SUPREME COURT OF QUEENSLAND

CITATION:	*Tomkins Commercial & Industrial Builders Pty Ltd v Majella Towers One Pty Ltd & Anor* [2017] QSC 202
PARTIES:	**TOMKINS COMMERCIAL AND INDUSTRIAL BUILDERS PTY LTD ACN 061 732 778** (applicant) **v** **MAJELLA TOWERS ONE PTY LTD ACN 153 205 497** (first respondent) **BODY CORPORATE FOR RADIUS APARTMENTS COMMUNITY TITLES SCHEME 48720 ABN 14 912 930 741** (second respondent)
FILE NO/S:	BS 5713 of 2017
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	15 September 2017
DELIVERED AT:	Brisbane
HEARING DATE:	13 June 2017
JUDGE:	Brown J
ORDER:	**The order of the court is that:** **1. Majella was obliged to deliver the bank guarantee to Tomkins pursuant to cl 5.4 on 15 June 2017.** **2. After 5pm on Tuesday 19 September 2017, the applicant be paid the sum of $607,647.50 together with any interest to which the applicant may be properly entitled, the sum of $607, 647.50 having been paid into the Supreme Court on 14 June 2017 pursuant to an order of that date.** **3. The respondents pay the applicant's costs of the proceedings on a standard basis.**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – GENERALLY – whether moneys due and payable – whether recourse may be had to a bank guarantee – consideration of *Martinek Holdings Pty Ltd v Reed Construction (Qld) Pty Ltd* – where final

certificate is subject to notice of dispute – where notice of dispute relates to the entirety of the subject of the final certificate.

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – consideration of risk allocation in a contract.

Body Corporate and Community Management Act 1997 (Qld)

Civil Mining & Construction Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd [2017] QSC 85
Clough Engineering Ltd v Oil and Natural Gas Corporation Ltd and Ors (2008) 249 ALR 458
Dial D Pty Ltd (as trustee for the Smith Street Unit Trust) v Kingston Building (Australia) Pty Ltd [2013] NSWSC 1846
Fletcher Construction Australia Ltd v Varnsdorf Pty Ltd [1998] 3 VR 812
Forsyth & Anor v Gibbs [2009] 1 Qd R 403
Gambaro Pty Ltd v Rohrig (Qld) Pty Ltd [2017] 1 Qd R 104
Intero Hospitality Projects Pty Ltd v Empire Interior (Australia) Pty Ltd [2008] QCA 83
John Holland Pty Ltd v Roads and Traffic Authority of NSW (2006) 66 NSWLR 624
John Holland Pty Ltd v Roads and Traffic Authority of NSW [2007] NSWCA 140
McDermott v Black (1940) 63 CLR 161
Martinek Holdings Pty Ltd v Reed Construction (Qld) Pty Ltd [2009] QCA 329
Merritt Cairns Constructions Pty Ltd v Wulguru Heights Pty Ltd [1995] 2 Qd R 521
Re Concrete Constructions Group Pty Ltd [1997] 1 Qd R 6
Saipem Australia Pty Ltd v GLNG Operations Pty Ltd [2016] 1 Qd R 254
Sugar Australia Pty Ltd v Lend Lease Services Ltd (2015) 31 BCL 407
Westpac Banking Corporation v Zilzie Pty Ltd [2016] QSC 238
Vos Constructions & Joinery Qld P/L v Sanctuary Properties Pty Ltd & Anor [2007] QSC 332

COUNSEL: K Downes QC with S B Whitten for the applicant
B Codd for the first respondent
M Hodge for the second respondent

SOLICITORS: CDI Lawyers for the applicant
Peter Ryan Lawyers for the first respondent
Scoglio Law for the second respondent

[1] This is an application for:

(a) An injunction restraining the respondents from calling on or having recourse to Commonwealth Bank Guarantee number G497696[1] ("the bank guarantee") pending delivery up of the bank guarantee by 5pm on 14 June 2017;

(b) An order that the first respondent deliver up the bank guarantee by 14 June 2017;[2]

(c) In the alternative to paragraphs 1(a) and 1(b), an interlocutory injunction restraining the respondents from calling on the bank guarantee pending trial or earlier order.

[2] An interim order was made on 14 June 2017 by consent whereby the applicant paid the amount of the bank guarantee into court and the first respondent returned the bank guarantee to the applicant thus protecting the parties' respective interests pending delivery of this decision.

Background

[3] The application was based on facts which are not in dispute.

[4] On 17 April 2014, the applicant, Tomkins Commercial and Industrial Builders Pty Ltd ("Tomkins"), entered into a building contract ("the contract") with the first respondent, Majella Towers One Pty Ltd ("Majella") for the construction of a residential apartment block at Woolloongabba.[3]

[5] The second respondent is the body corporate of Majella Towers One Pty Ltd ("the body corporate"). It has been joined in the application on the basis that it has subrogation rights in respect of the work carried out on common property and that the notice to call on the bank guarantee was given by both Majella and the body corporate.

[6] Under the contract Majella was the principal,[4] Tomkins was the contractor,[5] and Mr Phil Tagell was the superintendent ("superintendent").[6]

[7] Tomkins provided security pursuant to cl 5.1 of the general conditions of the contract ("general conditions") in the amount of 5 percent of the contract sum. It did this by providing two bank guarantees.[7] One of these guarantees has been returned to Tomkins following the issue of the certificate of practical completion.[8]

[8] The other bank guarantee, (numbered G497695), ("the bank guarantee") was still in the possession of Majella as at the date of the application.

[9] On 31 May 2017, the superintendent:

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1 Erroneously referred to as G497695 in the Originating Application, but intended to mean G497696 – Affidavit #2 of French, [7].
2 Not 15 June 2017 as stated in the Originating Application.
3 Affidavit #1 of French, JF-1 pp 1-104.
4 Affidavit #1 of French, JF-1 p 4.
5 Affidavit #1 of French, JF-1 p 4.
6 Affidavit #1 of French, [21].
7 Affidavit #1 of French, [4].
8 Affidavit #1 of French, [7].

(a) Issued an assessment under cl 41.3 in which he assessed Majella's prescribed notices of claims 1 and 3 to 6;[9]
(b) Issued a Progress Certificate certifying that the "Value of Prescribed Notices assessed by me" was the amount of "$2,350,593.73", then deducted the value of the security from that amount and certified as payable by Tomkins to Majella the sum of $1,742,946.23 plus GST ("final certificate");[10] and,
(c) Issued a revised "Final Progress Certificate" adding that it was made "with the advice of the Quantity Surveyor", for the same amount as the Progress Certificate ("revised final certificate").[11]

[10] On 2 June 2017, Tomkins issued notices of dispute in relation to the assessment under the final certificate and the revised final certificate pursuant to cl 41.3 ("second paragraph") and cl 42.1.[12] The notices were hand delivered to Majella and the superintendent on 5 June 2017. The notices of dispute related to the entirety of the amount the subject of the final certificate.

