SUPREME COURT OF QUEENSLAND

CITATION:	*RCR O'Donnell Griffin Pty Ltd ACN 003 905 093 v Forge Group Power Pty Ltd and Ors* [2015] QSC 186
PARTIES:	**RCR O'Donnell Griffin Pty Ltd ACN 003 905 093** (Applicant) **v** **Forge Group Power Pty Ltd (Receivers and Managers Appointed) (In Liquidation) ACN 103 678 324** (First Defendant) **AND** **MARK FRANCIS XAVIER MENTHA** (Second Defendant) **AND** **SCOTT DAVID HARRY LANGDON** (Third Defendant)
FILE NO/S:	No S5173 of 2014
DIVISION:	Trial Division
PROCEEDING:	Hearing
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	26 June 2015
DELIVERED AT:	Brisbane
HEARING DATE:	11, 12, 13, 16 February 2015
JUDGE:	Byrne SJA
ORDER:	
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – THE CONTRACT – CONSTRUCTION OF PARTICULAR CONTRACTS AND IMPLIED CONDITIONS – SECURITY AND RETENTION FUNDS – where subcontractor gave head contractor bank guarantees as security - where head contractor became insolvent – whether power to appoint Superintendent extends beyond termination of contract - whether power of Superintendent to resort to bank guarantees extends beyond termination of contract – whether insolvency context

influences implied allocation of risk for bank guarantee - whether Superintendent's demand for liquidated damages void

CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – THE CONTRACT – REMUNERATION – CERTIFICATES – GENERALLY – where head contractor became insolvent – where accrued rights of parties under subcontract retained by deed of novation - whether liquidated damages are payable without certificate being issued – whether Superintendent acted honestly when issuing certificate - whether certificate validly issued under contract

Corporations Act 2001, s 553C

400 George Street (Qld) Pty Ltd v BG International Ltd [2012] 2 QdR 302, cited

Clough Engineering Ltd v Oil and Natural Gas Corporation Ltd (2008) 249 ALR 458, cited

Gye v McIntyre (1991) 171 CLR 609, cited

Kell and Rigby Holdings Pty Ltd v Lindsay Bennelong Developments Pty Ltd [2010] NSWSC 777, cited

Main Roads Construction Pty Ltd v Samary Enterprises Pty Ltd [2005] VSC 388, cited

Redline Contracting Pty Ltd v MCC Mining (Western Australia) Pty Ltd [2011] FCA 1337, cited

Redline Contracting Pty Ltd v MCC Mining (Western Australia) Pty Ltd (No 2) [2012] FCA 1, cited

COUNSEL: J K Bond QC, with J Sweeney, for the plaintiff
D G Clothier QC, with A C Stumer, for the defendants

SOLICITORS: Carter Newell Lawyers for the plaintiff
Norton Rose Fulbright for the defendants

Subcontract

[1] In 2011, Diamantina Power Station Pty Ltd ("Diamantina") entered into a contract with the first defendant ("Forge") which obliged Forge to carry out the design, engineering, construction and commissioning of a power station.

[2] In 2012, Forge entered into a subcontract ("the Subcontract") with the plaintiff ("RCR") that required RCR to perform electrical work in the construction of the power station.[1]

[1] The Subcontract consisted of a Formal Instrument of Agreement, General Conditions of Contract and Annexures.

RCR progress claim

[3] RCR performed work under the Subcontract.

[4] On 28 January 2014, RCR submitted a progress claim for $4,208,076.88. The Superintendent[2] did not issue a progress certificate within ten business days. That omission meant that RCR's claim was deemed to be a progress certificate, obliging Forge to pay the amount of it by 4 March 2014.

Subcontract discharged

[5] In February 2014, the second and third defendants ("the receivers") were appointed as receivers and managers of Forge, and Forge entered voluntary administration. In mid-March 2014, a winding-up order was made. The administrators became Forge's liquidators.

[6] On 17 April 2014, Diamantina, Forge and RCR entered into a Deed of Novation which was to take effect from the "Novation Date": 22 April 2014.

[7] By then, there had been claims by RCR for extensions of time. The Superintendent at the time had not made any determination on them. Nor had any certificate issued requiring RCR to pay liquidated damages. And Forge had not paid RCR anything in respect of its January progress claim.

[8] By the Deed of Novation, from 22 April 2014:

- the Subcontract was "discharged";[3]
- a new contract was created between Diamantina and RCR;[4]
- RCR released Forge from any "obligation under or in connection with the Subcontract to be performed on or after the Novation Date" as well as from any action, claim[5] or demand against Forge which should "arise or accrue" after that Date.[6]

Security

[9] By cl 3.5(a) of the Deed of Novation, within 30 days of the Novation Date:

> Forge "must" return any security held under the Subcontract ("Existing Security") to RCR or the providing institution but "only to the extent that

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2 Lisa Montgomerie was appointed as the Subcontract Superintendent in January 2014. She resigned a few weeks later.

3 cl 3.1.

4 On the same terms and conditions as the Subcontract, subject to stated amendments.

5 cl 1 definition of Claim: "any allegation, debt, cause of action, liability, claim, proceeding, suit or demand of any nature howsoever arising and whether present or future, fixed or unascertained, actual or contingent, whether at law, in equity, under statute or otherwise."

6 cl 3.3.

> [Forge] does not, in its own absolute discretion, consider that it has or may have outstanding claims against [RCR] or has a reasonable belief that [RCR] has or will pursue a claim against [Forge]…".

[10] On 21 May 2014, the receivers' solicitors informed RCR that Forge "has or may have outstanding claims" against RCR and was not obliged to cancel the "Existing Security". That "Existing Security" consisted of two unconditional bank guarantees, each in the amount of $2,238,345.45. One (the "2014 Guarantee") was to expire at midnight on 3 June 2014; the other in 2016.

