

SUPREME COURT OF QUEENSLAND

CITATION: *CCIG (Australia) Pty Ltd v Amicus Hospitality Group Pty Ltd*
[2019] QSC 232

PARTIES: **CCIG (AUSTRALIA) PTY LTD**
ACN 602 873 905
(applicant)
v
AMICUS HOSPITALITY GROUP PTY LTD
ACN 622 349 017
(respondent)

FILE NO: BS8627 of 2019

DIVISION: Trial Division

PROCEEDING: Originating application

DELIVERED ON: 18 September 2019

DELIVERED AT: Brisbane

HEARING DATE: 11 September 2019

JUDGE: Mullins J

ORDER:

- 1. A declaration that upon the proper construction of the Contract between the applicant and the respondent dated 29 November 2017 (Contract), in particular clauses 5.2, 5.3, 5.8, 42.8 and Annexure Part A of the General Conditions of the Contract, the respondent is obliged to provide to the applicant security in the form of an unconditional bank guarantee in the sum of \$1,295,000.00 in the applicant's favour from 1 August 2019 as security for the due and proper performance of the Contract by the respondent until 14 days after the issue of a Final Certificate pursuant to clause 42.8 of the Contract.**
- 2. The respondent specifically perform its obligations under clause 5 of the General Conditions of the Contract by providing to the applicant security in the form of an unconditional bank guarantee in the sum of \$1,295,000.00 in the applicant's favour from 1 August 2019 as security for the due and proper performance of the Contract by the respondent until 14 days after the issue of a Final Certificate pursuant to clause 42.8 of the Contract.**
- 3. The respondent must pay the applicant's costs of the proceeding.**

CATCHWORDS: CONTRACTS – BUILDING, ENGINEERING AND

RELATED CONTRACTS – THE CONTRACT – CONSTRUCTION OF PARTICULAR CONTRACTS AND IMPLIED CONDITIONS – SECURITY AND RETENTION FUNDS – where the contract incorporated the Australian Standard General Conditions of Contract (AS2124-1992) as amended by Annexure Part B to the general conditions – where clauses 5.2 and 5.3 of the general conditions required the contractor to provide two unconditional bank guarantees each for 2.5% of the contract sum – where the bank guarantees that were provided each had an expiry date – where the second guarantee expired after the date of practical completion but before the date on which the principal is bound to release any security then held by the principal – whether the principal is entitled to demand the contractor provide a bank guarantee to replace the expired bank guarantee – whether the principal had impliedly approved the form of the bank guarantees with expiry dates

Ewing International LP v Ausbulk Ltd (No 2) [2009] SASC 381, cited

Larking v Great Western (Nepean) Gravel Ltd (in liq) (1940) 64 CLR 221; [1940] HCA 37, considered

Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104; [2015] HCA 37, considered

PHHH Investments No 2 Pty Ltd v United Commercial Projects Pty Ltd (No 2) [2018] VSC 92, distinguished

COUNSEL: P J Dunning QC and L M Campbell for the applicant
M H Hindman QC and S J Gibson for the respondent

SOLICITORS: Holding Redlich for the applicant
Fielding Robinson Lawyers for the respondent

- [1] The applicant is the owner and operator of Daydream Island Resort and Spa and entered into a contract dated 29 November 2017 with the respondent to carry out building works for the refurbishment and upgrade of the resort in consideration of payment of the lump sum price of \$51.8m plus GST.
- [2] Practical completion under the contract has been reached. A bank guarantee that the respondent provided pursuant to clause 5 of the general conditions expired on 31 July 2019. On 1 August 2019 the applicant requested the respondent to provide an unconditional bank guarantee in the amount of \$1.295m in substitution for the expired bank guarantee. The respondent disputes that there is an obligation to do so, as it had fully performed its obligation to provide bank guarantees under the contract.
- [3] The applicant therefore seeks a declaration that upon the proper construction of the contract the respondent is obliged to provide security in the form of an unconditional bank guarantee in the amount of \$1.295m in the applicant's favour from 1 August 2019 as security for due and proper performance of the contract by the respondent until 14

days after the issue of a final certificate pursuant to clause 42.8 of the contract. The applicant also seeks an order for specific performance in relation to the provision of that security.

