SUPREME COURT OF QUEENSLAND

CITATION:	*Wiggins Island Coal Export Terminal Pty Ltd v Monadelphous & Ors* [2015] QSC 309
PARTIES:	**WIGGINS ISLAND COAL EXPORT TERMINAL PTY LTD ABN 20 131 210 038** (plaintiff/respondent) v **MONADELPHOUS ENGINEERING PTY LTD ABN 43 010 305 923** (first defendant) and **MUHIBBAH CONSTRUCTION PTY LTD ABN 93 073 412 012** (second defendant) and **MONADELPHOUS GROUP LIMTED ABN 28 008 988 547** (third defendant) and **MUHIBBAH CONSTRUCTION ENGINEERING (M) BHD (COMPANY REGISTRATION NO. 12737-K)** (fourth defendant/applicant)
FILE NO/S:	BS5673/15
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	4 November 2015
DELIVERED AT:	Brisbane
HEARING DATE:	22 October 2015
JUDGE:	Jackson J
ORDER:	**The order of the court is that:** **1. The plaintiff is directed to amend the statement of claim in accordance with these reasons within 28 days.** **2. The plaintiff pay the fourth defendant's costs of the application.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER THE UNIFORM

CIVIL PROCEDURE RULES AND PREDECESSORS – PLEADING – STATEMENT OF CLAIM – where the fourth defendant applied to strike out part of the statement of claim on the basis that it had no reasonable cause of action against the fourth defendant – where the plaintiff alleges an overpayment to the first and second defendants pursuant to an adjudication certificate under the *Building and Construction Industry Payments Act* 2004 (Qld) – where the fourth defendant is the guarantor and indemnifier of the first and second defendants' liability to the plaintiff – whether the alleged overpayment is due and payable by the first and second defendants to the plaintiff – whether the alleged liability of the fourth defendant as guarantor and indemnifier has arisen – whether the impugned paragraphs in the statement of claim should be struck out

Building and Construction Industry Payments Act 2004 (Qld), s 21, 29, 100
Civil Proceedings Act 2011 (Qld), s 7(1)(b)
Judicature Act of 1876 (Qld)

Uniform Civil Procedure Rules 1999 (Qld), r 171
Rules of the Supreme Court 1900, O 64 r 1A

BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd [2015] 1 Qd R 228; [2013] QCA 394, cited
Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd [1999] 1 AC 266; [1998] 2 All ER 778, cited
Bunbury Foods Pty Ltd v National Bank of Australasia Ltd & Anor (1984) 154 CLR 491; [1984] HCA 10, referred to
Dura (Australia) Construction Pt Ltd v Hue Boutique Living Pty Ltd (2013) 41 VR 636; [2013] VSCA 179, cited
Electricity Generation Corporation v Woodside Energy Ltd (2014) 251 CLR 64; [2014] HCA 7, referred to
Grocon Constructors (Victoria) Pty Ltd v APN DF2 Project 2 Pty Ltd [2015] VSCA 190, cited
General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125; [1964] HCA 69, followed
Haggarty v Wood (No 2) [2015] QSC 244, referred to
McArthur v Mercantile Mutual Life Insurance Company Ltd [2002] 2 Qd R 197; [2001] QCA 317, cited
Mainteck Services Pty Ltd v Stein Heurtey SA (2014) 310 ALR 113; [2014] NSWCA 184, cited
Mount Bruce Mining Pty Ltd v Right Prospecting Pty Ltd [2015] HCA 37, referred to
Peabody (Wilkie Creek) Pty Ltd v Queensland Bulk Handling Pty Ltd [2015] QCA 202, cited
Re Concrete Constructions Group Pty Ltd [1997] 1 Qd R 6, referred to
Stratton Finance Pty Ltd v Webb (2014) 314 ALR 166; [2014] FCAFC 110, cited
Sunbird Plaza Pty Ltd v Maloney & Anor (1988) 166 CLR 245; [1988] HCA 11, referred to

Phipps v Australian Leisure Hospitality Group Pty Ltd [2007] QCA 130, distinguished
Wolmerhausen v Gullick [1893] 2 Ch 514, referred to
WMC Resources Ltd v Leighton Contractors Pty Ltd [1999] WASCA 10, cited

COUNSEL: B O'Donnell QC with M Trim for the applicant
P Franco QC with P Telford for the respondent
F Shaw for the third defendant

SOLICITORS: Herbert Smith Freehills for the applicant
Minter Ellison for the respondent
Jones Day for the third defendant

[1] **JACKSON J**: The fourth defendant applies to strike out parts of the statement of claim under *Uniform Civil Procedure Rules* 1999 (Qld) ("*UCPR*"), r 171, as not disclosing a reasonable cause of action.

