 As is apparent from *Autodesk*, there are occasions when the public interest in the finality of litigation must yield to the undoubted discretion in the Court to permit a matter which had been determined at an interlocutory level to be re-litigated. However, it is quite plain on the authorities that it is important for the court to monitor any obvious attempt to forum shop *extremely closely* and it is equally clear that where there is a change in circumstance, the inherent jurisdiction of the Court to vary an interlocutory order may be invoked. McLelland J in *Brimaud v Honeysett Instant Print Pty Ltd* (1988) 217 ALR 44 put the matter thus as follows at 46: *"The overriding principle governing the approach of the court to interlocutory applications is that the court should do whatever the interests of justice require in the particular circumstances of the case. In giving effect to that general principle and in recognition of the public and private interests earlier referred to, rules of practice have been developed in accordance with which the discretionary power of the court to set aside, vary or discharge interlocutory orders will ordinarily be exercised. Not all kinds of interlocutory orders attract the same considerations."*

Dealing with the issue

8 Mr Christie of counsel, who appears for Brick & Block, has acknowledged that there has indeed been a material change as between the occasion when the proceedings were before the Court and determined in November 2006 and the present time. That material change is evidenced by financial statements for JBK Engineering Pty Limited presently before the Court, identifying through Greg Rogers & Associates Pty Limited, accountants, that as at the end of December 2006 JBK Engineering had a total equity of \$722,646. [This is to be compared with the financial statement materials which would have been available on and after 15 November 2006 where the financial position of JBK Engineering was of an entirely different order].

9 The essential burden of the submissions put by Mr Christie to the Court today has been that the Court should be averse to permitting JBK to move away from a forensic stance, being that clearly identified in the judgments, [particularly that of 24 November 2006 and particularly set out in paragraph 7 of that judgment]. In short, the forensic approach by JBK [seeking to put out of contention the necessity for Brick & Block to call evidence of irreparable harm should the funds be paid out] was the subject of observation at subparagraph 8 of paragraph 7 of that judgment, [as well as at subparagraph 6 of paragraph 7].

10 At the end of the day the principled exercise of the Court's discretion in terms of whether or not it presently permits to be re-opened, effectively the question of the regime which is to go forward as between these parties, must be exercised against the clear background of the significance of the *Building and Construction Industry Security of Payment Act 1999* and the purposes for which, on established authority, that legislation was enacted.

- 11 In my view there is no doubt but that the appropriate exercise of the Court is to permit JBK to litigate the matters sought to be litigated in the current motions.
- 12 The evidence put forward by JBK in opposition to the threshold attack upon its entitlement to have these matters re-opened and argued is to be found in the folder marked exhibit PX and in the affidavits there referred to.
- 13 It is unnecessary to do more than to make quite clear that this judgment and the materials taken in as exhibits on the threshold application, are not to be regarded as before the Court on the motions proper, for the reason that it has been taken as a given that Brick & Block will be entitled, following a decision on the preliminary point, to have an opportunity to prepare and present its own evidence, following which the motions proper will be before the Court to be heard on their merits.
- 14 For those reasons the threshold application to refuse leave to JBK to pursue the motions is dismissed.
- 15 It only remains for directions to be given as to the way forward.
- 16 The Court is in the parties' hands in that regard appreciating the urgency which is said to attach to the pending invitation to tender.
- 17 Costs are reserved.

Mr J Hyde (Plaintiffs) instructed by Doyles Construction Lawyers
Mr M Christie (Defendant) instructed by Corrs Chambers Westgarth