

**TAYLOR PROJECTS GROUP PTY LIMITED v BRICK DEPT. PTY LIMITED & ORS
[2005] NSWSC 571**

Supreme Court of New South Wales – 17 June 2005

FACTS

Taylor Project Group Pty Ltd ('Taylor') entered into a construction contract with Brick Dept. Pty Limited ('Brick') for the carrying out of brick and block laying work at a site in Holden Street, Ashfield. Brick made an Adjudication Application under the *Building and Construction Security of Payment Act 1999* (NSW) ('the Act'). The Adjudicator determined that Taylor was required to pay Brick the sum of \$109,987.80.

Taylor and Brick subsequently entered into an agreement in which Taylor agreed to refrain from seeking an injunction preventing Brick from entering judgment for the adjudicated amount and would pay the adjudicated amount into Court on the basis that that the parties would obtain an early listing of the matter in the Supreme Court for determination and that the sum would be paid to Brick if it succeeded in those proceedings. Consent orders to that effect were made by the Court on 11 March 2005.

Proceedings were subsequently brought by Taylor against Brick in the Supreme Court, seeking to impugn the adjudication determination. The matter was heard on 5 May 2005 and the Court held that the adjudication determination was valid. The proceedings were stood over for argument as to costs, orders and questions concerning a stay of orders.

At a further hearing, commencing on 15 June 2005, Taylor sought an Order from the Court restraining Brick from taking steps to enforce the judgment obtained on 5 May 2005, and a further Order restraining Brick from filing any adjudication certificate as a judgment in any court. Taylor in its submissions relied on the decision in *Grosvenor Constructions(NSW) Pty Ltd v Musico* [2004] NSWSC 344 in which it was held that where a claimant clearly being insolvent had obtained an adjudication certificate, it was appropriate to order a stay of the execution of the judgment debt. Taylor argued that it would otherwise suffer irreparable prejudice as payment pursuant to the judgment debt could never be recouped.

ISSUE

If a claimant is close to insolvency, can the Respondent obtain an order of stay of the execution of the judgment debt?

FINDING

The Court held that whilst the financial position of Brick over the past few years had "waxed and waned", it was not proved to be under administration or being wound up in insolvency. The Court considered that if a claimant is close to insolvency, then non-payment of the debt would prevent cashflow and may drive the claimant into insolvency, which the Act was designed to prevent. Also the Court found that Taylor had not demonstrated that the principles in *Grosvenor* applied as there was neither *certainty* nor *a very real risk* that it would not be repaid should it succeed on the final determination. The Court ordered that upon Brick filing the adjudication certificate as a judgment, the sum paid into Court by Taylor be paid out to Brick.

QUOTE

Einstein J at paragraphs 52 and 60 held: "[52] The principle to be derived from *Grosvenor* is that where there is certainty that the defendant's 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...is to grant a stay... Such a stay is to "*prevent injustice*". [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."

IMPACT

When a claimant is not insolvent, but may become insolvent due to non payment of an adjudicated amount, the Respondent will not be permitted an order of stay of execution of a judgment debt.

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