[2] The relevant parts allege causes of action against the applicant as guarantor and indemnifier of the first and second defendants. Simply put, the applicant's alleged liability to the respondent as guarantor and indemnifier is based on the first and second defendants' failure to pay debts which are alleged to be due and payable to the respondent but are unpaid.

[3] The applicant submits that on the proper construction of the terms of the contracts between the respondent and the first and second defendants no sum is yet due by the first and second defendants to the respondent on the particular causes of action. The consequence is said to be that the corresponding causes of action alleged by the respondent against the applicant must fail because any obligation to pay on the guarantee or indemnity has not yet arisen.

Summary of the over-payment claims against the first and second defendants

[4] In the relevant parts of the statement of claim, the respondent alleges that under two construction contracts, each made between the respondent as the "principal" and first and second defendants as the "contractor", the first and second defendants agreed to construct off-shore marine works, including a 1.8 km long jetty and off-shore wharf, at the Wiggins Island Coal Export Terminal at Gladstone and to supply, manufacture and commission a ship loader and towed tripper as a fixture to the jetty.

[5] Under each of the contracts, the first and second defendants made a number of adjudication applications under s 21 of the *Building and Construction Industry Payments Act* 2004 (Qld) ("the Act"), resulting in adjudication decisions made under pt 3 of the Act. Broadly speaking, the respondent alleges that the adjudication amounts exceeded the amounts due as or on account of progress payments under the terms of the contract. However, by reason of each of the adjudication certificates, the respondent was required to pay the relevant adjudication amount to the first and second defendants.

[6] Accordingly, the relevant parts of the statement of claim allege that under the terms of the relevant contract, the first and second defendants are indebted to the

respondent for the amount of each overpayment. The respondent seeks to recover each overpayment by an order made under s 100(3) of the Act on the ground that the first and second defendants are only entitled to retain the payment to the extent if any that the Court concludes.

[7] It is unnecessary to set out every set of allegations in the statement of claim made in respect of each relevant adjudication certificate and the payment made under the certificate, because they are alike. For present purposes, one example will do.

VO5

[8] The respondent's claim for repayment in respect of the variation, described as VO5, relates to one of the drawings for the jetty. The applicant issued a revision of the drawing. The first and second defendants requested that the anchor pile spacing be increased. The applicant's representative agreed to that request. The first and second defendants made a claim under the contract for a variation because the increase of the anchor pile spacing caused an increase in the size of the jetty traveller that constituted a variation.

[9] The respondent alleges that the first and second defendants were not entitled to payment for the claimed works as they were not variation works within the meaning cl 42.1 of the general conditions of the contract, or the increase in the anchor pile spacing did not cause the works, the contractor failed to give a prescribed notice required under the contract, the variation was not approved by the applicant's representative and the applicant's representative and the first and second defendants did not agree upon the price under the relevant provisions of the contract.

[10] In the relevant adjudication decision, the adjudicator determined that the first and second respondents were entitled to $1,375,893.29 on account of the VO5 claim. The respondent paid that amount as part of the adjudicated amount under the adjudication certificate. It alleges that it was obliged to do so by s 29 of the Act.

[11] Paragraph 191 of the statement of claim cross-refers to the matters I have just summarised and then continues:

> "… the contractor is liable to repay the principal $1,375,893.29 in respect of the VO5 claim:
>
> (a) **under clause 42.1 of the GC12 general conditions**;
> (b) alternatively, on a common money count or in restitution;
> (c) in the further alternative pursuant to s 100 of the *Payments Act*." (emphasis added)

The guarantee and indemnity claim

[12] The logic of the claim by the respondent against the applicant commences with the allegation of the terms of cl 1 of the guarantee under which the applicant:

> "…unconditionally guarantees the full prompt and complete performance and observance by the Contractor of all terms, covenants and conditions expressed or reasonably implied in the Contract. The Guarantor indemnifies and agrees to keep the

> Principal fully indemnified from and against all loss, damage, costs, claims and expenses directly suffered or incurred by the Principal by reason of the Contractor's default, breach, non-performance or non-observance by the Contractor of any terms, covenants and conditions of the Contract…"

[13] It continues by alleging that in the premises of the paragraphs containing the allegations summarised above, among others, the first and second defendants failed to promptly and completely observe all of the terms, covenants and conditions expressly or reasonably implied in the contract and in particular failed to pay amounts owing under the contract. Alternatively, it is alleged that the respondent has directly suffered loss, damage, costs and expense by reason of the first and second defendants' default, breach and non-performance and non-observance by the first and second defendants of the terms, covenants and conditions of the contract and there is a claim for indemnity under cl 1.