The contract

- [4] There is no issue between the parties as to the documents that comprise the written contract. The contract documents include Annexures Part A and Part B to the Australian Standard General Conditions of Contract (AS2124-1992), the particular conditions of contract, Annexure Part C to the particular conditions and the general conditions of contract (AS2124-1992). The precedence of documentation is dealt with by clause 7 of the particular conditions (as substituted by Annexure Part C) and, relevantly, as between the particular conditions (as amended by Annexure Part C), Annexure Part B, Annexure Part A and the general conditions, in the event of any inconsistency or contradiction the particular conditions precede Annexure Part B, Annexure Part A and the general conditions in that order in the order of priority of interpretation.
- [5] Clauses 5.1 to 5.8 of the general conditions (as amended by Annexure Part B) provide:

“5.1 Purpose

Security, retention moneys and performance undertakings are for the purpose of ensuring the due and proper performance of the Contract.

5.2 Provision of Security

If it is provided in the Annexure that a party shall provide security then the party shall so provide security in the amount stated in the Annexure and in accordance with this Clause.

5.3 Form of Security

The security shall be in the form of cash, bonds or inscribed stock issued by the Australian Government or the Government of a State or Territory of Australia, interest bearing deposit in a trading bank carrying on business in Australia, an approved unconditional undertaking given by an approved financial institution or insurance company, or other form approved by the party having the benefit of the security.

The party having the benefit of the security shall have a discretion to approve or disapprove of the form of an unconditional undertaking and the financial institution or insurance company giving it or other form of security offered. The form of unconditional undertaking attached to these General Conditions is approved.

If the security is not transferable by delivery, it shall be accompanied by an executed transfer or such other documentation as is necessary to effect a transfer of the security. The costs (including all stamp duty or other taxes) of and incidental to the transfer and retransfer, shall be borne by the party providing the security.

5.4 Time for Lodgement of Security

Security shall be lodged within 28 days of the Date of Acceptance of Tender.

5.5 Recourse to Retention Moneys and Conversion of Security

The Principal may at any time after giving the notice required by Annexure Part A convert into money security that does not consist of money whether or not the Principal is then entitled to exercise a right under the Contract in respect of the security. The Principal shall not be liable in any way for any loss occasioned by such conversion.

The Principal may have recourse to retention moneys, cash security or to moneys obtained by conversion of security where the Principal:

- (a) has become entitled to exercise a right under the Contract in respect of the retention moneys or security;
- (b) has a bona fide claim against the Contractor whether for damages (including liquidated damages), under an indemnity or otherwise relating to the Works or the Contract; or
- (c) is otherwise entitled at law to have recourse to such moneys or security.

5.6 Substitution of Security for Retention Moneys

The Contractor shall be at liberty at any time to provide in lieu of retention moneys, security in any of the forms permitted in Clause 5.3. To the extent that such security is provided, the Principal shall not deduct retention moneys and shall forthwith release retention moneys.

5.7 Reduction of Security and Retention Moneys

Upon issue of the Certificate of Practical Completion, the Principal's entitlement to security and retention moneys shall be reduced to the percentage thereof stated in the Annexure or, if no percentage is stated, to 50 per cent thereof.

Subject to the first paragraph of Clause 5.7, if in the opinion of the Superintendent it is reasonable to further reduce the Principal's entitlement to security and retention moneys, that entitlement shall be reduced to the amount which the Superintendent determines to be reasonable.

The Principal shall, within 14 days of the Superintendent making such a determination, release security and retention moneys in excess of the entitlement.

5.8 Release of Security

If the Contractor has provided additional security pursuant to Clause 42.4, the Principal shall release that additional security within 14 days of the incorporation into the Works of the unfixed plant or materials in respect of which the additional security was furnished.