Superintendent certifies

[11] On 3 June 2014, Forge, by its receivers, wrote to RCR saying that "Michael Austin was appointed to be the Superintendent" under the Subcontract "from 14 March 2014".

[12] About 30 minutes later, Mr Austin attempted to transmit a facsimile to RCR which stated:

> "The Contractor has failed to achieve Practical Completion in accordance with the date for Practical Completion under the Contract.
>
> …
>
> In accordance with clauses 20, 34.7 and 37.2 of the General Conditions of the Contract, the Superintendent hereby certifies as immediately due and payable from the Contractor to the Principal, Liquidated Damages as per Item 24 of Annexure Part A to the Contract, for every day after the Date for Practical Completion…as follows:
>
> …
>
> The Superintendent hereby certifies, as an amount immediately due and payable from the Contractor to the Principal the total sum of $2,588,068.20. Payment of the full amount is due immediately, but in any event by no later than 2pm AEST on 3 June 2013."

[13] That facsimile, which was not received by RCR, was included in an email sent soon afterwards to RCR's solicitors. In that way, Mr Austin's certification came to RCR's attention.

[14] At about the same time, Mr Langdon, one of the Receivers, sent a facsimile to RCR:

- announcing Forge's intention to convert the 2014 Guarantee into cash on 3 June and to "hold it as cash security, pending the resolution of 'issues', including Forge's 'call on and recourse to the Security'";
- demanding payment of the $2,588,068.20 no later than 2.00pm AEST on 3 June;
- informing RCR that: "Forge will have recourse to the Security for any" of the amount "which remains unpaid" after the time for payment on which Forge insisted.

[15] On 26 June 2014, Mr Austin issued a further certificate. It certified that the same $2,588,068.20 was immediately due and payable as liquidated damages for delay.

[16] The expiry date of 2014 Guarantee has been extended by consent orders.

[17] RCR commenced proceedings to restrain Forge and the receivers from calling upon the two guarantees and for related declaratory relief.

Questions

[18] The separate determination of five questions has been ordered. The questions are:

- Has Mr Austin ever been validly appointed as the Superintendent under the Subcontract?
- Has there been any valid certification under the subcontract of any amounts due and payable from RCR to Forge for liquidated damages issued after the Novation Date?
- Was Forge entitled to call upon or seek to have recourse to the 2014 Guarantee at any time before the time it would have expired by effluxion of time?
- Is Forge entitled to call upon or seek to have recourse to the amended and extended 2014 Guarantee?
- Is Forge entitled to call upon or seek to have recourse to the 2016 Guarantee?

Superintendent's responsibilities

[19] Clause 20 of the General Conditions of the Subcontract stipulates:

> "The Principal shall ensure that at all times there is a Superintendent, and that the Superintendent fulfils all aspects of the role and functions honestly and in accordance with the [Sub]contract."

[20] In that context, "at all times" must include any period during which the Superintendent has a function to perform under the Subcontract. To that extent, the Subcontract required Forge to ensure that a Superintendent was in place.

[21] Several terms of the Subcontract envisage that the Superintendent has responsibilities that survive discharge of the Subcontract,[7] among them, cl 34.7, which provides:

> "If WUC[8] does not reach practical completion by the date for practical completion, the Superintendent shall certify, as due and payable to the Principal,[9] liquidated damages in Item 24 for every day after the date for

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7 e.g. cls 39.16 and 53.7.

8 cl 1 definition of WUC: "means the work which [RCR] is or may be required to carry out and complete…".

9 Forge.

> practical completion to and including the earliest of the date of practical completion or termination of the Contract or the Principal taking WUC out of the hands of the Contractor.[10]
>
> If an EOT[11] is directed after the Contractor has paid or the Principal has set off liquidated damages, the Principal shall forthwith repay to the Contractor such of those liquidated damages as represent the days the subject of the EOT.
>
> The aggregate liability of the Contractor for liquidated damages under this Clause 37.7 (sic) will not exceed the amount stated in Item 24(b)."

[22] As the Superintendent may be required to assess liquidated damages by reference to a period concluding with "termination" of the Subcontract, cl 34.7 implicitly assumes that, after termination, there may be a Superintendent to assess the liquidated damages to the date of discharge of the Subcontract.[12]

[23] As a matter of interpretation of the Subcontract, Forge's right to appoint a Superintendent to certify for liquidated damages under cl 34.7 survived discharge of the Subcontract.

[24] Did the Deed of Novation affect Forge's entitlement to appoint a Superintendent to facilitate a cl 34.7 certification?

Deed of Novation

[25] As between Forge and RCR, the Deed of Novation preserved certain rights and obligations in relation to the pre-discharge performance of the Subcontract.

[26] By cl 4.1:

> "The novation and release under clause 3 do not prejudice any accrued rights, obligations, claims or liabilities arising under the Subcontract in connection with the performance of the Subcontract before the Novation Date which [Forge] and [RCR] may have against each other."

[27] On RCR's case:

- the Deed of Novation did not preserve the Subcontract as a source for appointing a Superintendent to create what RCR characterises as new rights as between it and Forge;
- deployment of the word "accrued" to qualify "rights, obligations claims or liabilities" shows that a post-termination appointment of the Superintendent was not envisaged;
- after the discharge, there was no longer contractual authority for a Superintendent to establish anything as between Forge and RCR by certificate, and no longer any role for the Superintendent to perform;

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[10] RCR.
[11] cl 1 definition of EOT: "such extension of time for carrying out WUC…as the Superintendent assesses".
[12] At least where, as here, "termination" supplies the end date for the calculation.

- the preservation of accrued "rights…" meant that if a debt had already been created before the discharge, the right to recover it was preserved; and if there had been a breach of contract before discharge, a right to damages had accrued, and that right was preserved;
- but if the creation of an obligation depended upon further performance of the Subcontract, then the obligation had not accrued before the Subcontract was discharged and was not preserved;
- accordingly, the Deed precluded appointment of a Superintendent after the Subcontract was discharged on 22 April.