[11] By notices dated 7 June 2017[13] and 8 June 2017,[14] Majella gave notification of its intention to have recourse to the bank guarantee, either in its own right or on behalf of the body corporate, for the stated purposes of:
(a) Reduction of the debt, described as being the amount certified as payable to it in the final certificate; and,
(b) Further and in the alternative, assisting in payment of costs associated with rectification of the defects identified in the prescribed notices of claims 1 to 6.

[12] At the hearing, Majella clarified it was only relying on the first matter in support of its contention that it was entitled to retain and call upon the bank guarantee and not the second matter.[15] As such I will not consider further the arguments raised in relation to whether the payment for rectification of defects identified in the prescribed notices of claims 1 to 6 could relevantly be relied upon as a basis for having recourse to the bank guarantee.

[13] Clause 5.2 of the general conditions[16] enables a party to have recourse to security, provided that party remains unpaid after the time for payment has passed and 5 days have elapsed since that party notified the other party of its intention to have recourse.

[14] Tomkins submits that Majella was required, pursuant to cl 5.4 of the general conditions, to return the bank guarantee within 14 days of 31 May 2017, which was 14 June 2017, unless it (or the body corporate) was able to make a valid call on the bank guarantee before then.

[15] Tomkins contends that neither respondent was able to make a valid call on the bank guarantee prior to the time before which the bank guarantee was required to be returned.

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9 Affidavit #1 of French, [21] and JF-1 pp 220-221.
10 Affidavit #1 of French, [22] and JF-1 pp 222-223.
11 Affidavit #1 of French, [23] and JF-1 pp 224-225.
12 Affidavit #1 of French, [24] and JF-1 pp 226-236.
13 Affidavit #1 of Tuhtan, [7(1)] and AT-1 pp 34-37.
14 Affidavit #2 of French, [5(a)(iv)] and JF-2 pp 6-9.
15 T1-30/26-47 and T1-31/16-18.
16 Affidavit #1 of French, JF-1 p 20.

[16] It submits that on the proper construction of the contract, no amount is due and payable by Tomkins pursuant to the final certificate because a notice of dispute has been served by Tomkins in relation to that final certificate. As such, Majella is not "unpaid after the time for payment has passed" and there is no right for Majella to have recourse to the bank guarantee under cl 5.2.

[17] Neither Majella nor the body corporate challenged the proposition that, given that any rights of the body corporate can only arise by subrogation pursuant to s 36(3)(a) of the *Body Corporate and Community Management Act* 1997 (Qld), if Majella cannot have recourse to the bank guarantee, it must follow that the body corporate cannot have recourse.

The bank guarantee under the contract

[18] The bank guarantee provided by Tomkins to Majella constitutes "security" within the meaning of the contract.

[19] The relevant clause in the contract permitting recourse to the bank guarantee by Majella is cl 5.2 of the general conditions, which provides:

> "5.2 Recourse
>
> Subject to the following paragraph, 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. (emphasis added)
>
> The *Principal* is not entitled to have recourse to *security* to obtain an amount owed under the *Contract* unless the *Principal* has given written notice of the proposed use and the amount owed and such notice shall be given within 28 days after the *Principal* becomes aware, or after the *Principal* ought reasonably to have become aware, of the *Principal's* right to obtain the amount owed."

[20] Clause 5.4 of the general conditions provides for the reduction and release of security. It relevantly provides:

> "5.4 Reduction and release
>
> Upon the issue of the *certificate of practical completion* a party's entitlement to *security* (other than in *Item (*14e) shall be reduced by the percentage or amount in Item 14(f) or 15(d) as applicable, and the reduction shall be released and returned within 14 days to the other party
> …
> A party's entitlement otherwise to security shall cease 14 days after final certificate.
>
> Upon a party's entitlement to security ceasing, that party shall release and return forthwith the security to the other party." (emphasis removed)

Final payment claim and notice of dispute

[21] Clause 37 of the contract addresses, inter alia, progress claims, the issuing of progress certificates and a final certificate.

[22] Clause 37.4 of the general conditions addresses, inter alia, the final payment claim and certificate. It relevantly provides:

> "37.4 Final payment claim and certificate
>
> Within 28 days after the expiry of the last defects liability period, the Contractor shall give the Superintendent a written final payment claim endorsed 'the Final Payment Claim' being a progress claim together with all the claims whatsoever in connection with the subject matter of the Contract.
>
> Within 42 days after the expiry of the last defects liability period or within 10 business days after the receipt of the final payment claim, whichever is the earlier, the Superintendent shall issue to both the Contractor and the Principal a final certificate evidencing the moneys finally due and payable between the Contractor and the Principal on any account whatsoever in connection with the subject matter of the Contract.
>
> Those moneys certified as due and payable shall be paid by the Principal or the Contractor, as the case may be, within 5 business days after the Principal receives the final certificate, or within 15 business days after the Superintendent receives the final payment claim.
>
> The final certificate shall be conclusive evidence of accord and satisfaction, and in discharge of each party's obligations in connection with the subject matter of the Contract except for:
> …
> (d) unresolved issues the subject of any notice of dispute pursuant to clause 42, served before the 7th day after the issue of the final certificate." (italics removed)

[23] Clause 42.1 provides for the giving of a notice of dispute. There is provision for binding decisions if a dispute is not resolved within 14 days of the issuing of a notice of dispute in cl 42.3. It relevantly provides:

> "Expert Determination
> (a) If the parties cannot agree on an expert within 7 days, the expert will be appointed by an authorised officer of the Royal Institution of Chartered Surveyors (Queensland).
> (b) In making a determination, the expert shall:
> (i) give due weight to any written submissions or representations made by a disputing party within any reasonable time limit prescribed by the expert;
> (ii) give written reasons for his decisions;
> (iii) act as an expert and not as an arbitrator;
> (iv) in the absence of any manifest error, the decision of the expert on *disputes* up to a maximum value of $100,000 will be final and binding upon the parties and not subject to review; and
> (v) for *disputes* in excess of $100,000 and in the absence of any manifest error, the decision of the expert will be final and binding on the parties and not subject to review, if neither of the parties has taken any steps to enforce a right or remedy by instituting proceedings relating to the *dispute* within 28 days of the written decision of the expert.
> (c) The cost and expense of the conference and expert determination will be borne equally by the parties."

[24] Clause 42.4 provides that clause 42 does not interfere with the right of a party to institute proceedings to seek summary relief.

Contentions

[25] The question of whether Majella can have recourse to the bank guarantee involves the proper construction of cl 5.2, 5.4 and cl 37.4 of the general conditions.

[26] Tomkins submits that the effect of the first paragraph of cl 5.2 is that Majella is not entitled to have recourse to the bank guarantee unless three elements have been satisfied, being:

(a) The time for payment (under the contract) has passed; and,
(b) Majella remains unpaid; and further,
(c) Five days have elapsed since the specified notice of recourse was given by Majella.