If the Principal has provided security, then when the Contractor has been paid all moneys finally due to the Contractor under the Contract or a Separable Portion, the Contractor shall release the security lodged by the

Principal in respect of the Contract or the Separable Portion, as the case may be.

If the Contractor has provided security, then the Principal shall release it when required by Clause 42.8.”

- [6] In relation to clause 5.2 of the general conditions, Annexure Part A provides that the contractor shall provide security in the amount of “2 x unconditional bank guarantees each for 2.5% of the Contract Sum” and that the principal shall provide no security. For the purpose of clause 5.7, Annexure Part A provides that the percentage to which the entitlement to security and retention money is reduced is 50%.
- [7] The approved form of unconditional undertaking that is referred to in clause 5.3 of the general conditions is in terms of the financial institution unconditionally undertaking to pay on demand any sum or sums which may from time to time be demanded by the principal to the specified maximum aggregate sum. This form provides for the undertaking to continue until notification from the principal that the sum is no longer required or the undertaking is returned to the financial institution or until payment to the principal by the financial institution of the whole of the sum or such part as the principal may require. There is also a proviso in the approved form of unconditional undertaking that the financial institution may at any time without being required so to do pay to the principal the sum of the specified amount less any amounts it may previously have paid or such lesser sum as may be required and specified by the principal and the liability of the financial institution under the undertaking shall immediately cease. The approved form does not allow for an expiry date on which the undertaking automatically ceases.
- [8] The works under the contract were divided initially into three Separable Portions and given the designations Separable Portion 1A, Separable Portion 1B and Separable Portion 2. The defects liability period was fixed for each of the Separable Portions. There was a defects liability period of 12 months from the date of practical completion for each Separable Portion. Under Annexure Part A the date for practical completion of Separable Portion 1A was 15 June 2018 and the date for practical completion of each of Separable Portions 1B and 2 was 31 July 2018.
- [9] Clauses 42.5 to 42.8 of the general conditions provide:

“42.5 Certificate of Practical Completion

The Contractor shall give the Superintendent at least 14 days notice of the date upon which the Contractor anticipates that Practical Completion will be reached.

When the Contractor is of the opinion that Practical Completion has been reached, the Contractor shall in writing request the Superintendent to issue a Certificate of Practical Completion. Within 14 days of the receipt of the request, the Superintendent shall give to the Contractor and to the Principal a Certificate of Practical Completion certifying the Date of Practical Completion or give the Contractor in writing the reasons for not issuing the Certificate.

When the Superintendent is of the opinion that Practical Completion has been reached, the Superintendent may issue a Certificate of Practical Completion whether or not the Contractor has made a request for its issue.

42.6 Effect of Certificates

The issue of a payment certificate or a Certificate of Practical Completion shall not constitute approval of any work or other matter nor shall it prejudice any claim by the Principal or the Contractor.

42.7 Final Payment Claim

Within 28 days after the expiration of the Defects Liability Period, or where there is more than one, the last to expire, the Contractor shall lodge with the Superintendent a final payment claim and endorse it 'Final Payment Claim'.

The Contractor shall include in that claim all moneys which the Contractor considers to be due from the Principal under or arising out of the Contract or any alleged breach thereof.

After the expiration of the period for lodging a Final Payment Claim, any claim which the Contractor could have made against the Principal and has not been made shall be barred.

42.8 Final Certificate

Within 14 days after receipt of the Contractor's Final Payment Claim or, where the Contractor fails to lodge such claim, the expiration of the period specified in Clause 42.7 for the lodgement of the Final Payment Claim by the Contractor, the Superintendent shall issue to the Contractor and to the Principal a final payment certificate endorsed 'Final Certificate'. In the certificate the Superintendent shall certify the amount which in the Superintendent's opinion is finally due from the Principal to the Contractor or from the Contractor to the Principal under or arising out of the Contract or any alleged breach thereof.

...

Within 14 days after the issue of a Final Certificate which certifies a balance owing by the Principal to the Contractor, the Principal shall release to the Contractor any retention moneys or security then held by the Principal."