[28] The notion that the Deed was to deny Forge the chance to obtain a cl 34.7 certification for liquidated damages payable because of RCR's established delay in achieving practical completion lacks attraction.[13]

[29] Moreover, Forge's liquidated damages claim arises from RCR's "performance of the Subcontract before the Novation Date", which is an indication that far from impacting adversely on Forge's right to appoint a Superintendent post-termination, the Deed of Novation preserved it.

[30] Accordingly, after the Novation Date, Forge was entitled to appoint a Superintendent to enable certification under cl 34.7 of the amount payable for liquidated damages.

Clause 34.7 issues

[31] Further questions arise relating to cl 34.7:

- whether it obliges RCR to pay liquidated damages in the absence of a Superintendent's certificate; and
- whether such liquidated damages as the Superintendent certifies under cl 34.7 become payable once the Superintendent so certifies.

[32] On Forge's case:

- cl 34.7 confers an entitlement to liquidated damages, calculated in accordance with the methodology the provision prescribes, absent a Superintendent's certificate;
- so, if the Superintendent does not so "certify", nonetheless Forge is entitled to liquidated damages calculated in accordance with the cl 34. 7 formula; and the Superintendent is required so to certify.

[33] RCR, however, contends that RCR had no obligation to pay liquidated damages until the Superintendent issued two certificates: one under cl 34.7; the other, pursuant to cl 37.2.

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[13] Especially as such a certificate is a pre-condition of RCR's liability to pay.

[34] Clause 37 of the General Conditions, headed "Payment", provides for progress claims to be given in writing by RCR to the Superintendent.[14] By cl 37.2:

> "The Superintendent shall, within 10 Business Days after receiving such a progress claim, issue to the Principal[15] and the Contractor:[16]
>
> a) a progress certificate evidencing the Superintendent's opinion of the moneys due from the Principal to the Contractor pursuant to the progress claim and reasons for any difference ('progress certificate') and amounts otherwise due from the Principal to the Contractor or the Contractor to the Principal; and
>
> b) a certificate evidencing the Superintendent's assessment of retention moneys and moneys due from the Contractor to the Principal pursuant to the Contract.
>
> If the Contractor does not make a progress claim in accordance with Item 28, the Superintendent may issue the progress certificate with details of the calculations and shall issue the certificate in paragraph (b).
>
> If the Superintendent does not issue the progress certificate within 10 Business Days of receiving a progress claim in accordance with subclause 37.1, that progress claim shall be deemed to be the relevant progress certificate.
>
> The Principal shall within 25 Business Days after receiving the progress claim, pay to the Contractor the balance of the progress certificate after deducting retention moneys and setting off such of the certificate in paragraph (b) as the Principal elects to set off. If that setting off produces a negative balance, the Contractor shall pay that balance to the Principal within 5 Business Days of receiving written notice thereof.
>
> Neither a progress certificate nor a payment of moneys shall be evidence that the subject WUC has been carried out satisfactorily. Payment other than final payment shall be payment on account only."

[35] According to Forge, cl 34.7[17] should be construed as if it stipulated that liquidated damages, calculated in accordance with the formula the clause prescribes, are "due and payable", coupled with an ancillary obligation of the part of the Superintendent so to certify. On this approach, the certificate is a convenient, but not exclusive, mechanism for establishing a liability in RCR to pay.

[36] Forge contends that commercial considerations require that cl 34.7 not be construed to require certification as a condition of RCR's liability to pay liquidated damages, arguing that:

- Forge would be without an ability to pursue a claim for liquidated damages for delayed performance where the Superintendent refused to discharge the responsibility to certify;

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[14] cl 37.1A(c).
[15] Forge.
[16] RCR.
[17] No other provision of the Subcontract provides for liquidated damages for delay.

- engaging the dispute resolution provisions of the Subcontract could not result in the issue of a Superintendent's certificate; nor could any claim that Forge, as principal, might pursue in litigation against RCR.

[37] Two main difficulties stand in the way of Forge's contention that liquidated damages are payable without a cl 34.7 certificate.

[38] First, the language chosen apparently to describe the source of the obligation – "the Superintendent shall certify, as due and payable…" – accords with the idea that certification is essential to liability to pay.

[39] Secondly, by cl 34.5, even if RCR has not claimed an extension of time, the Superintendent is empowered, in his "absolute discretion at any time and from time to time before issuing the final certificate" to direct an "EOT". An exercise of that power would reduce, if not negate, liquidated damages otherwise payable for delay.

[40] So the assessment is not inevitably a mere mathematical exercise based on the number of days of delay after the date for practical completion fixed by the Subcontract.

[41] A cl 34.7 certificate is necessary to establish a liability in RCR to pay liquidated damages for delay.

[42] RCR, however, does not accept that a Superintendent's cl 34.7 certificate suffices to create a legal liability for liquidated damages. On its case, that obligation depends upon the Superintendent having issued certificates under both cl 34.7 and 37.2. Despite a Superintendent's cl 34. 7 certification that liquidated damages are "due and payable", on RCR's case, they are not. There must be a further process, for which cl 37 provides, before the legal liability exists: issue of a cl 37.2 progress certificate.[18]

[43] By cl 37.2, within 10 business days after receiving the progress claim, the Superintendent is to issue to Forge and RCR "(a) a progress certificate evidencing the Superintendent's opinion of the moneys due from" Forge to RCR and "(b) a certificate evidencing the Superintendent's assessment of…moneys due from" RCR to Forge.

[44] Those certificates relate to moneys "due" rather than, to use the language of cl 34.7, "due and payable". The difference is explained by the stipulation in cl 37 that the liability to pay on a cl 37 certificate does not arise when the certificate issues: in Forge's case, not until 25 business days after receiving the progress claim, and then only after any set-off by Forge: for RCR, if Forge's election to set-off yields "a negative balance", within five business days of receiving notice.