[14] Accordingly, the relevant amount is claimed by the respondent from the applicant pursuant to the terms of the guarantee.

Clause 42.1 and other relevant clauses

[15] The applicant's challenge focuses on the operation of cl 42.1 of the GC20 general conditions of contract. Those provisions are recognisable as drawn mostly from AS2124-1992, but the two are not identical. The actual provisions are as follows:

> "42.1 Payment Claims, Certificates, Calculations and Time for Payment
>
> At the times for payment claims stated in the Annexure and upon issue of a Certificate of Practical Completion and within the time prescribed by Clause 42.7 and in accordance with Special Conditions of Contract at Appendix F1, the Contractor shall deliver to the Principal's Representative claims for payment support by evidence of the amount due to the Contractor and such information as the Principal's Representative may reasonably require. Claims for payment shall include the value of work carried out by the Contractor calculated in accordance with Section C3 Contract Price Schedules, together with all other amounts then due to the Contractor arising out of or in connection with the Contract or for any alleged breach thereof.
>
> The Contractor shall not be entitled to payment for any Adjustment under the Contract until the work the subject of the Adjustment has been completed by the Contractor and the Principal's Representative has approved both the basis and quantum for the Adjustment and provided written notification of this approval to the Contractor. For the purpose of this paragraph, 'Adjustment' shall mean any Claim for payment in addition to the Contract Sum for costs, losses, expenses or damages, including variations, arising under, out of, or in connection with, the Contract, the work under the Contract or the Project.

Within 10 Business Days after receipt of a claim for payment, the Principal's Representative shall issue to the Principal and to the Contractor a payment certificate stating the amount of the payment which, in the opinion of the Principal's Representative, is to be made by the Principal to the Contractor or by the Contractor to the Principal. The Principal's Representative shall set out in the certificate the calculations employed to arrive at the amount and, if the amount is more or less than the amount claimed by the Contractor, the reasons for the difference. The Principal's Representative shall allow in any payment certificate issued pursuant to this Clause 42.1 or any Final Certificate issued pursuant to Clause 42.8 or a Certificate issued pursuant to Clause 44.6, amounts paid under the Contract and amounts otherwise due from the Principal to the Contractor and/or due from the Contractor to the Principal arising out of or in connection with the Contract including but not limited to any amount due or to be credited under any provision of the Contract. If the Contractor fails to make a claim for payment under Clause 42.1, the Principal's Representative may nevertheless issue a payment certificate.

Where the contract is not for building work pursuant to the Queensland Building Services Authority Act 1991, the following paragraph will apply:

Subject to the provisions of the Contract, including clause 42.10, within 30 days after the end of the month following receipt by the Principal's Representative of a claim for payment (or within 60 days after the end of the month where the Contractor issues the claim for payment later than the date specified in Annexure Part A), the Principal shall pay to the Contractor, or the Contractor shall pay to the Principal, as the case may be, an amount not less than the amount shown in the payment certificate as due to the Contractor or to the Principal as the case may be.

Where the Contract is for building work pursuant to the Queensland Building Services Authority Act 1991, the following paragraph will apply:

Subject to the provisions of the Contract, including clause 42.10, within 5 Business Days of when the Principal's Representative issues a payment certificate, the Principal shall pay to the Contractor or the Contractor shall pay to the Principal, as the case may be, an amount not less than the amount shown in the payment certificate as due to the Contractor or to the Principal as the case may be.

A payment made pursuant to this Clause shall not prejudice the right of either party to dispute under Clause 47 whether the amount so paid is the amount properly due and payable and on determination (whether under Clause 47 or as otherwise agreed) of the amount so properly due and payable, the Principal or Contractor, as the case may be, shall be liable to pay the

difference between the amount of such payment and the amount so properly due and payable.

Payments of moneys shall not be evidence of the value of work or an admission of liability or evidence that work has been executed satisfactorily but shall be a payment on account only, except as provided by Clause 42.8.

Notwithstanding Clause 42.4, the Principal shall be obliged to pay for any item of unfixed plant and materials where that item is –

(a) to be imported into Australia, provided the Contractor has given the Principal a clean on board bill of lading or its equivalent, drawn or endorsed to the order of the Principal and, where appropriate, a custom's invoice for the item; or

(b) listed in the Annexure and which is not an item to be imported into Australia, provided the Contractor establishes to the satisfaction of the Principal's Representative that the Contractor has paid for the item, and the item is properly stored, labelled the property of the Principal and adequately protected.