[10] Clause 42.11 of the general conditions provides:

"Where, within the time provided by the Contract, a party fails to pay the other party an amount due and payable under the Contract, the other party may, subject to Clause 5.5, have recourse to retention moneys, if any, and, if those moneys are insufficient, then to security under the Contract and any deficiency remaining may be recovered by the other party as a debt due and payable."

[11] Clause 44 of the general conditions deals with default. Clause 44.1 provides that if a party breaches or repudiates the contract, nothing in clause 44 prejudices the right of the other party to recover damages or exercise any other right. Clause 44.2 provides that if

the contractor commits a substantial breach of contract and the principal considers that damages may not be an adequate remedy, the principal may give the contractor a written notice to show cause. There is then a list of matters that amount to substantial breaches (although the list is not exhaustive). Clause 44.2(c) specifies that failing to lodge security in breach of clause 5 is a substantial breach.

[12] Clause 48 of the general conditions provides:

“Except as provided at law or in equity or elsewhere in the Contract, none of the terms of the Contract shall be varied, waived, discharged or released, except with the prior consent in writing of the Principal in each instance.”

[13] Clause 20.3 of the particular conditions sets out the conditions precedent to the contractor’s entitlement to submit a payment claim. They include 20.3(ii) that makes the entitlement conditional upon the contractor having:

“Provided the Principal with Approved Security for the amount required.”

[14] Clause 20.3 then provides for the consequences, if the contractor had not satisfied the conditions precedent at the time of submitting a payment claim:

- “(i) The Payment Claim may be deemed to have been invalidly submitted.
- (ii) The Superintendent will not be obliged to include in any Payment Schedule any amount included in the Payment Claim.
- (iii) The Principal will not be liable to pay any amount included in the Payment Claim.”

[15] Clause 20.5(iii) of the particular conditions specifies that any payment of moneys by the principal under the contract is not:

“Approval by the Principal or the Superintendent of the Contractor’s performance or compliance with the Contract, but is only to be taken as payment on account.”

[16] Clause 24 of the particular conditions sets out the conditions on which the principal may occupy or use any part of the works, although the whole of the works has not reached completion. The last paragraph of that clause provides:

“The Defect Period will commence from the completion of all works. There will be no reduction in security or retention until all works have reached Practical Completion.”

[17] By written agreement dated 18 July 2018 the applicant and the respondent agreed to a revised price for the works in Separable Portion 2, the extension of the dates for practical completion to 30 October 2018 for Separable Portion 1A and Separable Portion 1B and to 3 December 2018 for Separable Portion 2, and that the Superintendent would direct a unilateral extension of time (no cost) to give effect to those extended dates for practical completion. The parties expressly agreed that the terms of the July 2018 agreement would prevail over the terms of the contract to the

extent of any inconsistency, but otherwise the parties agreed to continue to be bound by the terms of the contract.

- [18] The Superintendent appointed under the contract certified the respondent had achieved practical completion of Separable Portion 2 (which was the last of the Separable Portions) as of 7 March 2019. The respondent asserts the Superintendent ought to have certified practical completion as of 20 February 2019, but it is not necessary to resolve that dispute between the parties for the purpose of this application.

The bank guarantees

- [19] The applicant had, in fact, in progress claim number 1 (which was in the nature of a deposit) allowed for the sum of \$2.59m for the bank guarantees. This enabled the respondent to deposit \$2.59m with the Commonwealth Bank of Australia to procure the issue of the bank guarantees in favour of the applicant. The applicant then recovered the sum advanced in respect of the bank guarantees in subsequent payment claims by instalments designated as “Reduction for Bank Guarantee Deposit”.
- [20] On 18 January 2018 the applicant received from the respondent two bank guarantees dated 12 January 2018 issued by the Commonwealth Bank in favour of the applicant as security for the obligations of the respondent under the contract. Each guarantee contains an unconditional undertaking by the bank to pay on written demand by the applicant any sum which may from time to time be demanded to a maximum aggregate of \$1.295m with the guarantee to continue until one of the following events occur: the bank receives written notification from the applicant that the guarantee is no longer required, the return of the guarantee to the bank, payment to the applicant by the bank of the whole of the guaranteed amount or such lesser sum as may be required by the applicant, or the arrival of the expiry date. The expiry date for one bank guarantee was specified as 31 July 2018 and for the other as 31 July 2019. Both bank guarantees came to an end on the respective expiry dates. At no time prior to 1 August 2019 did the applicant raise with the respondent any issue about the expiry dates in the bank guarantees not conforming to the requirements of clause 5.3 of the general conditions. (When the applicant received the original bank guarantees, they were locked away for safekeeping and there was no express communication with the respondent thereafter either approving or disapproving the form of the bank guarantees.)