[45] In other words, cl 37 provides for a different regime in the creation of a liability to pay.

[46] Another indication that Forge's entitlement to liquidated damages does not depend upon engaging the cl 37 progress payment scheme is the second paragraph of cl 34.7, which

[18] Or, perhaps, a final certificate issued after the Superintendent has certified under cl 34.7.

supplies its own mechanism for RCR to recover money paid for liquidated damages if an EOT is directed subsequently.

[47] The cl 34.7 certificate is necessary to create a liability in RCR to pay liquidated damages. Such a certificate also suffices to do so.[19]

Document Control System

[48] The Subcontract provides[20] for a Document Control System under which a "direction", which is defined to include a "certificate", is not to have effect until communicated through that system.

[49] Mr Austin's appointment as Superintendent was not "notified as such in writing"[21] through the document control system before 11 June. His certification for liquidated damages was also not communicated using that system until after the original expiration date of the 2014 guarantee.

[50] In those circumstances, as Forge accepts, the appointment of Mr Austin as Superintendent and his certification of liquidated damages did not become effective under the Subcontract until after 3 June 2014.[22]

Subcontract security

[51] Clause 5 of the General Conditions concerns security. It provides:

> "5.1 Provision
>
> Security shall be provided by the Contractor in accordance with Item 13. All delivered security, other than cash or retention moneys, shall be transferred in escrow.
>
> Notwithstanding any other provision of the Contract, compliance with this Clause 5.1 is a condition precedent to the entitlement of the Contractor to receive any payment from the Principal under the Contract and no payment shall be due and payable until this clause is satisfied.
>
> 5.2 Recourse
>
> Security shall be subject to recourse by the Principal where it remains unpaid after the time for payment.

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[19] In *Main Roads Construction Pty Ltd v Samary Enterprises Pty Ltd* [2005] VSC 388, Habersberger J considered a materially indistinguishable set of contractual provisions and was of opinion (see para 42) that "the reference in the first paragraph [of cl 34.7] to the superintendent certifying an amount due and payable to the principal is clearly a reference to the procedure set out in cl 37.2". His Honour did not advert to the different regimes for which cl 34.7 and 37.2 provide, and I respectfully disagree with his impression of the effect of those provisions.

[20] cl 2.1A of the General Conditions, which prevails against "any other provision of the" Subcontract (such as cl 7).

[21] cl 1 definition of Superintendent: someone who is appointed by Forge in writing and "notified as such in writing" to RCR.

[22] T2-47.

…

5.4 Reduction and release

Upon the issue of the certificate of practical completion the Principal's entitlement to security (other than in Item 13(e)) shall be reduced by the percentage or amount in Item 13(f), and the reduction shall be released and returned within 28 days to the Contractor…

The Principal's entitlement otherwise to security shall cease 28 days after final certificate.

Upon the Principal's entitlement to security ceasing, the Principal shall release and return forthwith the security to the Contractor.

5.4A Additional and replacement security

(a) If, at any time the contract sum increases (whether because of one increase or multiple increases as a result of variations) by more than 5%, the Contractor must provide additional security equal to 10% of the amount by which the contract sum has increased in accordance with Item 13(a).

(b) If the Principal has recourse to the security in accordance with the Contract and the security is reduced by more than 50%, upon written request from the Principal the Contractor must provide further security in accordance with Item 13(a) to replace the amount to which the Principal has had recourse."

Operation of Clause 5

[52] There are contests about the meaning and effect of cl 5.1 and cl 5.2.

[53] On the interpretation for which RCR contends, cl 5 should be understood in these senses:

- 5.1: "…delivered security, other than cash…shall be transferred" and not dealt with by Forge until Forge becomes entitled to have recourse to the security;
- 5.2: "Security shall be subject to recourse…" where a debt due and payable to Forge "remains unpaid after the time for payment".

[54] Forge propounds a different construction of cl 5.

[55] Forge does not accept that there is any constraint on converting the guarantee to cash, contending[23] that:

- there is an established distinction between merely calling upon a guarantee and converting it into cash on the one hand and having recourse to it on the other hand;

[23] Exhibit 2, Defendants' Outline of Submissions, 12 [55].

- the mere act of calling upon a guarantee does not constitute having recourse to it. Rather that converts it to cash, which then stands as the security. Having recourse involves appropriating the cash for one's own purposes i.e. towards some entitlement or claimed entitlement.

[56] Alternatively, on Forge's case, cl 5 functions as a risk allocation mechanism, not just as security. So Forge may appropriate the cash after payment under the guarantee where it makes a bona fide claim against RCR and the date nominated for payment passes without payment.

What is recourse?

[57] Is substituting cash having "recourse" to the security?

[58] Forge points out that, in at least two other instances, "Recourse" is used in the Subcontract in the sense of appropriation by Forge, not mere substitution of cash as security. Clause 37.8 provides that: "If the money payable" to RCR is not sufficient to discharge the amount due from RCR, Forge "may have recourse to the security". In cl 5.4A,[24] "recourse" also signifies appropriation by Forge for its own purposes rather than mere conversion.

[59] But to restrict the reach of "recourse" in a similar way in cl 5.1 could give rise to a state of affairs that is most unlikely to have been intended.

[60] It would mean that, in a Subcontract which stipulates for a guarantee – not cash – as the security, Forge could, at any time and for any (or no) reason, substitute cash as the security.

[61] The predictable consequences of such an election for the relationship between RCR and the bank providing the guarantee would be likely to be the same as if Forge appropriates the cash for its own purposes. And from RCR's perspective, as Forge presumably would have realised, those consequences would probably be unwelcome.

[62] All considered, conversion to cash is "recourse".

Escrow?

[63] The next issue concerns "escrow".

[64] The guarantee "shall be transferred in escrow". There is, however, no consensus on what that means.