Upon payment to the Contractor of the amount which includes the value of the item, the item shall be the property of the Principal free of any lien or charge." (emphasis added)

[16] The first of the emphasised paragraphs is called the "9th par of cl 42.1". The second is called the "10th par of cl 42.1".[1]

[17] It will be recalled that the relevant claims for overpayment are based, at least in part, on cl 42.1. As the argument developed, the parties also made reference to cl 47 of the general conditions of each contract. That clause provides:

"47 DISPUTE RESOLUTION

47.1 Negotiations

If a Dispute arises, the parties must, prior to the initiation of any legal proceedings, use their best efforts in good faith to reach a reasonable and equitable resolution of the Dispute in accordance with the process set out in this clause 47.

47.2 References to Representatives

If a Dispute arises, the Dispute must be referred to the Contractor's Representative and the Principal's Representative, who are to attempt to resolve the Dispute. The reference must be by written notice by either party specifying that it is a notice given under this

[1] I use this reference to the paragraphs of cl 42.1 as the parties referred to the paragraphs in this fashion in their submissions, although the paragraph numbers may not be correct.

clause 47.2 and giving full particulars of the nature and extent of the Dispute.

47.3 Reference to the Panel

If the Dispute is not resolved within ten (10) days of a referral in accordance with clause 47.2, the Dispute must be referred to a Panel for resolution. The reference must be by written notice by either party specifying that it is a notice given under this clause 47.3. Each party must nominate in writing a senior representative for the Panel within three (3) Business Days of the referral to the Panel in accordance with this clause 47.3.

The Panel will determine its own procedures by which it will attempt to resolve the Dispute. Unless otherwise agreed by the parties, all discussions involving the Panel will be conducted on a without prejudice basis.

47.4 Legal Proceedings

If the Dispute is not resolved by the Panel within ten (10) days of referral to the Panel, either party may commence legal proceedings.

47.5 Preconditions to legal proceedings

Neither party may commence legal proceedings in relation to a Dispute unless the parties have undertaken that processes set out in this clause 47 and those proceedings have failed to resolve the Dispute or one of the parties has attempted to follow these processes and the other party has failed to participate.

47.6 Urgent relief

Nothing in this clause 47 prevents a party seeking urgent injunctive relief or similar interim relief for a court.

47.7 Performance of obligations

Despite the existence of a Dispute, the parties must continue to perform their respective obligations under this Contract except where this Contract has been terminated."

[18] Further, the respondent made reference to cl 42.9 which provides:

"42.9 Interest on Overdue Payments

If any moneys due to either party remain unpaid after the date upon which or the expiration of the period within which they should have been paid then interest shall be payable thereon from but excluding the date upon which or the expiration of the period within which they should have been paid to and including the date upon which the

> moneys are paid. The rate of interest shall be the rate stated in the Annexure and if no rate is stated the rate shall be 18 percent per annum. Interest shall be compounded at six monthly intervals."

Applicant's argument

[19] The applicant submits that the respondent's allegation in par 191(a) of the statement of claim that it is presently entitled to repayment from the first and second defendants under cl 42.1 turns on the proper construction of the emphasised 9th and 10th pars of cl 42.1. The applicant submits that, properly construed, the first and second defendants as contractor will not be "liable to pay the difference between the amount of" the payments made "and the amount properly due and payable" until there is a "determination (whether under cl 47 or otherwise)", most likely by a judgment of the Court in this proceeding.

[20] Because no liability to pay the difference presently exists on the part of the first and second defendants as contractor, the applicant submits that there has been no failure by the first and second defendants as contractor to perform or observe and no default, breach, non-performance or non-observance of a term, covenant or condition under cl 1 of the guarantee and indemnity. Accordingly, the applicant contends that as yet no cause of action against it on the guarantee or indemnity can have arisen.

[21] I agree that the point raised is one of the proper construction of the terms of the contract.

Respondent's arguments

[22] The respondent opposes the application in three ways. First, it contends that whether or not the applicant's construction of cl 42.1 is ultimately found to be correct, as a matter of discretion, the Court should not decide it on this application. Second, it contends that the applicant's construction is incorrect. On the oral hearing of the application it added a third limb. It relied on *Phipps v Australian Leisure Hospitality Group Pty Ltd*[2] as a basis for refusal of the application on the footing that if the relevant causes of action against the applicant will accrue at some reasonable time in the future, there is a discretion to refuse the application because of the power in the UCPR to amend a claim to include a cause of action accruing after a proceeding is started.