That much is uncontentious.

[27] It is not in issue that Majella has not been paid the amount which is certified in the final certificate as being owed to it. Nor is it in issue that Majella has issued a notice of intention to have recourse within the appropriate time, if recourse was to be had to the bank guarantee.

[28] What is in issue is whether the time for payment has passed. Tomkins contends the time for payment has not arrived because a notice of dispute in relation to the entire amount certified in the final certificate has been served within the meaning of cl 37.4(d) of the general conditions. It submits that issuing such a notice the fourth paragraph qualifies the effect of the second and third paragraphs of cl 37.4 such that Tomkins has no obligation to pay Majella by reason of that final certificate.

[29] Tomkins principally relies on the Court of Appeal decision of *Martinek Holdings Pty Ltd v Reed Construction (Qld) Pty Ltd* ("*Martinek*").[17]

[30] Tomkins contends, relying on the construction of the Court of Appeal as to cl 37.4 in *Martinek* that:

(a) The final certificate is qualified because a notice of dispute has been issued in relation to it;
(b) The giving of the notice of dispute pursuant to cl 42 is a qualification to the second and third paragraphs of cl 37.4 by cl 37.4(d);
(c) This means that no right to payment has arisen which would otherwise arise pursuant to the third paragraph of cl 37.4; and as such,
(d) No right to payment has arisen, and cl 5.2 cannot be relied upon for recourse to the bank guarantee because the "time for payment" of the amount certified in the final certificate has not arisen and so has not passed.

[31] In *Martinek*, a final certificate was issued under the construction contract and a notice of dispute was served in relation to that final certificate. The case involved the proper construction of a clause which was in materially the same terms as cl

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17 [2009] QCA 329, especially at [20].

37.4 of the general conditions in the present case.[18] The question in *Martinek* was whether the effect of the final certificate under clause 37.4 of the contract superseded an adjudication under s 100 of the *Building and Construction Industry Payments Act* 2004 (Qld) (*BCIPA*).

[32] In the case, Keane JA[19] stated at [20]:

> "In my respectful opinion, on the proper construction of cl 37.4, it is only the moneys certified as due and payable by a certificate unqualified in its effect by the fourth paragraph of cl 37.4 that give rise to a right to payment in accordance with the third paragraph of cl 37.4. Because the effect of the superintendent's certificate is qualified in this way, it can give rise to no right in Martinek under the contract which is apt to trump the effect of the adjudication decision."[20]

[33] In doing so, his Honour rejected the argument that the second and third paragraphs of cl 37.4 should be read separately from the fourth paragraph, stating at [17] that:

> "… the fourth paragraph should not be read as an operative stand alone provision; rather, its natural reading is as an explanation and qualification of the effect of the second and third paragraphs."

[34] In other words, if one of the exceptions to the fourth paragraph of cl 37.4 of the general conditions applies then the right to payment under the third paragraph of cl 37.4 is qualified to the extent that the exception applies.

[35] *Martinek* was followed by McDougall J in *Dial D Pty Ltd (as trustee for the Smith Street Unit Trust) v Kingston Building (Australia) Pty Ltd*[21] ("*Dial D*"). Dial D sought judgment based on a final certificate issued by the superintendent which certified that it was owed in excess of $992,000.00 from Kingston. The contractual clause not materially different to cl 37.4 in the present case. After discussing the *Martinek* case at length, his Honour held that no right of payment arose under the final certificate, observing:

> "To my mind, the analysis that Keane JA gave, of the structure and operation of cl 37.4, at [17] of his reasons, is the explanation of why it is that the certificate 'has not yet come into effect to entitle Martinek to refuse payment of the adjudication amount'. It did not have that effect, his Honour said, because the 'explanation and qualification' in the fourth paragraph applied to each of the second and third paragraphs. In particular, and again as his Honour said, it explained and qualified the second paragraph by depriving the superintendent's certificate of the evidentiary effect stated in that paragraph."

[36] Tomkins referred to two decisions which followed *Martinek.*[22]

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18 [2009] QCA 329 at [9].The differences are not material because they relate to the time within which certain things must be done. For example, the moneys certified as due and payable shall be paid within different timeframes depending on which version of cl 37.4 is considered.

19 As his Honour then was, with the Chief Justice, as he then was and Holmes JA, as her Honour then was, both agreeing.

20 *Martinek*, [20].

21 [2013] NSWSC 1846.

22 In *Mainstream (Aust) Pty Ltd v Gilpip Bayside Projects Pty Ltd* [2013] VSC 610 Vikery K considered the construction of cl 37.4 by the Court in *Martinek* could apply where there was no

[37] *Martinek* was also followed in *Civil Mining & Construction Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd*[23] ("*CMC*"), in which a final certificate was issued and a notice of dispute was served by the contractor in relation to the final certificate. The principal submitted that as a matter of construction, the amounts certified under the final certificate were due and owing, and the giving of a notice of dispute did not relieve the plaintiff of the obligation to pay.

[38] In *CMC* Flanagan J accepted that the consequence of serving a notice of dispute qualified the evidentiary effect of the final certificate, in connection with the subject matter of the contract and that no amount was payable pursuant to the final certificate. The result was that a superintendent's final certificate is not 'final' while a notice of dispute remains unresolved. Following *Martinek*,[24] his Honour noted:

> "In both instances the final certificate certifies the amount which, in the opinion of the relevant representative, is finally due from the Principal to the Contractor or from the Contractor to the Principal. The consequence of serving a notice of dispute on the evidentiary effect of the final certificate is, according to Keane JA:
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> > … an express invitation to treat the fourth paragraph as an explanation and qualification of the effect of the superintendent's certificate as 'evidencing the moneys finally due and payable between the Contractor and Principal on any account … in connection with the subject matter of the Contract."

[39] Tomkins contends that the consequence of the binding decision of *Martinek* is that in this case, where Tomkins has issued a notice of dispute in respect of the final certificate, Majella has no right to payment of the amount certified in that final certificate whilst the notice of dispute remains unresolved. This is because the notice of dispute served by Tomkins put in dispute the entire amount in the final certificate.

[40] Thus Tomkins contends that there is no right to payment of the amount certified in the final certificate once the notice of dispute is issued, and it follows that the time for payment has not passed and there is no present amount due and owing which would entitle Majella to make a call on the bank guarantee pursuant to cl 5.2 and Majella " is not unpaid after the time for payment has passed".

[41] Majella seeks to distinguish *Martinek* on the basis that it dealt with competing interests between the contract and the *BCIPA* and did not consider the effect of the final certificate in the contract as whole. It contends that it was only authority for the proposition that where there is a dispute on foot, the final certificate cannot be used to reverse the results of an adjudication decision.

[42] Majella submits that the words 'accord and satisfaction' in the fourth paragraph of cl 37.4 are critical. They suggest that the fourth paragraph, properly construed, only preserves a right to dispute the amount certified as being the actual amount of debt but does not change the interim nature of the entitlement to be paid that

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adjudication decision and granted an injunction restraining the calling of a bank guarantee where the final ccertificate was disputed deciding it was arguable that no such indebtedness arose:see [55] and [56]

23 [2017] QSC 85.

