

**JUDGMENT** : Einstein J Equity Division Technology and Construction List 24<sup>th</sup> November 2006

- 1 The notices of motion presently before the Court follow the judgment delivered on 14 November 2006 [2006 NSWSC 1192].
- 2 The notices of motion filed by Brick & Block: Although there are three notices of motion filed by Brick & Block, each on 15 November 2006, and each seeking a stay of judgments given on 14 November 2006, it is unnecessary to determine the motion in the third set of proceedings [ 55045 of 06] as there is no issue but that the existing undertaking as to damages supporting a continued interlocutory injunction regime is to remain in place.
- 3 The notices of motion filed by Brick & Block in proceedings 55041 of 06 and 54042 of 06 do require to be treated with.
- 4 JBK has also filed three notices of motion on 22 November 2006. Two of those notices of motion, those filed in proceedings 55042 of 06 and 55041 of 06, each seek orders for the sums paid into Court by Brick & Block to be paid out to Court to JBK Engineering or the other JBK company.
- 5 In so far as that concerning proceedings 55045 of 2006, the notice of motion filed by JBK does not require to be treated with for the same reason, namely the existing undertaking as to damages supported by a continued interlocutory injunction is to stay in place.
- 6 The other motions by JBK each seek an order of the Court that the particular amount paid into Court in each of the suits be paid out to JBK: the amounts are [in 55042 of 06], the sum of \$143,901.34 and [in 55041 of 06], the sum of \$514,639.65.
- 7 The short position in relation to the respective contentions of the parties and in relation to the forensic position as it now obtains, may be described as follows:
  1. Early in the proceedings Brick & Block paid into Court an amount of \$600,000 pending the final determination of the proceedings to set aside the judgments: cf section 25(4)(b) of Building & Construction Industry Security of Payment Act 1999 NSW.
  2. As a result of the judgment delivered on 14 November 2006, the challenge by Brick & Block to the validity of the respective determinations has been unsuccessful, at least at first instance.
  3. In that circumstance, one or both of two future paths faced the parties:
    - (a) The pressing of an appeal by Brick & Block against the 14 November 2006 judgment;
    - (b) The parties regularly proceeding to a final hearing of their dispute.
  4. In that environment, JBK sometime ago sought the payment out to it of the security moneys paid into Court as a condition of the entitlement of Brick & Block to challenge the validity of the determinations.
  5. The response of Brick & Block to the claim by JBK to have the security moneys paid out to it was to seek an order staying the payment out. It did so against a background in which it was proposing to call evidence of alleged irreparable harm should the funds be paid out: The contention being that the evidence would establish that JBK would not be in a position to repay the money should either an appeal against the judgment succeed or Brick & Block ultimately succeed upon a final hearing of the dispute.
  6. JBK's response to the application for the stay was both twofold, as well as interesting:
    - (a) The response was to offer to furnish to the Registrar a bank guarantee for the same amount of \$600,000 at the same time as receiving from the Registrar the cash sum of \$600,000 previously held as security [it is appropriate to comment that this form of exchange would not alter the situation ante in any material respect].
    - (b) The response was to indicate that JBK was also entitled to regard the forensic position as one in substance, similar to that which would obtain if Brick & Block were seeking a continued interlocutory injunction: such a situation entitling JBK not only to an undertaking as to damages to come forward from Brick & Block but also as entitling JBK to require that Brick & Block, it was suggested, provide security to support such an undertaking as to damages.
  7. In the result JBK has sought a Court order requiring both the undertaking as to damages and the production by Brick & Block of security to support that undertaking in the sum of \$250,000.
8. It is appropriate to observe that the forensic approach by JBK putting out of contention the necessity for Brick & Block to call evidence of irreparable harm should the funds be paid out has to be regarded as no more than that.
9. The parties are obviously, as it seems to me, both posturing for the best forensic position practicable and on their instructions, seeking to obtain the best form of platform obtainable from the Court, at first instance, in order to walk the distance, either through the appellate proceedings and/or through the final hearing of the proceedings, in terms of their ultimate final rights.
10. In a sense, it is fair to say that the parties have been able to reach a partial consensus only, as to the manner in which Brick & Block's stay applications are to be resolved. In short, because of the consensual approach to the exchange of the \$600,000 cash funds for the bank guarantee in the same sum, it has been put to the Court that it has been unnecessary for the Court to determine the merit or lack of merit in the proposition being put forward

by Brick & Block that it would suffer irreparable harm should the moneys which had been paid into Court be paid out to JBK.