The applicant’s submissions

- [21] The applicant’s submissions can be summarised as follows. As a matter of construction of the contract, the respondent has a continuing obligation to comply with clause 5 of the general conditions in the provision of security. The proper construction of the contract requires analysis of the objective meaning of the actual text used in the contract, the context (being the entire text of the contract) and the purpose and object of the transaction: *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Limited* (2015) 256 CLR 104 at [46]-[51]. The express purpose of the security under clause 5.1 of the general conditions is to secure for the benefit of the applicant the due and proper performance of the contract by the respondent. That the obligation to provide that security is a continuing promise is confirmed by this purpose. Clause 5.2 should be

construed as a promise by the respondent that it will continue to provide security while the contract remains to be performed by the respondent. The respondent was in breach of its obligations under clause 5.3 of the general conditions, as a result of the express expiry dates in the bank guarantees provided to the applicant. The respondent does not contend there was express approval by the applicant of the form of the bank guarantees provided by the respondent. The respondent admits that by the payment of moneys by the applicant to the respondent under the contract the applicant did not waive its entitlement to hold the security for the period provided for under the contract and concedes that the applicant was not, and could not, be put to an election. The respondent is also neither relying on an estoppel against the applicant from seeking its entitlement to security in terms of clause 5.3 of the general conditions nor contending there was a variation of the terms of the contract agreed upon by the parties to allow for provision of bank guarantees with a temporal limitation. The respondent rests its case on implied approval by the applicant of the bank guarantees with the temporal limitation. There is no scope for an implied approval where the contract provides expressly (in clause 20.5(iii) of the particular conditions) that any payment of moneys by the principal is not approval by the principal of the contractor's performance or compliance with the contract and clause 48 of the general conditions requires any variation, waiver, release or discharge of the terms of the contract to be with the prior written consent of the principal.

- [22] The scheme of the contract is such that the applicant's silence in response to the breach by providing bank guarantees with a temporal limitation did not alter the ongoing requirement for the respondent to comply with its obligations under clause 5.3. To the extent the respondent relies on the authority of *PHHH Investments No 2 Pty Ltd v United Commercial Projects Pty Ltd (No 2)* [2018] VSC 92, it should either be distinguished on the facts or not followed on the basis the reasoning is incorrect.

The respondent's submissions

- [23] The respondent's submissions can be summarised as follows. The applicant by its conduct in receiving the two bank guarantees provided by the respondent without demur approved the security due under the contract in the form provided by the respondent. The respondent's performance of its obligation under clause 5.2 of the general conditions was complete upon the applicant's implied approval of the bank guarantees in the form in which they were provided. The contract does not stipulate that the respondent has a continuing obligation to provide security until the contract is fully performed or an obligation to provide replacement security in the event that the security expires or becomes unenforceable for any reason. The second paragraph of clause 5.3 confers expressly on the party having the benefit of the security "a discretion to approve or disapprove of the form of an unconditional undertaking and the financial institution or insurance company giving it or other form of security offered".
- [24] Clause 20.3 of the particular conditions relevantly provided that the respondent's entitlement to submit a payment claim was conditional upon the respondent having provided the applicant with approved security for the amount required and that if that condition were not satisfied, the payment claim may be deemed to have been invalidly submitted and the applicant would not be liable to pay any amounts included in the payment claim. Between 15 January 2018 and 1 August 2019 the respondent submitted