[65] Forge argues that it constrains RCR not to derogate from the rights Forge acquires by the guarantees. "Escrow" is said to signify that the "transfer" of the guarantee is not absolute:

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[24] See above [51].

it becomes "absolute once recourse occurs";[25] and to the extent that some condition must be identified before conversion, the only one stated in Annexure M is demand by Forge.

[66] "Shall be transferred in escrow" is used in a contractual setting in which the guarantees are "subject to recourse by [Forge] where [Forge] remains unpaid after the time for payment". In this context, it is most unlikely that "…in escrow" was included to impose a constraint on RCR.

[67] Rather, as RCR proposes, the expression evinces an intention that some condition must be satisfied[26] before Forge – the party having the benefit of a guarantee – may resort to it.

Entitling condition

[68] It can only be cl 5.2 that states the condition that justifies "recourse". Its meaning is also controversial.

[69] RCR contends that "remains unpaid after the time for payment" concerns circumstances where Forge has an admitted or proved right to payment: as, for example, where a valid certificate issues for payment of money that RCR is liable to pay: in short, that "recourse" cannot be had unless there is a debt due and payable by RCR to Forge. For present purposes, that requires a valid superintendent's certificate under cl 34.7.

[70] Another interpretation, however, seems more consonant with a purpose for which the security appears have been taken.

[71] There are indications in the Subcontract that cl 5 was supposed to function not just as means of providing security for debts due and payable but also as a risk allocation device, allocating the risk as to which party would be out of pocket pending resolution of a dispute in respect of a claim made by Forge in good faith.

[72] First, the security is to be provided before RCR is entitled to be paid anything. By cl 37.2A, RCR "is not entitled to any payment" under cl 37 unless RCR has "provided the security in the circumstances described in cl 5". By cl 39(2)(a), Forge may "immediately terminate" the Subcontract if RCR "fails to provide security as required by cl 5".

[73] Secondly, the nature of the security – an unconditional, irrevocable, on-demand bank guarantee – is consistent with recourse being permitted upon a bona fide claim, not only where a debt is indisputably payable.

[74] Thirdly, Clause 5.2 does not speak of a "debt due and payable". Elsewhere, the Subcontract does employ "due and payable": for example, in cl 37.4.

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[25] Exhibit 2, Defendants' Outline of Submissions, 14 [68].

[26] cf *400 George Street (Qld) Pty Ltd v BG International Ltd* [2012] 2 QdR 302, [10].

[75] Fourthly, "unpaid after the time for payment" may be read as comprehending circumstances in which a payment has been demanded and the time fixed for payment has passed without payment. In other words, cl 5.2 is not, in terms at any rate, obviously concerned exclusively with circumstances in which Forge's claim is for money that is, at least provisionally, indisputably due and payable.

[76] To interpret cl 5.2 in that restrictive fashion would significantly diminish the value of the security to Forge, rendering an unconditional bank guarantee a poor substitute for cash, especially under this Subcontract, where the security has a finite life. The prospect of a protracted dispute about whether Forge is entitled to a payment claimed when the guarantee is invoked involves significant potential jeopardy to Forge: an outcome that is unlikely to have been anticipated when Item 13(a) opted for unconditional bank guarantees as the security.

[77] Given the importance of the security in the administration of the contract, there is no sufficient justification for an interpretation of cl 5.2 which would mean that the security was available only in respect of debts due and payable. RCR has many obligations under the Subcontract. Breach would ordinarily involve exposure to unliquidated damages. There would be a substantial erosion of the value of the security if Forge could not resort to the security in respect of such claims.

[78] RCR, however, emphasises that an interpretation of cl 5.2 that allows Forge to invoke the guarantee on the strength of a good faith claim for payment puts RCR at considerable risk in the event of Forge's insolvency. In such circumstances, Forge would have the money from the bank, exposing the risk that RCR may have to prove for its claims against Forge in an insolvent administration.

[79] Were the guarantee called upon and the providing bank to debit RCR's account to that extent,[27] RCR would be out of pocket pending the resolution of any contest. RCR would also confront the unpalatable prospect of being restricted to pursuing its claims for payment against Forge in circumstances where the administration in insolvency might not result in recovering the entirety of a valid claim.

[80] That prospect is not a good reason to construe cl 5.2 as permitting resort to the guarantee only where a debt by RCR is due and payable. For one thing, the risk of insolvency is one that RCR runs in subcontracting: it is an ordinary commercial incident of the relationship it was content to conclude. In any event, the risk exists whether Forge's demand on RCR is for a debt due and payable or merely a claim for money made in good faith.

Guidance

[81] In *Clough Engineering Ltd v Oil and Natural Gas Corporation Ltd,*[28] the Full Court of the Federal Court of Australia[29] said:[30]

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[27] Or exercise other rights against RCR to its financial disadvantage.
[28] (2008) 249 ALR 458.
[29] French, Jacobsen and Graham JJ.
[30] At pp 477-480.

"[75] The principles under which a court will construe the terms of a bank's undertaking in a performance guarantee, and the contract between a contractor and an owner, have been stated in a series of authorities over the last 30 years. The seminal decision is that of the High Court in *Wood Hall Ltd v Pipeline Authority* (1979) 141 CLR 443; 24 ALR 385 (*Wood Hall*).

[76] Reference was made in *Wood Hall* to the commercial purpose of the guarantees, which in that case was that they be equivalent to cash…As Stephen J observed, to introduce a qualification on the entitlement of the owner to call upon the performance guarantees…:

> …would be to deprive them of the quality which gives them commercial currency.

…

[77] Nevertheless, the authorities have recognised three principal exceptions to the rule that a court will not enjoin the issuer of a performance guarantee, or bond, from performing its unconditional obligation to make payment…

First – the Court will enjoin the party in whose favour the performance guarantee has been given from acting fraudulently…

Second – the party in whose favour the performance bank guarantee has been given may be enjoined from acting unconscionably in contravention of s 51AA of the TPA…

Third – the most important exception for present purposes, is that, whilst the Court will not restrain the issuer of a performance guarantee from acting on an unqualified promise to pay (*Reed Construction Services* at 164 per Austin J):

> …if the party in whose favour the bond has been given has made a contract promising not to call upon the bond, breach of that contractual promise may be enjoined on normal principles relating to the enforcement by injunction of negative stipulations in contracts.