24 At [938].

amount. Majella further relies upon the language of cl 37.4 and particularly the second paragraph which it asserts creates a debt from the time of certification given the words "a final certificate evidencing the moneys finally due and payable" and the third paragraph which provides for 5 days grace to pay the existing debt (given the words "certified as due and payable"). It contends that if a dispute is not raised within seven days in accordance with the fourth paragraph the right to dispute the amount is lost forever.

[43] Thus, Majella contends pending the resolution of the matters raised in the notice of dispute, Tomkins has an obligation to make the payment under the final certificate on an interim basis. In the event that the determination of the dispute in respect of the final certificate found Tomkins did not owe all or part of the money certified, then Tomkins would have a right in restitution to claim the money back.

[44] In support of its construction, Majella referred to several cases, some of which provided that progress payments were payments on account.

[45] *Re Concrete Constructions Group Pty Ltd*[25] involved the issuing of a progress payment certificate by the superintendent from which the principal deducted liquidated damages. The Court of Appeal held that there was no implied term which entitled the principal to deduct the amount of liquidated damages and that the principal was bound to pay the amount in the certificate. Clause 42.1 of the Contract provided:

> "…..
> Subject to the provisions of the Contract, within 28 days after receipt by the Superintendent of a claim for payment or within 14 days of issue by the Superintendent of the Superintendent's payment certificate, whichever is the earlier, 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 Certificate as due to the Contractor or to the Principal as the case may be, or if no payment certificate has been issued, the Principal shall pay the amount of the Contractor's claim. 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."

[46] McPherson JA and Helman J relevantly stated:[26]

> "The principal's submissions are not without a degree of cogency. It is possible, however, to discover an answer, or at least a partial answer, to most of them in the fact that the process involved is one of making, certifying and paying progress claims. Such claims and payments are, in building contracts in the common form, always intended to be provisional only. See *Hudson's Building and Engineering Contracts* (11th ed., 1995), at paras 6.186–6.189. That is to say, they await the day when a final certificate issues, in which the ultimate indebtedness by one party to the other is ascertained and fixed. Before that stage is reached, it is generally correct to say that no payment is

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25 [1997] 1 Qd R 6.

26 At 12; Fitzgerald JA in a separate judgment agreed the appeal should be dismissed.

> capable of finally determining the rights of the parties with respect to matters in dispute between them. So 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.
>
> Most of the considerations relied on by the appellant are capable of being accommodated by keeping firmly in mind that the character of the payments with respect to which problems are said to arise are only provisional."

[47] Majella contends that by analogy, a "final certificate" issued under clause 37.4 becomes a debt due and owing once issued. The amount procured under the final certificate may be subject to adjustment in subsequent dispute proceedings.[27]

[48] Majella frames the question differently from Tomkins stating that "The question is not whether or not a certificate under cl.37.4 creates a debt due and owing which is incontestable – but rather whether or not it creates a "*final certificate*" within the meaning of cll. 5.2 and 5.4".[28]

[49] Majella contends that the contract should not be construed so that a party could avoid recourse to a bank guarantee by merely issuing a notice of dispute. That would not accord with how the parties have allocated risk under the contract. It relies on a number of decisions as to the allocation of risk and the ability to have recourse to a bank guarantee notwithstanding that the amounts were in dispute.

[50] In *Saipem Australia Pty Ltd v GLNG Operations Pty Ltd*, [29] PD McMurdo J referred to Callaway J in *Fletcher Construction Australia Ltd v Varnsdorf Pty Ltd*[30] where his Honour referred to the two reasons that a contract may have provided for a performance guarantee: one is to provide security in the sense that if a party has a valid claim and there are difficulties recovering from the party in default, the former has recourse against the bank; the second reason, which is additional to the first, is to allocate the risk as to who shall be out of pocket pending resolution of a dispute[31] in which case the beneficiary is entitled to call the bank guarantee even if ultimately the other party is found not to be in default. If the performance guarantee is a risk allocation device, that intention must be fundamental to a consideration of the justice of an application made to restrain recourse to such a performance guarantee pending final determination of the dispute. It is not however determinative and depends upon the terms of the contract in question.

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27 Majella also relied on *Merritt Cairns Constructions Pty Ltd v Wulguru Heights Pty Ltd* [1995] 2 Qd R 521. That was a case where the principal sought to deduct unliquidated damages for delay which was the subject of dispute. The court found those moneys were only contingently due and were not moneys "due" within the meaning of a set-off clause (at 526) and the principal was obliged to pay the amount certified under the progress certificate until a determination under the final provisions of the contract. Payments under the progress certificates were payments on account.

28 Majella's submissions at [47].

29 [2016] 1 Qd R 254.

30 [1998] 3 VR 812.

31 [1998] 3 VR 812 at 826-7

[51] *Fletcher Construction Australia Ltd v Varnsdorf Pty Ltd* was followed by the Full Federal Court in *Clough Engineering Ltd v Oil and Natural Gas Corporation Ltd and Ors.*[32] In that case the Court also stated the importance of such securities in the construction industry as a factor which bears upon the question of construction of the contract.

[52] Majella particularly relies upon the decision of Douglas J in *Vos Construction & Joinery Qld Pty Ltd v Sanctuary Properties Pty Ltd & Anor*[33] *("Vos")* as to the effect of a notice of dispute on the enforceability of a bank guarantee where a final certificate has been issued. The relevant contractual provisions are set out at [5] in the judgment in *Vos*. Relevantly it provides that:

> "1. Subject to clause C6, the owner may draw on the security provided by the contractor under clause C1 if:
>
> - a certificate issued by the architect in favour of the owner under any of clause N4, N11 or Q17 is not paid by the contractor within the period shown in **item 4 of schedule 1** or
> - the contractors engagement is terminated by the owner under clause Q1 or Q2 and the architect has issued a certificate under clause Q9
>
> and the contractor has not disputed the owner's rights under clause A8."

[53] After traversing the relevant authorities as to recourse to securities, his Honour held:[34]

> "[10] The breach of a negative stipulation asserted here is the attempt to draw on the security although the applicant has disputed the respondents' rights under cl A8 of the contract. When one examines the relevant clauses of the contract to which I have referred, however, it seems evident to me that the mere fact that a contractor has disputed the owner's rights under cl A8 should not be enough to prevent the owner from drawing on the security. As Mr Beacham submitted for the respondent, this would give a notice of dispute the effect of permanently suspending the respondents' right to have recourse to the guarantee and allow the avoidance of recourse to it by the giving of further notices of dispute every time a certificate issued in the respondents' favour.
>
> [11] In my view the obvious commercial purpose or business common sense of the proviso in cl C5 I was to prevent recourse to the security where the contractor has disputed the owner's rights under cl A8 successfully, so as to negate the effect of the earlier certificate. The role played by the architect in issuing a certificate is clearly one of assisting to determine in a preliminary and speedy fashion the circumstances in which access to the money secured by the bank guarantee may occur. If that process could be stopped by any notice unsuccessfully disputing the architect's certificate there would be no point to the clause. As to the role of business common sense in the construction of contracts, see the well known statement of Lord Diplock in *Antios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191, 201 that: 'if detailed semantic and syntactical analysis of words in a

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32 (2008) 249 ALR 458; see also *Sugar Australia Pty Ltd v Lend Lease Services Ltd* (2015) 31 BCL 407.