payment claims which were paid by the applicant without any issue being raised about the adequacy of the bank guarantees. The respondent accepts that the applicant did not expressly approve the form of the bank guarantees, but by its conduct, assessed objectively, approved the security in the form provided by the respondent. The issue to be decided is analogous to that considered in *PHHH Investments* and that decision should be applied. The terms of clauses 5.4 and 44.2 of the contract contemplate that the provision of security is a once-off obligation and the respondent did not have an ongoing obligation. Clauses 5.8 and 42.8 of the general conditions also contemplate there may well be no security held by the applicant during all or part of the defects liability period. There is no express requirement under the contract that the respondent continue to provide security until the contract is fully performed.

PHHH Investments

- [25] In *PHHH Investments* the owner of a building had entered into a contract with the builder to perform certain alterations and additions to the building. The contract provided that before the owner was obliged to make the first progress payment under the contract, the builder had to have in place the security by unconditional guarantee in accordance with the relevant clause of the contract. Under that clause (read with the relevant schedule) the builder was obliged to provide the owner with unconditional guarantees. A further clause specified that where the security to be provided by the builder was unconditional guarantees, the builder must within 10 working days after execution of the contract give to the owner two unconditional guarantees each equal in value to the percentage of the contract price specified in the relevant schedule. Another clause specified that:

“An unconditional guarantee is an unconditional undertaking or a performance undertaking from a recognised financial institution approved by the owner. The guarantees must be of an approved type. The type shown in schedule 5 is approved.”

The contract also provided that when the architect issued the notice of practical completion, the builder was entitled to the release of 50% of the amount of the security then held and, if the security were by unconditional guarantees, the owner must return one of the guarantees to the builder within the specified period in the schedule. The contract also provided that the balance of the amount of security was not required to be released until at least the expiration of 12 months after the date for practical completion.

- [26] The builder had provided two bank guarantees, each of which had an expiry date. The expiry date of the second guarantee was one year after the expiry date of the first guarantee. There was a problem with the first set of bank guarantees that were in favour of a director of the owner and they were subsequently replaced by revised bank guarantees in favour of the builder that were otherwise identical to the original guarantees, including the inclusion of expiry dates. The defects liability period was not due to expire until about four months after the second guarantee expired. The owner sought an injunction that the builder provide it with two unconditional bank guarantees in accordance with the terms, and in the form approved by schedule 5, of the contract. Riordan J identified at [28] that the issue for determination was whether the owner’s approval of the revised guarantees could be inferred from its conduct in the

circumstances. Riordan J considered authorities at [31]-[38] as to when acceptance of an offer to form a contract would be inferred and applied the test stated by McHugh JA in *Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd* (1988) 14 NSWLR 523, 535 as to “whether a reasonable bystander would regard the conduct of the offeree, including his silence, as signalling to the offeror that his offer has been accepted”.

- [27] Riordan J identified the relevant circumstances at [39] and found at [40] that an objective bystander would have concluded that the owner had approved the revised guarantees and signalled that approval to the builder, as the owner rejected the form of the original guarantees solely and specifically on the basis of the name of the favouree, on receipt of the revised guarantees the owner paid the outstanding progress claim which it had been entitled to withhold until it approved the guarantees, and both parties had proceeded with the contract for over 12 months without any issue being raised about the adequacy of the guarantees. Riordan J concluded at [43] that the builder had complied with his obligation to provide unconditional guarantees and dismissed the proceeding.