It may be preferable not to describe this as an exception but rather as an over-riding rule because it emphasises that the "primary focus" will always be the proper construction of the contract…

[79] In *Fletcher Constructions*, Charles JA at 821 and Callaway JA at 826 recognised that there are generally two commercial reasons why a beneficiary of a performance guarantee may have stipulated for such an entitlement. One is to provide security for a valid claim against the contractor. The second, which is additional to the first, is to allocate the risk between the parties as to who shall be out of pocket pending the resolution of a dispute between them. Callaway JA went on to observe that it is a question of construction of the underlying contract whether the guarantee is provided solely by way of security or also as a risk allocation device. He went on to say (at 827):

> Remembering that we are speaking of guarantees in the sense of standby letters of credit, performance bonds, guarantees in lieu of retention moneys and the like, the latter purpose is often present and

> commercial practice plays a large part in construing the contract. No implication may be made that is inconsistent with an agreed allocation of risk as to who shall be out of pocket pending resolution of a dispute and clauses in the contract that do not expressly inhibit the beneficiary from calling upon the security should not be too readily construed to have that effect. As I have already indicated, they may simply refer to the kind of default which, if it is alleged in good faith, enables the beneficiary to have recourse to the security or its proceeds.
>
> [80] It seems to us that his Honour's reference to a default "alleged in good faith" was intended to embrace the first exception we have set out above. That is to say, the breach relied upon to support a call on the performance guarantee must not be asserted fraudulently because the Court will enjoin a party from so acting. Thus, subject to the exceptions of fraud and unconscionability, the beneficiary of a performance guarantee granted in its favour as a risk allocation device, will be entitled to call upon the guarantee even if it turns out, ultimately, that the other party was not in default…
>
> [81] In determining whether the underlying contract confers an unfettered right to call upon the performance guarantee, the importance of such instruments in the construction industry, both nationally and internationally, is a factor which bears upon the question of construction of the Contract…
>
> [82]…What the authorities emphasise is that the commercial background informs the construction of the contract. In particular, as Callaway JA said in the passage quoted above, the Court ought not too readily favour a construction which is inconsistent with an agreed allocation of risk as to who is to be out of pocket pending resolution of the dispute about breach.
>
> [83] It follows that clear words will be required to support a construction which inhibits a beneficiary from calling on a performance guarantee where a breach is alleged in good faith, i.e., non-fraudulently…
>
> [85] The question of construction as to whether the underlying contract contains a qualification on the right to call upon the security must be determined in light of the contract and the form of the performance guarantee as contained in the contract…"

[82] In *Redline Contracting Pty Ltd v MCC Mining (Western Australia) Pty Ltd*,[31] cl 5 of the contract provided that:

> "5.1 *Provision*
>
> *Security* shall be provided in accordance with *Item* 13 or 14. All delivered *security*, other than cash or retention moneys, shall be transferred in escrow.
>
> 5.2 *Recourse*
>
> *Security* shall be subject to recourse by a party who remains unpaid after the time for payment where at least 5 days have elapsed since that party notified the other party of intention to have recourse. (Original emphasis.)"

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31 [2011] FCA 1337.

[83] "Security" was defined to mean "cash; retention monies; or an approved unconditional undertaking given by an approved financial institution…". The annexure stipulated, in para 13, for a contractor's security to be in the form of a "Unconditional Insurance Bond".

[84] *Redline* contended that:

- cl 5.2 required, as a condition of the exercise of the right to call on the undertaking, that it had been determined, pursuant to a mechanism under the contract, that *Redline* was liable to pay *MCC Mining* the amount demanded and that amount was not the subject of a set-off;[32]
- *MCC Mining* was not entitled to call upon the undertaking because there had been no determination that the amounts claimed in the letters of demand were due for payment; and, in any event, those claims were subject to being set-off against amounts claimed by *Redline*.

[85] Siopis J said:[33]

> "First, the contract is to be construed in its commercial context, namely, that performance guarantees and like instruments, are treated as providing the beneficiary thereof with a security which is only defeasible in such limited circumstances, that it is to be regarded as approximating cash. Further, the parties to a contract which provides for the issue of a performance bond, are to be taken as having contracted, in the knowledge of the special status accorded to performance bonds in the industry, and the legal principles relating to the construction of contractual terms insofar as they affect the right of a beneficiary to call upon a performance bond.
>
> The construction of the contract advanced by Redline imposes conditions upon the exercise of the right to call upon the unconditional undertaking, which have the propensity to undermine substantially the commercial purpose of requiring a contractual party to provide a performance bond. This is particularly so, insofar as Redline contended that the contract was to be construed in such a way as to preclude MCC Mining from calling upon the unconditional undertaking on the basis of Redline's claim to a set off.
>
> As the Full Court observed in *Clough Engineering*, it would require very clear wording for a contract to impose conditions such as those contended for, which so substantially undermine the effectiveness of a performance bond as a commercial security instrument. In my view, this contract does not contain wording which answers this description.
>
> Secondly, the contract must be construed in light of the whole contract and the language of the performance bond itself. In this case, the relevance of the language used in the unconditional undertaking to the question of construction, is demonstrated by the fact that the parties contracted for the unconditional undertaking to be supplied in the specific form annexed to the contract as annexure "CD6".

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[32] [25].
[33] [31]-[36].