[23] It is convenient to deal with the last point first. In *Phipps*, the plaintiff alleged a cause of action at common law for damages for negligence but had started the proceeding in contravention of a statute that required a notice to be served before doing so. The proper construction of the statute was that it denied the remedy but not the right to damages for negligence. Therefore, the proceeding was not brought on a non-existent cause of action. It is true that Keane JA spoke in terms of feeding the plaintiff's title to her claim in his reasons for judgment.[3] But, in my view, that was a metaphorical way of describing the conclusion that the statute did not destroy the common law right to damages for negligence, but only prohibited the plaintiff from starting a proceeding before giving the notice. When the plaintiff started the proceeding in contravention of the bar to the remedy, the court was faced with a

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2 [2007] QCA 130.

3 *Phipps v Australian Leisure Hospitality Group Pty Ltd* [2007] QCA 130, [22]-[27].

discretionary decision whether the proceeding should be dismissed. That is not a conclusion that a plaintiff whose cause of action has not yet arisen can start and continue a proceeding in advance of the substantive right arising. In particular, in this case, the applicant's hypothesis is that any claim for a sum due under the guarantee or indemnity on the relevant causes of action will not accrue until judgment is given in the proceeding against the first and second defendants. In my view, *Phipps* is not relevant.

Discretionary Factors

[24] The respondent relied on a range of factors as supporting the discretionary refusal of the application. Some of those factors go to whether the question of construction is sufficiently difficult or complex to make it inappropriate to decide it on this application. Others go to whether a decision upon the question in this application might create procedural difficulties or not be of sufficient utility to warrant embarking on it.

[25] So, for example, the respondent relies on the fact that the attack is made by the applicant but not by the first and second defendants. A decision in the applicant's favour would not be binding as between the respondent and the first and second defendants with the possibility of inconsistent results or decisions on the same question. Second, the application will determine only whether the applicant is presently liable to the respondent on its guarantee and indemnity because no cause of action against it can have accrued at this time. However, if the respondent succeeds against the first and second defendants, a judgment of this Court will be a determination within the meaning of cl 42.1 and the applicant would be liable as guarantor and indemnifier on any failure by the first and second defendants to pay upon that judgment. Third, the resolution of the question raised by the applicant will not determine the other claims made in the proceeding as against it. The other claims will cause the applicant to remain a party and to defend the proceeding at trial. Fourth, if the question is determined now, there could be a fracturing of the proceeding otherwise as between the applicant and the respondent, if there were an appeal, which may lead to a delay of the trial of the proceeding as between them and also might affect the progress of other parties who are not involved the hearing of this application.

[26] All of these are relevant discretionary matters and are to be taken into account in deciding the application having regard to the philosophy of the UCPR as expressed in r 5.

[27] When asked why there was advantage in having the court decide the question raised by the application before the trial of the other parts of the respondent's claim against the applicant, Mr O'Donnell QC said that it would obviate the need for the applicant to defend the relevant parts of the respondent's claim against the first and second defendants and thereby avoid the costs of it doing so. That may be true, but in the particular circumstances of this case there is a countervailing factor. As appears from the circumstances as I have described them, if the respondent is successful against the first and second defendants at trial, the determination that the applicant says is a pre-condition of the applicant's liability will have occurred. At that point, the substance of the present attack will have disappeared. Yet, because it will not have been a party to a claim based on the relevant causes of action, the applicant

will not be bound by the result as between the respondent and first and second defendants as expressed in the judgment.

[28] In my view, this is a significant consideration. An important purpose and object of the reforms which found their voice in this State in the *Judicature Act of 1876* (Qld) was to prevent or avoid multiplicity of proceedings as much as possible. The relevant provision is now in the *Civil Proceedings Act* 2011 (Qld), s 7(1)(b). Particularly having regard to the likely length, complexity and detail of the trial of the relevant parts of the proceeding as between the respondent and the first and second defendants, it is an unappealing prospect that the applicant might seek to re-litigate those questions as between it and the respondent if it were dissatisfied with the outcome as between the respondent and the first and second defendants.

[29] The applicant sought to meet this consequence of the order that it seeks by tender of evidence of an open offer as to its liability under the guarantee and indemnity, in certain circumstances, and by conceding in its submissions that it would be liable in the event of the first and second defendants' liability to the respondent under cl 42.1 of the contract. But there is a real difference between a party prospectively admitting liability and being bound by a judgment or order.

[30] There is further question that arises about utility. As appears from par 191(b) and par 191(c) of the statement of claim, cl 42.1 is one of three alternative bases for the liability alleged by the respondent against the first and second defendants. As against the applicant, it does not appear from the statement of claim whether the respondent relies on either of the other two bases of liability by the first and second defendants as engaging the applicant's liability under the guarantee. From par 43 of the respondent's response to the applicant's request for further and better particulars of the statement of claim it is stated that the sum alleged to be owing in par 191, *inter alia*, is an amount that the first and second respondents are liable to pay under cl 42.1 of the general conditions. However there is no clear abandonment of the alternative basis for liability under par 191(b) as a common money count or restitutionary liability.