The construction of clauses 5.2 and 5.3

- [28] It was suggested in submissions by the applicant that clause 5.3 of the general conditions gave the applicant a complete discretion as to which type of security referred to in paragraph 1 of clause 5.3 should be provided by the respondent. That submission overlooked the fact that Annexure Part A stipulated that the security to be provided by the respondent for the purpose of clause 5.2 of the general conditions was two unconditional bank guarantees each for 2.5% of the contract sum. Annexure Part A did not merely set the amount of the security, but specified the type of security. (It should be noted that Annexure Part A in the tender documents contemplated the security would be either cash retention or two approved bank guarantees, but that was modified by the final version of Annexure Part A incorporated into the contract that is given precedence in interpretation over the general conditions.)
- [29] The parties agreed that the second paragraph of clause 5.3 of the general conditions gave to the applicant the discretion to approve or disapprove the form of the bank guarantees proffered by the respondent and the identity of the bank giving the guarantees. There is no time limit expressly provided for in clause 5.3 for the applicant to approve or disapprove of the bank guarantees when received from the respondent.
- [30] Both parties used language such as a “continuing” obligation or a “once and for all” or “once-off” obligation to characterise the application of clause 5.3. That language is more appropriate to describe a breach of an obligation rather than the nature of the obligation itself. The difference between a continuing breach and a once and for all breach is illustrated by *Larking v Great Western (Nepean) Gravel Ltd (in liq)* (1940) 64 CLR 221. A licence was granted by Mr Larking to the company to remove sand and gravel from the bed of a river that adjoined Mr Larking’s land. The grant required royalties to be paid quarterly and included conditions (for the purpose of preventing Mr Larking’s stock straying) that the company should at its own expense erect and maintain certain fences and a gate. If there was default in the performance of any of the conditions and it continued for 30 days after any of the quarter days, Mr Larking could determine the licence. The period within which the fences and gate should be erected

was not specified. The company commenced operations under the licence in June 1937. Mr Larking complained from time to time about non-compliance with the conditions about the fences and gate. In October 1939 Mr Larking by letter to the company required the fences and gate to be erected within 14 days. Mr Larking accepted the next quarterly payment of royalties and then gave notice to the company purporting to determine the licence.

- [31] The trial judge found that the work required to erect the fences and gate should have been done within a reasonable time of the commencement of the company's operations under the licence which was a breach of the relevant clauses and it was not a continuing breach. It was found that as Mr Larking had continued to treat the licence as subsisting, he elected not to exercise the right to determine it and consequently waived his right to determine it.
- [32] That decision was affirmed by the High Court. Starke J at 230 identified the question for consideration as whether the covenants to erect the fences and gate could only be broken "once and for all" or whether a breach of each covenant was of a continuing nature. Starke J at 231 agreed with the trial judge's construction of the relevant clauses that pointed to "an obligation that should be performed completely and effectively within a limited time, which, as the agreement is silent, is within a reasonable time having regard to all the circumstances of the case" and that as Mr Larking knew that the fences and the gate had not been erected, but allowed the operations under the licence to continue, he affirmed the agreement and waived his right to determine it for the breach by the company. Rich ACJ expressed a similar view at 228, as did Dixon J at 239-240.
- [33] Consistent with the approach in *Mount Bruce* at [46], clauses 5.2 and 5.3 of the general conditions must be construed objectively by reference to the text and in the context of the entire contract and its purpose. Inclusion of provisions such as clause 48 of the general conditions and clause 20.5(iii) of the particular conditions are directed at ensuring that the principal retains full control over what departures from the performance by the contractor of the obligations under the contract have effect between the parties and the action taken by the principal in response. The contract has been drafted to overcome the outcome of *Larking* where the breach of a once and for all obligation was waived by the other party continuing to treat the contract as subsisting.
- [34] It is noteworthy that there is no express provision in the contract for the extension or replacement of the bank guarantees provided as security under clause 5 of the contract. That is because the form of the guarantee that is contemplated in clause 5.3 is unconditional without an expiry date. The role of the security provided by the respondent under the contract to ensure the due and proper performance of the contract is important in respect of the operation of the contract and intended by the parties in respect of the second bank guarantee, subject to any recourse that had previously been made in respect of the bank guarantee under the contract, to be available to the applicant until 14 days after the issue of final certificate which cannot be issued until the final payment claim has been lodged within 14 days after the expiration of the defects liability period. Nothing that was agreed to by the parties in the July 2018 agreement affected the operation of the provisions of the contract that security would remain in place until released in accordance with the contract.