> In my view, the language of the contract and the unconditional undertaking is inconsistent with Redline's contention that the exercise of the undertaking is conditioned by the matters to which it referred. First, effect must be given to the fact that the parties have chosen to characterise the undertaking as "unconditional". Thus, the definition of "security" in the contract, refers specifically to the need to provide an "unconditional" undertaking. Further, the language of the undertaking provides that the surety "unconditionally undertakes to pay on demand any sum or sums which may from time to time be demanded by [MCC Mining]". The undertaking also provides that the surety "unconditionally" agrees to make the payment demanded "without reference to [Redline] and notwithstanding any notice given by [Redline] not to pay the same".
>
> …there is not sufficient likelihood of Redline succeeding in making good its contention in relation to the proper construction of cl 5.2, at trial, to justify…enjoining MCC Mining from calling upon the unconditional undertaking…at trial, the words "time for payment" in the phrase "a party remains unpaid after the time for payment" in cl 5.2 of the contract, will be construed as referring to the time specified by MCC Mining for Redline to make the payment demanded and not as importing the inhibiting restrictions contended for by Redline; and that cl 5.2 will be construed as a clause intended to allocate risks pending the resolution of the underlying dispute."

[86] Siopis J returned to cl 5.2 in *Redline Contracting Pty Ltd v MCC Mining (Western Australia) Pty Ltd (No 2)*,[34] concluding:

> "It is likely that at trial the Court will find that the proper characterisation of cl 5.2, is as a risk allocation clause, and that resort to the security by MCC Mining is not conditioned upon there being an undisputed amount due and payable by Redline. It is sufficient…that MCC Mining bona fide believed that it had such a claim. It is also likely…that the trial court will find that the resort by MCC Mining to the unconditional undertakings will not be precluded, by reason only, that the disputed claim is in respect of an unliquidated amount as damages."

Bona fide claim suffices

[87] The Subcontract's similarities to the *Redline* contract are obvious.

[88] And the reasoning in the *Redline* cases is persuasive.

[89] Like the *Redline* contract, the Subcontract does not contain clear words indicating that resort to the guarantee requires a debt due and payable.

[90] Clause 5 permits recourse on a bona fide claim.

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[34] [2012] FCA 1.

Impact of Deed of Novation

[91] Forge and RCR contend that the Deed of Novation, in different ways, affects Forge's entitlement to invoke the guarantees.

[92] On Forge's case, the Deed confers a right of conversion to cash on demand if cl 5 of the Subcontract does not. This is said to follow from the cl 4.1 right to retain security to the extent that Forge has, or may have, outstanding claims against RCR or has a reasonable belief that RCR has, or will, pursue claims against Forge.

[93] But in a Deed that preserves only accrued rights and obligations, that provision for retention of documents scarcely presents as an adequate foundation for a conclusion that the Deed was intended to confer a right to call upon a guarantee – even for the limited purpose of substituting cash as security – in circumstances beyond those envisaged by the Subcontract.

[94] Forge contends that cl 3.5 of the Deed confers a right to convert a[35] guarantee to cash as a substituted form of security if cl 5 of the Subcontract does not.

[95] The right is said to inhere in the cl 3.5 "mechanism" for retention: otherwise the right to hold a guarantee that was to expire on 3 June would be "practically worthless":[36] in reality, there would be no security under that guarantee, at least in respect of future or contingent claims by Forge, beyond the imminent expiration of the security.

[96] That, however, is not a consequence that should be regarded as so very peculiar that the parties could not have intended it.

[97] The Deed of Novation does not create any additional right to convert the guarantees to cash.[37]

[98] RCR contends that the Deed constrains Forge's exercise of a right of recourse.

[99] Forge, RCR contends, was permitted to retain the guarantees to provide security against non-payment in the event that the balance of account between Forge and RCR favoured Forge: not to put Forge in the "position of obtaining provisional payment and leaving RCR to prove in the winding up".[38] If, therefore, cl 5 of the Subcontract functions as a risk allocation device, the Deed negated that purpose.

[100] RCR contends that the insolvency context in which the Deed was agreed to makes it improbable that retention of the guarantees under the discharged Subcontract was to

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35 Or at least the 2014 guarantee.

36 Exhibit 2, Defendants' Outline of Submissions, 22 [100]-[101].

37 Forge expressly refrained from suggesting that cl 4.1 enables the guarantees to be called up for appropriation of the money for its own purposes other than in circumstances where such recourse was permitted under the terms of the Subcontract.

38 Exhibit 3, Plaintiff's Submissions in Reply, 4 [9(c)].

allocate to RCR the risk of being out of pocket pending resolution of competing claims in Forge's insolvency.

[101] RCR attaches significance to Forge's liquidation in ascertaining the effect of cl 4.1, drawing attention to s. 553C of the *Corporations Act 2001*, which calls for set-off of sums due between an insolvent company and another, with only the balance of account being either admissible in proof against the company or payable by it. That regime avoids the injustice[39] that might otherwise arise where the company takes the whole of the debt owed to it while insisting that the other party must content itself with whatever lesser sum it may recover by proving its claim in the liquidation.

[102] Against that background, RCR contends that, when the Deed was entered into, only the balance of an account of what was due between Forge and RCR could be regarded as payable to Forge or capable of being proved by RCR in the liquidation. Yet Forge contends for recourse to the guarantees to obtain provisional payment of a claim against RCR before proving its validity, leaving RCR in this predicament: if, subsequently, it were to establish that Forge had received "overpayment through the guarantees", RCR would be left to prove that debt in the liquidation, along with Forge's other unsecured creditors.

[103] RCR makes too much of those surrounding circumstances. From its perspective, it may have been sensible to fix limits on Forge's right of recourse upon discharge of the Subcontract and Forge's insolvency. That was a matter for negotiation. The Deed, however, is not expressed in a way which suggests that it was designed to deprive Forge of a right of recourse created by the Subcontract. The language of the Deed is not apt to deprive the security of its risk allocation function.