33 [2007] QSC 332.

34 [2007] QSC 332.

> commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense…
>
> [14] Clause P1 is not referred to in cl C5 whose purpose seems to me to be to provide a right to draw on the security when the architect's certificate remains unpaid and still on foot because it has not been disputed successfully under cl A8."

[54] In the case of *Vos,* after the principal initially issued the final certificate, the contractor issued a notice of dispute which was then assessed by the architect pursuant to clause 8.3 of the contract. The architect rejected the contractor's submissions and determined that the final certificate should stand. Following that decision the principal gave notice of its intention to draw upon the security. The contractor contended that the principal had no right to draw upon the security on the basis that it had issued a notice of dispute, even though it had been unsuccessful in its challenge.

[55] Counsel for Majella emphasises that the same position[35] would exist in the present case in terms of permanently suspending Majella's right to call upon the security if Tomkins were permitted to avoid paying by issuing a notice of dispute. Tomkins' argument, if accepted, does have that effect. However, the provisions in the *Vos* contract provided for a simple and relatively quick procedure for the architect to issue the final certificate and determine any dispute in relation to the certificate. Unlike the present case there had been a determination of the notice of dispute.

[56] Majella contends that the decision of Flanagan J in *CMC* did not consider the decision of *Martinek* in the manner pressed by the respondents in this proceeding. It also contends *Dial D* was a case dealing with the competing rights between the *BCIPA* and under a contract and not internal contract rights as in the present

[57] The body corporate adopts a slightly different approach to Majella insofar as it contends that *Martinek* in fact supported its contention that cl 37.4 imposes an obligation to pay, notwithstanding a notice of dispute had been issued.

[58] It contends that the Court of Appeal's construction of cl 37.4, particularly in relation to the operation of the fourth paragraph, is that the issuing of a notice of dispute qualified the effect of the final certificate such that, it was not "conclusive evidence of accord and satisfaction and in discharge of each party's obligations", but did not qualify the obligation to pay the amount certified in the final certificate pursuant to the third paragraph of cl 37.4.

[59] The body corporate contends that on its correct analysis, the decision in *Martinek* recognised that the money certified under the final certificate was payable, but that if disputed the final certificate was not a final settling of accounts and the payment was only an interim payment and did not have the evidential effect of accord and satisfaction as provided in the fourth paragraph.

[60] In particular the body corporate relies on three aspects of the judgment of Keane JA, namely [4], [11] and [16], as supporting its characterisation of the decision which it contends provided the context for the language used in [17] and [20] of *Martinek*. Those paragraphs respectively refer to moneys under the final

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35 As discussed in *Vos*

certificate being due; to the concession by the respondent in that case that a final certificate gave a contractual right of payment but did not produce a final settling of accounts which was apt to supersede the adjudication decision; and to the amount under the final certificate constituting a set off.

Consideration

[61] As set out above, Majella seeks to confine *Martinek* as authoritative only as to the effect of competing rights as between a construction contract and the *BCIPA*. It also contends that to the extent that the case addressed the construction of cl 37.4 it is not binding.[36]

[62] In *Martinek,* the adjudication decision under the *BCIPA* and the final certificate related to the same progress claim.[37] Martinek contended that the final certificate had the effect of trumping the adjudication decision and Reed could not pursue its rights under the *BCIPA*.

[63] Section 100 of the *BCIPA* declares, inter alia, that nothing in Pt 3 of the Act affects the parties' contractual rights and obligations or civil proceedings "arising under a construction contract" except to the extent required by s 99.[38] It therefore preserves contractual rights and remedies. The Court in *Martinek* considered that a final determination under a final certificate, at least under contract AS 4902-2000, would supersede a statutory adjudication of the amount of the progress payment but found in that case that there was no finality of the determination given a notice of dispute had been issued challenging the final certificate in its entirety.[39]

[64] However, Keane JA[40] in *Martinek* stated that the resolution of the issue before the Court turned upon the interpretation of cl 37.4 of the contract.[41] The construction of the clause determined the ultimate rights which arose under cl 37.4 of the contract. Having determined the effect of the final certificate his Honour then considered whether the contractual rights were such that they could "trump" the adjudication decision. The ratio of the decision therefore included the determination of the correct construction of cl 37.4. The construction of cl 37.4 to the extent it determined the same issues as arising in the present case is binding upon me. However, even if that is not the case, it is a decision of the Court of Appeal, which considers the construction of clause 37.4 which is highly persuasive; it would be only if I were persuaded that decision was incorrect that I would depart from it.

[65] The question then is whether *Martinek* determined that issuing a notice of dispute under cl 37.4(d) has the effect that no moneys for disputed claims which is the subject of the final certificate is payable, pending a determination of the dispute under cl 42 of the contract, or whether it only alters the evidential effect of the

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36 First respondent's submissions at [39(b)].

37 At [3].

38 *Intero Hospitality Projects Pty Ltd v Empire Interior (Australia) Pty Ltd* [2008] QCA 83 at [44] per Muir JA with whom Holmes JA and Chesterman JA agreed.

39 *Gambaro Pty Ltd v Rohrig (Qld) Pty Ltd* [2017] 1 Qd R 104 at [28] following *Martinek.*

40 With whom the rest of the court agreed.

41 At [6] The Chief Justice and Holmes JA both agreed with Keane JA.

final certificate such that the amount certified remains due and payable on an interim basis, pending resolution of the dispute.

[66] Keane JA in *Martinek* stated at [17] that:

> "On Martinek's behalf it is argued that the second and third paragraph of cl 37.4 are to be read separately from the fourth paragraph. That argument is unpersuasive for two reasons. First, one must attempt to give all the paragraphs of cl 37.4 an operation by which each paragraph works in harmony with the others: the fourth paragraph should not be read as an operative stand alone provision: rather, its natural reading is as an explanation and qualification of the effect of the second and third paragraphs. Secondly, both the second and the fourth paragraphs of cl 37.4 speak in terms of the evidentiary effect of the superintendent's certificate: that is an express invitation to treat the fourth paragraph as an explanation and qualification of the effect of the superintendent's certificate as 'evidencing the moneys finally due and payable between the Contractor and Principal on my account … in connection with the subject matter of the contract.'"