[31] Nevertheless, that point was not raised by the respondent. For present purposes, I proceed on the footing that the respondent's claim against the applicant is said to turn on the first and second defendant's liability under cl 42.1 of the general conditions.

[32] As to the complexity of the question of construction of cl 42.1, the respondent raised a number of factors. First, it submitted that it is conceivable that the Court will be better placed to determine the issue at trial because it will have a more complete understanding of the genesis, background and context of the contracts. In support of that proposition, the respondent referred to the now well known passage from *Electricity Generation Corporation v Woodside Energy Ltd*[4] that to determine the rights and liabilities and the meaning of the terms of a commercial contract:

> "… will require consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purposes and objects to be secured by the contract. Appreciation of the commercial purpose or objects is facilitated by an understanding

4 (2014) 251 CLR 64.

> 'of the genesis of the transaction, the background, the context [and] the market in which the parties are operating'".[5]

[33] That statement has led intermediate appellate courts to consider the pre-conditions for and the extent of extrinsic evidence that might be admissible to prove relevant contextual facts.[6] In *Mount Bruce Mining Pty Ltd v Right Prospecting Pty Ltd*[7] the High Court recently adverted to that subject without resolving all the outstanding questions.[8] However, in submissions, the respondent did not refer to any particular contextual facts that might be relevant. None is pleaded in the statement of claim.

[34] Otherwise, the respondent's submissions about the difficulty of the question of construction of cl 42.1 were based in the particular arguments it raised as to the proper construction itself. One exception was that the respondent urged that it was undesirable to construe cl 42.1 to the extent raised by the application because that might require consideration of the operation of cl 42.9 relating to interest. The same logic would apply to the consideration of cl 47. I do not find it persuasive.

[35] In support of its contentions about the complexity of the question of construction of cl 42.1, the respondent relied on a range of cases, including some that support the dismissal of an application for summary judgment where there is complexity. I have elsewhere discussed the overlapping but distinct procedures relating to summary judgment on the one hand and an application to strike out a pleading or part of a pleading on the ground that it discloses no reasonable cause of action on the other.[9] In my view, the guiding principles for an application of the present kind were best summarised in *General Steel Industries Inc v Commissioner for Railways (NSW)*[10].

[36] There is a long history in this court of deciding a question of construction of written contracts summarily. Prior rules of court specifically provided for the court to be able to do so on what was known as a "construction summons".[11] Although those specific rules of court have been repealed, it does not seem to me that the approach of the court under the UCPR, guided by UCPR r 5, should be different.

[37] Although an application to strike out a pleading or part of a pleading on the ground that it does not disclose a reasonable cause of action is a different procedural context, as Barwick CJ said in *General Steel Industries Inc v Commissioner for Railways (NSW)*:[12]

> "I do not think that the exercise of the jurisdiction should be reserved for those cases where argument is unnecessary to evoke the futility of the plaintiff's claim. Argument, perhaps even of an

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5 *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 64, 656-657 [35].

6 *Peabody (Wilkie Creek) Pty Ltd v Queensland Bulk Handling Pty Ltd* [2015] QCA 202, [42]-[43]; *Grocon Constructors (Victoria) Pty Ltd v APN DF2 Project 2 Pty Ltd* [2015] VSCA 190, [85]; *Stratton Finance Pty Ltd v Webb* (2014) 314 ALR 166; *Mainteck Services Pty Ltd v Stein Heurtey SA* (2014) 310 ALR 113.

7 [2015] HCA 37.

8 [2015] HCA 37, [48]-[52], [108]-[113] and [118]-[119].

9 *Haggarty v Wood (No 2)* [2015] QSC 244, [74]-[79].

10 (1964) 112 CLR 125, 130.

11 *Rules of the Supreme Court* 1900, O 64 r 1A.

12 (1964) 112 CLR 125.

> extensive kind, may be necessary to demonstrate that the case of the plaintiff is so clearly untenable that it cannot possibly succeed."[13]

Construction of cl 42.1

[38] Returning to cl 42.1 the applicant submits that it operates in this way:

(a) the payment of a progress certificate is intended to be provisional only;
(b) such payments await the time when the ultimate indebtedness of one party to the other is determined;
(c) under the 9th par of cl 42.1 it is only upon the making of a "determination" that a liability attaches to one party or the other to pay the difference between the amount already paid and the amount determined as properly due and payable; and
(d) a determination can be made in several ways including by determination by the court.