[104] RCR also contends that, by implication of a term necessary to give the Deed business efficacy, it should be concluded that, after discharge of the Subcontract, the guarantees functioned solely as security against non-payment by RCR in the event that the balance of the account favoured Forge, and Forge was to have recourse to the security to give effect to such an intention but not otherwise.

[105] But it is scarcely "goes without saying"[40] that RCR and Forge must both be taken to have intended such a constraint. So no term to that effect should be implied.

Conduct of Superintendent and Forge

[106] Other issues arise in relation to the efficacy of the Superintendent's certification.

[107] RCR contends that Mr Austin's certificate should be ignored[41] on the footing that he did not act honestly, in accordance with the Subcontract, in issuing his certificates.

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39 cf *Gye v McIntyre* (1991) 171 CLR 609, 618.
40 Exhibit 3, Plaintiff's Submissions in Reply, 9 [34].
41 cf *Kell and Rigby Holdings Pty Ltd v Lindsay Bennelong Developments Pty Ltd* [2010] NSWSC 777 [55]-[58].

[108] First, it is said that Mr Austin did not perform his duty because he did not determine RCR's claims to extensions of time before certifying.

[109] Two things may be said about that:

- the Subcontract does not require the Superintendent to determine an outstanding claim for an extension before certifying for liquidated damages. Indeed, cl 34.7 expressly anticipates that such a determination might not have been made when the Superintendent certifies: it stipulates for the consequences of an "EOT" directed by the Superintendent after liquidated damages are paid;
- Mr Austin did turn his mind to RCR's extension claims and thought that he did not have enough information to decide that they were justified and that RCR had not adequately addressed time bar issues.

[110] Mr Austin's unwillingness to pronounce on RCR's claims before certifying for liquidated damages did not involve a departure from his duty to act honestly, in accordance with the Subcontract, impartially, and fairly.[42]

[111] Next, RCR contends that Mr Austin's certification, on 3 and 26 June, for immediate payment is strong evidence of failure of duty.[43]

[112] Mr Austin did act swiftly once his appointment as Superintendent was made; and did so because of the imminent expiry of the 2014 guarantee. But, in all the circumstances, the promptness of his actions does not bespeak a failure to perform his duty.

[113] Mr Austin was Executive General Manager (Eastern Division) of Forge Group Limited between September 2012 and February 2014. Forge Group Limited is the holding company for Forge.

[114] Between November 2013 and mid-February 2014, Mr Austin supervised Forge's work on the Diamantina Power Station project. He communicated with others working on the project about events during the project works, including works subcontracted to RCR. He was aware of letters sent to RCR rejecting delay claims or requesting further information in relation to them. He saw reports that RCR had submitted concerning extensions of time. He noted that a report furnished to support a claim for a 155 day extension did not consider notice provisions that needed to be complied with to establish an entitlement to an extension.

[115] In mid-March, Mr Austin recommenced with Forge, tasked with assisting the receivers in connection with the project. When collating documents and assessing claims, Mr Austin worked out of the offices of Norton Rose Fulbright, the receivers' solicitors.

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[42] cf cl 20 of the Subcontract.

[43] And of improper interference by Forge.

[116] From 22 April, one of his responsibilities was to advise the receivers about liabilities of Forge to subcontractors, including RCR. He also made assessments of amounts that subcontractors were liable to pay Forge.

[117] In May 2014, during telephone conferences, Mr Austin participated in discussions about the Subcontract: in particular, concerning achievement of practical completion of the separable portions. He also assessed the reports RCR had furnished concerning delay. He considered whether there was sufficient material to support RCR's position that it had been subjected to disruptions that would warrant an extension of time. He reflected on RCR's failure to particularise critical path delay events. To Mr Austin, there was not an adequate basis to adjust the required dates for practical completion – a view that had obvious ramifications for RCR's liability to pay liquidated damages.

[118] Mr Austin considered that RCR was liable to pay liquidated damages for its failure to achieve practical completion for separable portions 2, 3 and 4 by the dates required. His own investigations into RCR's claims, as well as his participation in discussions and teleconferences, contributed to his assessment of the liquidated damages payable.

[119] In the last days of May or the first couple of days of June, Mr Austin was invited to accept appointment as Superintendent. He understood that a Superintendent would need to be appointed to issue certificates under the Subcontract. He knew that the 2014 guarantee was about to expire by effluxion of time. He believed that, with his background with the project and industry experience, he was well placed to fulfil the role of Superintendent. Mr Austin accepted the appointment. Soon afterwards, he received written notice of his appointment, signed by Mr Langdon.[44]

[120] A solicitor from Norton Rose Fulbright prepared the letter dated 3 June by which Mr Austin was to certify the $2,588,068.20 as immediately due and payable by RCR. Before he signed the letter, Mr Austin reviewed it and considered cl 34.7 of the Subcontract.[45] He was satisfied that RCR had failed to achieve practical completion by the required dates. He also held the opinion that RCR had not supplied information adequate for him to determine that any extension of time should be allowed.

[121] When on 3 and 26 June Mr Austin certified for liquidated damages, he considered that the damages he assessed were properly certified pursuant to cl 34.7.

[122] Mr Austin is not shown to have breached his duty.

[123] Another contention is that Forge interfered with the proper exercise of Mr Austin's functions as Superintendent in certifying, leading him astray or otherwise improperly influencing him in the performance of duties as certifying Superintendent.

[124] Mr Austin and Mr Langdon were cross-examined. Neither was taxed with a suggestion of inappropriate interference by Forge. Nor is there any satisfactory factual foundation for such an inference. Indeed, the evidence does not show that anybody sought to deflect

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[44] It purported to backdate the appointment to 14 March when Mr Austin's employment with Forge restarted.
[45] Mr Austin was not aware of RCR's outstanding January 2014 progress claim.

Mr Austin from the proper discharge of the Superintendent's duties let alone succeeded in doing so.

Disposition

[125] I will hear the parties concerning the responses that should, consistently with these reasons, be made to the questions ordered to be determined and otherwise as to the form of order.