SUPREME COURT OF QUEENSLAND

CITATION:	*Descon Group Australia Pty Ltd v 35 Merivale Pty Ltd* [2023] QSC 276
PARTIES:	**DESCON GROUP AUSTRALIA PTY LTD** **ACN 625 771 075** (applicant) **v** **35 MERIVALE PTY LTD** **ACN 167 068 804** (respondent)
FILE NO:	BS No 12325 of 2023
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	1 December 2023
DELIVERED AT:	Brisbane
HEARING DATE:	26 October 2023
JUDGE:	Davis J
ORDERS:	**1. The injunctions made on 3 October 2023 and extended on each of 5 October, 23 October and 26 October 2023 are dissolved.** **2. The matter proceed as if started by claim.** **3. The application is otherwise dismissed.** **4. The parties exchange written submissions on costs by 4.00 pm on 15 December 2023.** **5. In the absence of any application being filed by 4.00 pm on 22 December 2023 seeking leave to make oral submissions on costs, the question of costs will be decided without further oral hearing.**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – THE CONTRACT – CONSTRUCTION OF PARTICULAR CONTRACTS AND IMPLIED CONDITIONS – SECURITY AND RETENTION FUNDS – where the applicant is a builder – where the respondent is developing an apartment block – where the applicant was contracted to build the apartments – where pursuant to the contracts the applicant provided security by way of insurance bonds – where the applicant claims money owing – where the respondent claims money owing – where the respondent sought to call on the bonds – where the

applicant obtained an injunction enjoining the respondent from calling on the bonds – whether the right to call on the bonds has arisen – whether those conditions are negative contractual stipulations qualifying the right of the respondent to call on the bonds – whether the bonds are a risk allocation mechanism

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – DETENTION, INSPECTION AND PRESERVATION – FREEZING ORDERS – where the applicant is a builder – where the respondent is developing an apartment block – where the applicant was contracted to build the apartments – where pursuant to the contracts the applicant provided security by way of insurance bonds – where the applicant claims money owing – where the respondent claims money owing – where the respondent sought to call on the bonds – where the applicant obtained an injunction enjoining the respondent from calling on the bonds – where the respondent sought to have the injunctions dissolved – where the applicant sought a freezing order to preserve the bonds – whether the respondent can satisfy any claim by the applicant – whether the interests of justice require a freezing order – whether a freezing order ought to be granted

EQUITY – EQUITABLE REMEDIES – INJUNCTIONS – INTERLOCUTORY INJUNCTIONS – RELEVANT CONSIDERATIONS – GENERALLY – where the applicant is a builder – where the respondent is developing an apartment block – where the applicant was contracted to build the apartments – where pursuant to the contracts the applicant provided security by way of insurance bonds – where the applicant claims money owing – where the respondent claims money owing – where the respondent sought to call on the bonds – where the applicant obtained an injunction enjoining the respondent from calling on the bonds – whether the injunction should be continued – whether the applicant can demonstrate a *prima facie* case that the respondent is not entitled to call on the bonds – whether the balance of convenience favours continuing the injunction

Uniform Civil Procedure Rules 1999, r 260A
Building Industry Fairness (Security of Payment) Act 2017 (Qld)

Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd (2001) 208 CLR 199; [2001] HCA 63, cited
Australian Broadcasting Corporation v O'Neill (2006) 227 CLR 57; [2006] HCA 46, cited
Beecham Group Ltd v Bristol Laboratories Pty Ltd (1968) 118 CLR 618; [1968] HCA 1, cited
Cardile v LED Builders Pty Ltd (1999) 198 CLR 380; [1999]

HCA 1, cited

Clough Engineering Ltd v Oil and Natural Gas Corporation Ltd (2008) 249 ALR 458; [2008] FCAFC 136, cited
Codelfa Construction Pty Ltd v State Rail Authority (NSW) (1982) 149 CLR 337; [1982] HCA 1, followed
CPB Contractors v JKC Australia LNG Pty Ltd [2017] WASC 112, cited
Daewoo Shipbuilding & Marine Engineering Co Ltd v INPEX Operations Australia Pty Ltd (2022) 404 ALR 503; [2022] NSWSC 1125, considered
Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd (2017) 261 CLR 544; [2017] HCA 12, cited
Electricity Generation Corporation v Woodside Energy Ltd (2014) 251 CLR 640; [2014] HCA 7, followed
Fletcher Construction Australia Pty Ltd v Varnsdorf [1998] 3 VR 812, cited
Hortico (Australia) v Energy Equipment Co (Australia) (1985) 1 NSWLR 545, cited
Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104; [2015] HCA 37, followed
Olex Focas Pty Ltd v Skodaexport Co Ltd [1998] 3 VR 380, cited
Parbery v QNI Metals Pty Ltd (2018) 358 ALR 88; [2018] QSC 107, cited
Pearson Bridge (NSW) Pty Ltd v State Rail Authority of New South Wales [1982] 1 Aust Const LR 81, cited
Reed Construction Services Pty Ltd v Kheng Seng (Australia) Pty Ltd (1999) 15 BCL 158, cited
Simic v New South Wales Land and Housing Corporation (2016) 260 CLR 85; [2016] HCA 47, cited
Sugar Australia Pty Ltd v Lend Lease Pty Ltd [2015] VSCA 98, cited
Wood Hall v Pipeline Authority (1979) 141 CLR 443; [1979] HCA 21, cited