[39] It is the step in subparagraph (c) that is critical. In support of that contention, the applicant relies in particular on *Re Concrete Constructions Group Pty Ltd*.[14] The relevant part of the clause in question there was not materially different from the 9th par of cl 42.1 in this case. McPherson JA and Helman J said:

> "…[s]o much is expressly recognised in this instance by cl. 42.1, providing as it does at the end of the fourth paragraph of that clause that a payment made pursuant to it does not prejudice the right of either party under cl. 47 to dispute whether the amount so paid is the amount properly due and payable. If the dispute is determined under cl. 47, a liability then attaches to one party or the other to pay the difference between the amount already paid and the amount that was properly due and payable."[15]

[40] However, the question for decision in that case was not relevant to the present case and it is not a binding precedent on the point. Cases about the construction of a particular clause of a contract are rarely of particular precedential value in another case about another contract, although they may be persuasive. It is unnecessary to set out the other cases relied on by the applicant in the same vein.

[41] The respondent submitted that the second and third defendants are presently indebted to the respondent because:

(a) the text of the opening line of the 9th par of cl 42.1 contemplates an existing debt based on the substantive entitlements of the parties;
(b) the text of the 10th par of cl 42.1 refers to payments being "on account only" consistently with an entitlement to claim an overpayment as money owing under the contract;
(c) interest is payable under cl 42.9 from the date of overpayment under the contract; and
(d) "the function of the court is to ascertain existing rights and obligations … rather than create new ones".

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13 *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125, 130.
14 [1997] 1 Qd R 6.
15 *Re Concrete Constructions Group Pty Ltd* [1997] 1 Qd R 6, 12.

[42] As to the 10th par of cl 42.1 the respondent submits that in ordinary language the use of the word "account" suggests a running balance of amounts owing from time to time. In my view, in context, the text in the 10th par that a payment of money shall be a payment on account only means that the payment is one on account of the amount properly or ultimately due and payable. That is the usual meaning attributed to a provision for progress payments against an amount finally due and payable on the issue of final certificate under a construction contract.[16]

[43] To say that that does not speak, in my view, to the question whether a sum not included in a payment certificate under cl 42.1 and not paid is a sum due and payable under cl 42.1 or that a sum paid but not included in a payment certificate under cl 42.1 is a sum due and payable under cl 42.1.

[44] As to interest, the respondent submits that because under cl 42.9 interest is payable upon monies due to either party that remain unpaid after the date upon which or the expiration of the period within which they should have been paid, it would be uncommercial if a recoverable overpayment is not payable under the 9th par of cl 42.1 until a determination is made under cl 47.

[45] In my view, it is not necessarily uncommercial if interest is not payable under cl 42.9 upon a claimed but uncertified amount under cl 42.1 before a dispute about the certification is resolved under cl 47.

[46] That view is, I think, supported by the fact that cl 47.3 in AS2124-1992 expressly provides for an arbitrator to award whatever interest the arbitrator considers reasonable which would include an amount calculated from the date on which it should have been originally allowed.

[47] As to the respondent's submission that the court's function is to ascertain existing rights and obligations rather than create new ones, I confess that I do not fully understand it or how it affects the proper construction of cl 42.1. The respondent referred to cases concerned with the nature of the judicial power of the Commonwealth. They are not relevant. It submitted that the applicant's construction potentially creates jurisdictional issues that do not arise on the respondent's construction of the clause. Again, I do not understand the submission made. In my view, there is no apparent jurisdictional or other issue about creating a debt raised by the applicant's preferred construction. There is nothing unusual about a guarantor contending that a creditor does not have a cause of action because the principal debtor does not owe any amount to the creditor. See, for example, *Sunbird Plaza Pty Ltd v Maloney & Anor*.[17] As between the respondent as creditor and the first and second defendants as debtor, there is also nothing untoward in a defence that a debt is not due because a condition precedent to the alleged liability has not been satisfied, for example until a reasonable time has elapsed after demand. See *Bunbury Foods Pty Ltd v National Bank of Australasia Ltd & Anor*.[18]

[48] It is not to the point for present purposes that there is no dispute between the respondent and the first and second defendants that the subject of the statement of

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16 See also *Re Concrete Constructions Group Pty Ltd* (1997) 1 Qd R 6, 12.
17 (1988) 166 CLR 245, 258.
18 (1984) 154 CLR 491, 503.

claim is not defended by the first and second defendants on the footing that any overpayment is not a present debt.[19]

[49] For present purposes, none of the parties contends that the Court does not have power upon the respondent's claim to give judgment that will operate under cl 47.4 as a determination of a dispute under cl 47. Such a determination may engage relevant rights or obligations of the parties under the 9th par of cl 42.1. The respondent's contention is that the Court's judgment will operate as a judgment to pay a pre-existing liability in the nature of a debt that is presently due upon its claims to recover the overpayment under cl 42.1.