[67] Further, at [20], he relevantly states that:

> "In my respectful opinion, on the proper construction of cl 37.4, it is only the moneys certified as due and payable by a certificate unqualified in its effect by the fourth paragraph of cl 37.4 that give rise to a right to payment in accordance with the third paragraph of cl 37.4. Because the effect of the superintendent's certificate is qualified in this way, it can give rise to no right in Martinek under the contract which is apt to trump the effect of the adjudication decision."

[68] In *Martinek,* his Honour considered the decisions of the New South Wales Courts in *John Holland Pty Ltd v Roads and Traffic Authority of NSW ("John Holland")*.[42] It was relied upon by Martinek to support its argument that the final certificate had the effect of trumping the adjudication decision. However, his Honour noted that the clause in that case (cl 42.7) was in different terms from cl 37.4 of the contract presently being considered. Clause 42.7 contemplated that the superintendent certificate was capable of settling accounts finally between the parties. His Honour considered cl 42 of the present contract which provides the relevant dispute resolution mechanism excludes that possibility.[43] His Honour at [18] stated:

> "… It may be that, as was urged on behalf of Martinek, the superintendent under the contract at issue in *John Holland* might himself have resolved the "outstanding …disputes" in the course of arriving at the Final Payment Schedule. But to say this is merely to emphasise that the contract at issue in *John Holland* contemplated that the superintendent's certificate was capable of settling accounts finally between the parties… Further, in the contract in issue in *John Holland*, cl 42.5 provided that the issue of the Final Payment Schedule under cl 42.7 constitutes 'conclusive evidence that all work under the Contract has been finally and satisfactorily executed … except in so far as it is provided [sic] in any proceedings … or … arbitration … that the said

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42 (2006) 66 NSWLR 624 and [2007] NSWCA 140. Majella relied on [62] of the Appeal case with respect to the inter-relationship of an adjudication under the *BCIPA* and a superintendent's contractual function.

43 At [18].

> Final Payment Schedule is erroneous by reason of fraud, defects or omissions or accidental or arithmetical error.' The effect of this provision was to make the Final Payment Schedule 'conclusive evidence' until the contrary was established as a fact. Here cl 37.4(d) operates to deny even that effect to the superintendent's final certificate while disputes under cl 42 are unresolved."

[69] In *Martinek,* the respondent Reed, who contended the final certificate did not have finality because a notice of dispute had issued, conceded that the amount certified in the final certificate gave Martinek a contractual right of payment of the amount. That was noted by Keane JA at [11]. The body corporate stated that this was adopted by his Honour at [16] where his Honour stated:

> "But under the terms of cl 37.4(d) of the contract, the superintendent's certification has not yet come into effect to entitle Martinek to refuse payment of the adjudication amount, save insofar as the sum of $72,027.27 may properly be set off against the adjudication amount." (emphasis added)

[70] The body corporate contends that the reference to 'set off' by Keane JA was an acknowledgment that the amount under the final certificate was due and had the status of being an interim payment pending resolution of the dispute.

[71] The matters referred to by the body corporate provide some support for its argument.

[72] The reference to "set off" in [16] of *Martinek* suggests that the final certificate in that case gave rise to a claim for an amount which was payable.[44] However what is meant by the reference to set-off by Keane JA is unclear. The suggestion that it acknowledges that the amount certified is due and payable on a provisional basis does not sit easily with the authorities including *John Holland* which was considered by his Honour which establish that a contractual right which is not a final determination would not affect the statutory entitlement under the *BCIPA* as "the statutory right to payment is unaffected by calculations undertaken by a superintendent or other authority appointed to value work under the contract".[45] If it was a provisional payment or payment on account as contended by the respondents it would be a parallel right to the adjudication but would not constitute a set-off of the adjudicated amount.

[73] The statement in [4] in *Martinek* does not appear to be a finding by the Court. Similarly the concession that the certificate gave a contractual right of payment but did not represent a final settling of accounts is consistent with that being the status of the final certificate before a notice of dispute is issued. It does not concede the there was an obligation to pay after a notice to dispute was issued still exists on an interim basis.

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44 At common law a claim could not be set-off unless it was a liquidated claim. In equity set-off exists as a substantive defence. In the latter case there must not only be a cross demand but the equity must also be such as to impeach the adversary's title to demand; *Forsyth & Anor v Gibbs* [2009] 1 Qd R 403. However if a debt s contingently payable it may constitute an equitable set-off: R Derham *"The Law of Set-Off"* (Oxford University Press, 2010) at 4.65. In Queensland the statute of set-off was repealed and after 1 July 1999 it was regulated by r 173 UCPR and additionally since 2011 by the s 20 of the *Civil Proceedings Act 2011* (Qld)*;* see *Westpac Banking Corporation v Zilzie Pty Ltd* [2016] QSC 238.

45 *John Holland Pty Ltd v Roads and Traffic Authority of New South Wales and Ors* (2007) 23 BCL 205 referred to by Fraser JA in *Gambaro Pty Ltd v Rohrig (Qld) Pty Ltd* [2017] 1 Qd R 104 at [31].

[74] In the circumstances I consider that the body corporate's argument attaches too much weight to the concession by the respondent and the reference to "set off". In this regard I note that the Court's statement in [16] was qualified by the words 'insofar as … may be properly set off …". Nor was the concession by the respondent Reed the subject of any analysis or positive acknowledgement by the Court.

[75] Majella particularly relies on the words "accord and satisfaction" in contending that the final certificate gave rise to a debt that was due and payable albeit on a provisional basis if subject to a dispute. The final certificate is said to constitute conclusive evidence of "accord and satisfaction and in discharge of each party's obligations in connection with the subject matter of the Contract" unless one of the qualifying matters in the fourth paragraph arises.

[76] In the last sentence of [18] in *Martinek,* his Honour after considering the provision in *John Holland* stated:

> "The effect of this provision was to make the Final Payment Schedule 'conclusive evidence' until the contrary was established as a fact. Here cl 37.4(d) operates to deny even that effect to the superintendent's final certificate while the disputes under cl 42 are unresolved."

[77] According to Dixon J "The essence of accord and satisfaction is the acceptance by the plaintiff of something in place of his cause of action".[46] The fourth paragraph in cl 37.4 clearly preserves the right to challenge the determination of the superintendent in the final certificate. It is true that the qualifying paragraph does not provide that the amount certified under the final certificate is not otherwise payable. Conversely, it does not expressly provide that the amount certified in the final certificate must still be paid on account.

[78] However, His Honour found that the fourth paragraph on a proper reading qualified the second and third paragraphs of cl 37.4. In terms of the second paragraph, if the effect of the final certificate is suspended once disputed, it does not have the effect of "evidencing the moneys finally due and payable." If the only qualifying effect was to be an evidential one then it would only need to qualify the reference to "finally" in the second paragraph and not the third paragraph. The qualifying effect on the third paragraph can only be read as a qualification on the moneys certified "as due and payable" which "shall be paid … within 5 business days after the receipt of the final certificate". As such it operates to prevent the final certificate having the effect of making the monies due and payable as provided under the second and third paragraph pending the dispute.