COUNSEL: N M Cooke for the applicant
S B Whitten and L Tassell for the respondent

SOLICITORS: Kanther Law for the applicant
CDI Lawyers for the respondent

[1] The applicant, Descon Group Australia Pty Ltd (Descon), filed an application (which was later amended) seeking various relief, but ultimately pressed for:

1. an interlocutory injunction restraining the respondent, 35 Merivale Pty Ltd (Merivale), from calling upon insurance bonds held pursuant to contracts between them; alternatively

2. a freezing order to similar effect.

Background

[2] Descon is a builder.

[3] Merivale is a property developer.

[4] Merivale is developing a residential apartment project called "The Residences" (the Apartments) in Merivale Street, South Brisbane.

[5] By a contact dated 22 November 2021, Descon agreed to build the Apartments and Merivale agreed to pay Descon for so doing (the building contract).

[6] The building contract is in a standard form. It identifies a price for Descon to build the Apartments[1] which is payable by progress claim instalments.[2]

[7] Clause 37 concerns progress claims. It provides, relevantly:

> "**37 Payment**
>
> **37.1 Progress claims**
>
> The *Contractor* shall claim payment progressively in accordance with *Item* 33, while *WUC* is being carried out prior to *practical completion*, at *practical completion* and at the *final payment claim*.
>
> An early progress claim shall be deemed to have been made on the date for making that claim.
>
> The date prescribed in this subclause 37.1 as the time for a *progress claim* is the 'reference date' for the purposes of the *Payments Act*.
>
> Each progress claim shall be given in writing by way of email to the email address in *Item* 14A, addressed to the attention of the *Superintendent* and shall include:
>
> (a) details of the value of *WUC* done and may include details of other moneys then due to the *Contractor* pursuant to provisions of the *Contract*; and
>
> (b) a declaration in the form contained in Annexure Part I executed by a person authorised to do so on behalf of the *Contractor*; and
>
> (c) a detailed *construction program* which is consistent with the form of *Contractor's* program requirements attached at Annexure Part L and sets out the progress of *WUC* done.
>
> The *Superintendent* in receiving a *progress claim* does so as agent of the *Principal* for the purposes of the *Payments Act*.

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1 Clause 2.1.

2 Clause 37.1 and item 33.

37.2 Certificates

The *Superintendent* shall, within 10 *business* days after receiving such a progress claim, issue to the *Principal* and the *Contractor* a *progress certificate* which:

(a) identifies the progress claim to which it relates;

(b) states the amount of the payment, if any, that the *Principal* proposes to make (***certified amount***);

(c) if the *certified amount* is less than the claimed amount, state why the *certified amount* is less, and if it less because the *Principal* is withholding payment for any reason, the *Principal's* reason for withholding payment; and

(d) states the amount of retention moneys and moneys due from the *Contractor* to the *Principal* pursuant to the *Contract*.

The parties agree that any *progress certificate* issued by the *Superintendent* under this clause 37.2 is a payment schedule for the purposes of the *Payments Act*.

The *Superintendent* in issuing a payment schedule does so as agent of the *Principal* for the purposes of the *Payments Act*.

If the *Contractor* does not make a progress claim in accordance with *Item 33*, the *Superintendent* may issue the *progress certificate* with details of the calculations and shall issue the certificate dealing with the matters in paragraph (c).

Failure by the *Superintendent* to set out in a *progress certificate* an amount which the *Principal* is entitled to retain, deduct, withhold or set off from the amount which would otherwise be payable to the *Contractor* by the *Principal*, will not prejudice the *Principal's* right to subsequently exercise its rights to retain, deduct, withhold or set off any amount under the *Contract*.

The *Contractor* shall within 2 business days of receipt of the *progress certificate*, provide a tax invoice to the *Superintendent* for the amount stated in the *progress certificate* as being payable to the *Contractor* by the *Principal*. The provision of such a tax invoice shall not prejudice any right that the *Contractor* may have to dispute the amount shown in the *progress certificate*.