11. For those reasons, the otherwise forensic tools available in relation to a close examination of the financial position, for example, here of JBK, are rendered otiose.
12. However, in so far as JBK has also included as a suggested term of the accommodation that the Court extract an undertaking as to damages from Brick & Block supported by the above described security of \$250,000, Brick & Block has disputed any such regime as appropriate, either by Court order or by consent in the present circumstances.
- 8 Before proceeding further, it is convenient to immediately reject one of the submissions put forward by Brick & Block, which is that the words “final determination of the proceedings” appearing in s 25(4)(b) of the Act properly construed, refer to the final determination of an appeal from a first instance decision.
- 9 In the context of the Act in focus, I am quite clear that the submission is misconceived. The words “final determination of the proceedings” as used in that section refer, and refer only, to final determination at first instance.
- 10 There has then been a close examination in the respective submissions put to the Court of the general principles in relation to extraction of undertakings as to damages and the like in interlocutory proceedings. To my mind the general principles must always be subject to particular circumstances in which interlocutory proceedings or undertakings as to damages are sought.
- 11 The Court has been taken to a decision of Hely J in *Doric Products Pty Limited v Lockwood Security Products Pty Limited* [2002] FCA 282 where some short examination was given to the propriety of extracting an undertaking as to damages as the price of the stay. It is true that his Honour held that in a particular circumstance, a party should only be required to give an undertaking as to damages where it was necessary for the protection of persons against a perceived risk of injury.
- 12 In my view, that particular decision on its facts does not assist in the determination of the very specific circumstance now faced by this Court in the unusual position as I have described, where one has a decision at first instance, upholding determinations, an apparent intent by Brick & Block to seek to appeal from that decision, and an obvious necessity, unless the matter is settled, for the parties to go forward with the finality of the proceedings in order to obtain a final decision as to liability.
- 13 It is very important to recall, it seems to me, that from beginning to end, Brick & Block has paid into Court as security, the unpaid portion of the adjudicated amounts. Against the template above described, those funds [albeit undergoing a change in the form in which the security moneys are held by the Court] should the Court determine that this is the appropriate regime, will remain held by the Court to abide any final determination of the party’s rights and indeed, to abide the possibility that the Court of Appeal may set aside the judgment.
- 14 Ultimately the Court whenever an application [for a stay of proceedings and/or a tangential application for a Court order to order that funds paid into Court should not be released] has the discretion to condition the grant of such a stay or the making of an order that the funds remain with the Court upon such other appropriate conditions, if any, as the Court sees fit.
- 15 Presently, and albeit that the parties had only reached a certain distance in their accommodation of one another’s positions, in my view it is inappropriate for the Court in the present environment to impose upon Brick & Block a condition that unless it proffer an undertaking as to damages and/or such an undertaking secured by an amount to be paid into Court of \$250,000, the funds presently paid into Court be paid out to JBK without more.
- 16 Mr Doyle’s contention that in the present circumstances his client is entitled to extract the undertaking as to damages, together with the security of an amount of \$250,000 to be paid into Court, cannot be sustained on any of the evidence before the Court, nor on general principle.
- 17 The undoubted fact is that Brick & Block’s attempt to, at first instance, have the civil determinations upset or declared void, has failed.
- 18 As long as the continued circumstance involves the \$600,000 worth of security, whether in the form of a bank guarantee or in cash, safely remaining in the Registrar’s power, custody and control, the requirements of the Act in the unusual circumstances and environment in which this Act does operate, have been satisfied.
- 19 It is, it seems to me, very important to note that a forensic stance such as that which appears to me here to be adopted by JBK, [to put out of Court in terms of what is being litigated, the question of whether or not Brick & Block can establish that JBK would not be in a position to repay the moneys, should either an appeal against the judgment succeed or Brick & Block ultimately succeed upon a final hearing of the dispute], simply cannot involve a win/win situation for JBK.
- 20 In all of the circumstances, the principled exercise of the material discretion is to order that the sum of \$600,000 presently held by the Registrar, either remain in the custody of the Registrar or if, and only if, a co-relative bank guarantee comes forward from JBK in the same amount, to permit the Registrar to exchange one form of that security for the other.

- 21 Outside of that particular order, it is unnecessary, it seems to me, for the Court to do otherwise than to, in relation to the notices of motion filed by JBK in proceedings 55041 of 2006 and 55042 of 2006, dismiss in each case the application for the order sought in the respective paragraphs numbered three.
- 22 It is not intended that those notices of motion, in so far as seeking an account or inquiry be treated with today.
- 23 In relation to costs of the respective motions which have been before the Court today, the Court orders that in relation to each of the motions filed by Brick & Block Company Pty Limited [but not that in 55045 of 2006] the respective respondents to the motion pay 90 per cent of the costs of Brick & Block.
- 24 In relation to each of the motions filed by JBK [but not that in 55045 of 2006] there is to be no order as to costs.
- 25 In relation to the notices of motion filed in the proceedings no. 55045 of 2006 no order as to costs is made.

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