[79] This accords with his Honour's determination in [20] that it is "only the moneys certified as due and payable by a certificate unqualified in its effect by the fourth paragraph of cl 37.4 that give rise to a right to payment in accordance with the third paragraph of cl 37.4."

[80] This is consistent with how *Martinek* has been interpreted by this court in the decision of *CMC*.[47] It was submitted on behalf of the body corporate, that his Honour may not have been directed to [16] of *Martinek,* given he did not refer to it

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46 *McDermott v Black* (1940) 63 CLR 161 at 183-5.

47 [2017] QSC 85 at [937] and [938].

in the extract of the judgment quoted[48] such that his Honour did not appreciate the concession that had been made. While not expressly referring to [16] of *Martinek,* his Honour did refer to [15]. In those circumstances I cannot infer that his Honour did not consider [16]. A sum was claimed by WICET as a debt due and owing of an amount certified under a final certificate or in the alternative as damages for breach of CMC's obligation to pay under the contract.[49] CMC had issued a notice of dispute in relation to the contents of the final certificate.[50] It was contended by WICET that the amounts certified in the final certificate were due and owing and that the giving of a notice of dispute did not relieve CMC of the obligation to pay. WICET contended that while the notice of dispute under the terms of the contract affected the evidentiary status of the final certificate, it did not affect the obligation to pay in accordance with the final certificate. His Honour found that the decision of Keane J in *Martinek* was not relevantly distinguishable in terms of the wording of the relevant clauses and held that CMC was not in breach of the contract by not paying the sum specified in the final certificate. [51]

[81] In the decision of *Dial D,* McDougall J considered a contract which was not materially different from the present case.[52] One of the matters the Court considered was whether, if a final certificate issued under cl 37.4 was valid, Dial D had an entitlement to a judgment for the amount certified by it, or was the certified amount to be set-off against the judgments that Kingston had recovered against Dial D.[53] In *Dial D* a notice of dispute had been issued which took issue with the superintendent's determination of every claim. Dial D argued that the 37.4(c) and (d) in the fourth paragraph which were bothrelevant in that case only affected the conclusive effect of the final certificate but did not qualify or negate the obligation to pay the amount that it stated as due and payable.[54] Counsel for Dial D sought to distinguish the case of *Martinek* on the basis that the conclusion at [20] of the reasons were not essential to the actual decision in the case.

[82] While his Honour accepted a close reading of the reasons in *Martinek* showed that the precise issue in litigation was whether the superintendent's final certificate was conclusive to bring into play the allowance provisions in s 100 of the *BCIPA*, his Honour found that the structure and operation of cl 37.4 addressed at [17] of the reasons in *Martinek* explains why it is that the certificate has not come into effect to entitle *Martinek* to refuse payment of the adjudication amount.[55] His Honour regarded the reasons as the necessary step leading to the ultimate conclusion but stated even if it was not essential to the conclusion he would be bound to follow it

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48 At [935].

49 At [921-[923]. Amounts the subject of the proceedings were deducted from the amount certified. An alternative amount was claimed which was a fresh valuation of the items in the final certificate not disputed in the proceedings.

50 [2017] QSC 85 at [929].

51 At [937] and [938].

52 In this regard, I accept that the clause was likely to have been in the same terms as cl 37.4 in the present even though not fully replicated at [17] where the third paragraph was admitted by reason of the fact that the terms of the third paragraph appear to have been averted to in [80]-[83]. See also [86] of the reasons, that "cl 37.4 was relevantly unamended".

53 It was not a case dealing with competing rights between the contract and the *BCIPA* as contended by Majella.

54 At [79].

55 At [105].

unless persuaded that it was plainly wrong. He did not regard the decision as plainly wrong.[56]

[83] McDougall J also considered the decision of *Martinek* at considerable length. Many of the arguments raised in by the respondents in the present case were raised in *Dial D*. His Honour at [102] referred to the reliance by Dial D on the concession made by Reed in *Martinek* that Martinek had a contractual right to payment of the amount identified as due and payable under the final certificate but that it was not final. Dial D submitted, like the body corporate in the present case, that the contractual entitlement to payment of the certified amount was not an issue in the litigation.[57] That argument was not accepted.

[84] His Honour therefore rejected the argument that there was an obligation to pay the amount provided under the certificate given there was a dispute as to the principal's entitlement, which was in the throes of resolution in accordance with cl 42.

[85] In my view the construction of cl 37.4 was pivotal to the decision of the Court of Appeal in *Martinek* and is binding upon me. Even if not ratio it would be highly persuasive and it would not be appropriate to depart from it unless I was persuaded it was incorrect, which I am not.

[86] I consider that consistent with the decision of *Martinek* on its correct construction by reason of the fourth paragraph of cl 37.4 the issuing of the notice of dispute challenging the final certificate in its entirety prevents the final certificate having the effect of moneys being due and payable by operation of the second and third paragraphs while the dispute remains unresolved.

[87] I do not consider that the final certificate still has the effect of making the monies due and payable such that they are paid on account pending the outcome of the dispute as is the case with respect to progress certificates under cl 37.2.

[88] Even if the decision of *Martinek* is not decisive, the above construction is supported by a number of other matters.

[89] Unlike cl 37.2, cl 37.4 makes no reference to a disputed payment being a payment of account.[58] Such provisions in the context of progress payments are common contractual provisions to ensure the contractor has the benefit of cashflow. In the present case however the parties are determining their rights and obligations after practical completion has occurred. The construction of the fourth paragraph applies equally to either party to the contract depending on which party is the beneficiary of moneys being determined to be payable under the final certificate. The fact that the obligation to pay is suspended pending resolution of the dispute is consistent with the fact that the parties may have a protracted dispute before the matter is finally determined.

[90] Further support for this construction is found in the fact that the matters outlined in subparagraphs (a) to (c) in the fourth paragraph of cl 37.4 do not provide for those

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56 At [108].

57 [2009] QCA 329; see also *Dial D* at [90].

58 While clause 37.4 does refer to a progress claim the effect of the final certificate is set out and does not provide that when there is a dispute it is to be treated as a progress certificate.

matters to be determined by any dispute resolution process or determination to have a qualifying effect on the final certificate.[59] As such those matters if established have an immediate effect on the final certificate. The effect is not deferred pending any determination or successful challenge to the final certificate.[60] In those circumstances it would not make commercial sense to interpret the clause as providing for provisional payment of the amount certified in the final certificate.

[91] There is also no mechanism in the contract making provision for the event that some or all of the claims constituting the final certificate are successfully disputed such that those amounts are to be repaid.[61] While the relevant party may still have a right in restitution, the absence of such a provision suggests that it was not the parties' intention that payment be made where it is the subject of dispute.[62]

[92] I had originally considered that the difference in the time for payment provided for in cl 37.4, which is 5 business days, and the time to issue a notice of dispute, which is 7 days, may support the fact that there was an interim obligation to pay where there was a dispute, given the period to issue the notice of dispute exceeded the time for payment. However, the point ultimately is a neutral one, given one refers to "business days" and the other to "days".