- [35] The obligation to provide bank guarantees in the amount and in the form that complied with clauses 5.2 and 5.3 of the general conditions was a once and for all obligation. Unless the applicant approved the bank guarantees with expiry dates, the respondent failed to perform fully its obligations under clauses 5.2 and 5.3 of the general conditions when it provided the bank guarantees with expiry dates.
- [36] As a matter of construction of the contract, mere effluxion of time after the breach by the respondent of its obligations in respect of the bank guarantees without the applicant taking any action in respect of that breach does not preclude the applicant from seeking to enforce the respondent's performance of clauses 5.2 and 5.3 of the general conditions, unless there was implied approval of the bank guarantees with expiry dates. The position is not as asserted by the respondent that it complied with clauses 5.2 and 5.3 by providing the subject guarantees to the applicant without demur. If the applicant had chosen to do so, clause 20.3 of the particular conditions would have allowed it to treat the payment claims as invalidly submitted. That the applicant did not do so did not translate into an implied approval of the temporal limitation in the bank guarantees, because of the application of clause 20.5(iii) of the particular conditions. The question to be determined is whether there has been implied approval by the applicant of the bank guarantees with expiry dates conveyed by the applicant to the respondent.
- [37] Unlike in *PHHH Investments*, where the relevant contract did not contain a provision like clause 20.5(iii) of the particular conditions and there was conduct by the builder in rejecting the first set of bank guarantees and receiving replacement guarantees from which implied approval of the replacement guarantees could be inferred, there is no relevant conduct of the applicant considered against the terms of the contract and conveyed to the respondent that amounts to implied approval of the bank guarantees with expiry dates. The silence relied on by the respondent as implied approval is equivocal in the context of the terms of this contract. In the absence of implied approval, the fact that the defects liability period has commenced does not make it too late for the applicant to seek to enforce the respondent's obligation under clauses 5.2 and 5.3 of the general conditions: *Ewing International LP v Ausbulk Ltd (No 2)* [2009] SASC 381 at [319]-[322].
- [38] In the circumstances, the applicant can enforce compliance by the respondent with clauses 5.2 and 5.3 of the general conditions, at least in respect of the second bank guarantee. The applicant is therefore entitled to the declaration and order for specific performance that it seeks in paragraphs 1 and 2 of its originating application.

Orders

- [39] When this application was heard, the parties agreed that, subject to one matter, costs should follow the event. The one matter was in relation to paragraph 3 of the originating application that was abandoned in the written submissions filed by the applicant after the hearing on the first return date of the originating application before Bowskill J, when the applicant sought an interlocutory injunction that was related to paragraph 3 of the originating application. Bowskill J dismissed the interlocutory application and ordered that the applicant pay the respondent's costs of that application and otherwise ordered that the costs of the originating application be costs in the proceeding. The order of costs made on the interlocutory application will have covered

the majority of the costs incurred by the respondent in relation to paragraph 3 of the originating application. In light of the costs orders made by Bowskill J, it is neither necessary nor appropriate to make any separate order for costs in the respondent's favour in respect of that one matter.

[40] The orders which should be made therefore are:

1. A declaration that upon the proper construction of the Contract between the applicant and the respondent dated 29 November 2017 (Contract), in particular clauses 5.2, 5.3, 5.8, 42.8 and Annexure Part A of the General Conditions of the Contract, the respondent is obliged to provide to the applicant security in the form of an unconditional bank guarantee in the sum of \$1,295,000.00 in the applicant's favour from 1 August 2019 as security for the due and proper performance of the Contract by the respondent until 14 days after the issue of a Final Certificate pursuant to clause 42.8 of the Contract.
2. The respondent specifically perform its obligations under clause 5 of the General Conditions of the Contract by providing to the applicant security in the form of an unconditional bank guarantee in the sum of \$1,295,000.00 in the applicant's favour from 1 August 2019 as security for the due and proper performance of the Contract by the respondent until 14 days after the issue of a Final Certificate pursuant to clause 42.8 of the Contract.
3. The respondent must pay the applicant's costs of the proceeding.