[50] Finally, the respondent focused on the textual operation of the 9th par of cl 42.1. It submits that the provision in the opening lines that "a payment made pursuant to this clause shall not prejudice the right of either party to dispute … whether the amount so paid is the amount properly due and owing …" recognises and is consistent with its preferred construction that the difference between the amount of the payment and the amount ultimately found to be properly due and payable is a present debt.

[51] In my view, as the applicant submits in reply, the opening lines refer to the right of either party, after a payment is made, to contend that another amount is properly due and payable. They do not refer to when that amount is payable.

[52] Next, the respondent submits that the use of the "past tense" in the closing portion of the 9th par supports its preferred construction. The relevant words are that "the principal or contractor, as the case may be, shall be liable to pay the difference between the amount of such payment and the amount so properly due and payable".

[53] The verb in that clause is "shall be liable". It is in future tense not past tense. In my view, those words do not support the respondent's preferred construction. As the applicant submitted in reply, the use of the future tense is appropriate to identify a liability that will arise upon occurrence of the future event.

[54] Next, the respondent submits that the reference in the 9th par of cl 42.1 to a determination of the amount properly due and payable is directed at the quantification of the difference to be recovered rather than the time at which the liability accrues.

[55] The relevant part of the text of the 9th para of cl 42.1 is: "and on determination (whether under cl 47 or as otherwise agreed) of the amount so properly due and payable, the principal or contractor, as the case may be, shall be liable to pay …". The ordinary meaning of those words is that the liability to pay arises on the determination being made. In my view, the respondent's preferred construction gives no effect at all to the time relationship between the liability to pay and the event of the determination provided for by those words.

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[19] It is unnecessary to discuss any of the cases about the nature or extent of the Court's jurisdiction, such as *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd* [2015] 1 Qd R 228; *Dura (Australia) Construction Pt Ltd v Hue Boutique Living Pty Ltd* (2013) 41 VR 636; *McArthur v Mercantile Mutual Life Insurance Company ltd* [2002] 2 Qd R 197; *WMC Resources Ltd v Leighton Contractors Pty Ltd* [1999] WASCA 10; *Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd* [1999] 1 AC 266.

[56] In my view, there is no relevant ambiguity in the ordinary meaning of the text of the 9th par of cl 42.1. The respondent's claim of the applicant's liability under the guarantee and indemnity depends on the existence of a relevant debt presently due and payable by the first and second defendants to the respondent under cl 42.1 as alleged in par 191(a) of the statement of claim. In my view, the part of the respondent's case predicated on that liability under cl 42.1 is so clearly untenable that it cannot possibly succeed, because on the proper construction of the 9th par of cl 42.1 the relevant sum will become payable as a difference between the amount of the payment and the amount properly due and payable only on the determination whether under cl 47 or as otherwise agreed.

Other considerations and conclusions

[57] For those reasons, in my view, the application must succeed.

[58] However, as I pointed out to the applicant's counsel during argument, the application applies for an order that paragraphs of the statement of claim be struck out when those paragraphs are not attacked by the first, second or third defendants. Accordingly, it is inappropriate to strike them out from the statement of claim in their entirety. Instead, the respondent should be directed to amend the statement of claim as against the applicant so as to delete reliance in the relevant paragraphs, namely paragraphs 1022 and 1028, upon the liability of the first and second defendants alleged in the paragraphs corresponding to paragraph 191(a). The respondent did not make any submissions as to the particular form of relief. However, it may follow from these reasons that the respondent should also delete the claims for relief made in paragraphs 19 and 20 of the statement of claim.

[59] Further, as previously mentioned, it does not seem to me that it is desirable that the applicant avoid a determination as between itself and the respondent as to whether the applicant should be bound by the determination as between the respondent and the first and second defendant of the respondent's claims under cl 42.1 of the contracts.

[60] The applicant acknowledged this, to an extent, by accepting in its submissions that the respondent might seek some form of unspecified declaratory relief. I raised with the parties the form of relief granted in *Wolmerhausen v Gullick*[20] upon a claim by one co-surety for contribution against another for an equity of exoneration.

[61] In my view, a possibility appears that the respondent might seek a declaration that a judgment of the Court on its claims under cl 42.1 will be a determination under cls 47.1 and 42.1 of the contracts and that upon the first and second defendants failing to pay the amount of the judgment the respondent will be liable to pay the amount under the guarantees and indemnities.

[62] That possibility is enough to justify an order the respondent should be granted leave to amend the statement of claim, as it may be advised. How it amends, in response to the order having the effect of striking out reliance on the relevant paragraphs, is a matter for it.

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20 [1893] 2 Ch 514.