[93] Majella also relied on the fact that the bank guarantee read in conjunction with cl 37.4 is a risk apportionment device and cannot be avoided by the mere issuing of a notice of dispute, as had been discussed by Douglas J in *Vos Constructions & Joinery Qld P/L v Sanctuary Properties P/L & Anor.*[63] However as I have discussed above, the contract in that case had different terms. On the correct construction of cl 37.4 no amount is payable because the final certificate has no effect where there are unresolved issues because a notice of dispute under cl 42 has been given challenging the certificate in its entirety. There was therefore no amount payable under the final certificate and no amount which remained unpaid after the time for payment such that recourse could be had to the bank guarantee under cl 5.2. In my view such an interpretation is not inconsistent with the terms of the security provisions in the contract.

[94] While this construction does prevent Majella and the body corporate having recourse to the bank security in circumstances of a dispute, that is how the parties have allocated the risk under this contract where there is a dispute in relation to the amount certified under the final certificate and that recourse to the bank guarantee is limited to non-payment where the amount provided for in the final certificate is not the subject of challenge[64]. I do not consider that there is any risk allocation by cl 37.4 or the relevant security provisions by which the Principal, Majella is to have the benefit of monies certified under the final certificate notwithstanding that there is a dispute.

If the amount was not payable did the bank guarantee have to be returned?

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59 Although if there was a dispute cl 42.1 may provide for the

60 *Cf* cl 42.5 considered in *John Holland*.

61 *Cf Re Concrete Constructions Group Pty Ltd* [1997] 1 Qd R 6.

62 *Cf John Holland.*

63 [2007] QSC 332.

64 There challenge to the amounts in the final certificate may only be partial in which case it would be of effect to that extent.

[95] Majella and the body corporate contend that even if the final certificate did not require the amount certified to be paid, even on a provisional basis, the bank guarantee did not have to be returned pursuant to cl 5.4. In that regard they submit that:

(a) Clause 1 of the contract provides that "final certificate" has the meaning in subclause 37.4;

(b) If the final certificate was qualified by cl 37.4(d) such that it did not have the effect of evidencing the moneys finally due and payable as provided for by the second paragraph of cl 37.4 or causing the money to be paid as provided for by the third paragraph or being conclusive evidence of accord and satisfaction as provided for in the fourth paragraph of cl 37.4, the certificate was not a "final certificate" within the meaning of cl 37.4;

(c) Tomkins' construction would lead to inconsistencies in the operation of the contract so that the certificate has none of the effects of a final certificate as provided for by cl 37.4 but nevertheless triggers the time running for the purposes of other clauses of the contract. That is an uncommercial construction because in the very situation in which a principal would wish to have recourse to the guarantee, they can be deprived of the security by a contractor issuing a notice of dispute.

[96] Tomkins however contends that the words of the clause are clear and the court must give effect to them even if they have no discernible commercial purpose.[65] Tomkins contends that the trigger for the return of the bank guarantee under cl 5.4 was the issue of the final certificate, and not that the effect of the final certificate is that the money is properly due and payable. To adopt any other interpretation, according to Tomkins would requiring reading words into the clause that are not otherwise there. In support of its argument, Tomkins relies upon the fact that upon issuing a notice of dispute, there is no provision for the issuing of a further final certificate. Clause 42 provides for the matter to be resolved by expert determination.[66]

[97] Tomkins contends that to adopt the construction of Majella and the body corporate would mean that the bank guarantee could never be returned save for the possibility that the expert may make the decision that the superintendent's final certificate was correct and is to be given effect.[67]

[98] I consider Tomkins' construction is correct. In the event that the decision differed from the final certificate, a decision would be handed down in accordance with cl 42.3. There is no provision for the issuing of a further final certificate or amending the final certificate to give effect to the decision made under cl 42.3.

[99] The release of the bank guarantee 14 days after the final certificate has been issued, in circumstances where a notice of dispute has been issued pursuant to cl

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65 Relying upon K Lewison & D Hughes, *The Interpretation of Contracts in Australia* (Pyrmont 2012) at [2.07] referring to, inter alia, Gibbs J in *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99 at 109.

66 At cl 42.3.

67 The exception, in 37.4(d) is in respect of "unresolved issues; the subject of any notice of dispute". Arguably if the issues were resolved in the same way as the superintendent had determined in issuing the final certificate the exception would no longer operate and it would have effect. However if the decision is different from that in the final certificate the operative decision is the determination by the expert or if disputed by the court.

42, means that Majella[68] is exposed in the event Tomkins defaults in paying any amount determined by an expert or in subsequent proceedings.

[100] This is however consistent with the fact that cl 5.2 of the contract refers to recourse by a party who remains unpaid after the time for payment where at least 5 days have elapsed since the party notified the other party of the intention to have recourse. If the amount certified by the final certificate pursuant to cl 37.4 is not due and payable there is no amount which remains unpaid which would trigger the operation of cl 5.2. However if there is no dispute as to the final certificate and Tomkins did not pay within 5 business days, Majella would have time to give notice of its intention to have recourse to the bank guarantee before the expiry of the 14 days after the final certificate.

[101] In this regard, the terms of cl 5.2 provide security for default for non-payment but it is not by its terms a risk allocation device in relation to who should be out of pocket pending resolution of a dispute as was found to be the case in *Saipem Australia Pty Ltd* or in relation to the performance bonds that were considered in *Sugar Australia Pty Ltd v Lend Lease Services Pty Ltd,*[69] where the contractual provisions were quite different.

[102] In my view on its construction the contract does not provide that the contractor must bear the risk of non-payment by the principal while disputing the final certificate. In the context of the final determination as to amounts owing under the contract neither party gets the benefit of payment where a final certificate is disputed pending resolution.

[103] I accept the construction contended for by Tomkins and consider that the bank guarantee should have been returned on 15 June 2017, on the basis that no amount remained unpaid pursuant to which Majella (or the body corporate) could have recourse to the security. Accordingly Majella was obliged to deliver the Bank guarantee to Tomkins pursuant to cl 5.4 on 15 June 2017.

[104] I will hear the parties as to the appropriate orders that should be made in respect of the money paid into court in the amount of the bank guarantee.

[105] Following further submissions being made by the parties on 15 September 2017 when I provided my reasons, I made the following orders which I indicated to the parties would be incorporated into these reasons. Those orders are that:

1. After 5pm on Tuesday 19 September 2017, the applicant be paid the sum of $607,647.50 together with any interest to which the applicant may be properly entitled, the sum of $607, 647.50 having been paid into the Supreme Court on 14 June 2017 pursuant to an order of that date.
2. The respondents pay the applicant's costs of the proceedings on a standard basis.

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68 And the body corporate.

69 (2015) 31 BCL 407.