The *Principal* shall within 15 business days after receiving the *progress claim*, pay to the *Contractor* the balance of the *progress certificate* after setting off such moneys or amounts as the *Principal* elects to set off. If that setting off produces a negative balance, that negative balance shall become a debt due and payable by the *Contractor* to the *Principal*.

Neither a *progress certificate* nor a payment of moneys shall be evidence that the subject *WUC* has been carried out satisfactorily, nor shall they prejudice any claim by or defence by the *Principal*. Payment other than *final payment* shall be payment on account only.

At any time and from time to time, the *Superintendent* may by a further *progress certificate* correct any error which has been discovered in any previous *payment schedule*. …" (emphasis added)

[8] As can be seen from clause 37.2, where a negative figure is arrived at, that sum becomes payable by Descon to Merivale as a "debt due".

[9] Clause 39 gives various remedies to both Descon and Merivale. Relevantly:

"**39 Default or insolvency**

39.1 Preservation of other rights

If a party breaches (including repudiates) the *Contract*, nothing in this clause shall prejudice the right of the other party to recover damages or exercise any other right or remedy.

39.2 Contractor's default

If the Contractor commits a substantial breach of the *Contract*, the *Principal* may give the *Contractor* a written notice to show cause. Substantial breaches include, but are not limited to:

(a) failing to:

(i) perform properly the *Contractor's design obligations*;

(ii) provide *security*;

(iii) provide evidence of insurance;

(iv) comply with a *direction* of the *Superintendent* pursuant to subclause 29.3; or

(v) use the materials or standards of *work* required by the *Contract*;

(b) wrongful suspension of *work*;

(c) substantial departure from a *construction program* without reasonable cause or the *Superintendent's* approval;

(d) where there is no *construction program*, failing to proceed with due expedition and without delay; and

(e) is respect of clause 0, knowingly providing documentary evidence containing an untrue statement.

39.3 Principal's notice to show cause

A notice under subclause 39.2 shall state:

(a) that it is a notice under clause 39 of these General Conditions;

(b) the alleged substantial breach;

(c) that the *Contractor* is required to show cause in writing why the *Principal* should not exercise a right referred to in subclause 39.4;

(d) the date and time by which the *Contractor* must show cause (which shall not be less than 7 *business days* after the notice is received by the *Contractor*); and

(e) the place at which cause must be shown.

39.4 Principal's rights

If the *Contractor* fails to show reasonable cause by the stated date and time, the *Principal* may by written notice to the *Contractor*:

(a) take out of the *Contractor's* hands the whole or part of the *work* remaining to be completed and suspend payment until it becomes due and payable pursuant to subclause 39.6; or

(b) terminate the *Contract*.

39.5 Take out

The *Principal* shall complete *work* taken out of the *Contractor's* hands and may:

(a) use materials, equipment and other things intended for *WUC*; and

(b) without payment of compensation to the *Contractor*:

(i) take possession of, and use, such of the *construction plant* and other things on or in the vicinity of the *site* as were used by the *Contractor*;

(ii) contract with such of the *consultants* and *subcontractors*; and

(iii) take possession of, and use, such of the *design documents*,

as are reasonably required by the *Principal* to facilitate completion of *WUC* taken out.

If the *Principal* takes possession of *construction plant*, *design documents* or other things, the *Principal* shall maintain them and, subject to subclause 39.6, on completion of the *work* taken out, shall return such of them as are surplus.

The *Superintendent* shall keep records of the cost of completing the *work* taken out.

39.6 Adjustment on completion of work taken out

When *work* taken out of the *Contractor's* hands has been completed, the *Superintendent* shall assess the cost thereby incurred and shall certify as moneys due and payable accordingly the

> difference between that cost (showing the calculations therefor) and the amount which would otherwise have been paid to the *Contractor* if the *work* had been completed by the *Contractor*.
>
> If the *Contractor* is indebted to the *Principal*, the *Principal* may retain *construction plant* or other things taken under subclause 39.5 until the debt is satisfied. If after reasonable notice, the *Contractor* fails to pay the debt, the *Principal* may sell the *construction plant* or other things and apply the proceeds to the satisfaction of the debt and the costs of sale. Any excess shall be paid to the *Contractor*." (emphasis added)

[10] By clause 5.1 of the building contract, Descon covenanted to provide security. That ultimately took the form of unconditional and irrevocable insurance bonds from Vero Insurance (the bonds) in a total sum of $4,295,750.

[11] Clause 5.2 provides:

> "**5.2 Recourse**
>
> The *Principal* may have recourse to *security*:[3]
>
> (a) for any amount due, as a debt arising under the *Contract*, to the *Principal* which remains unpaid after the time for payment, or where there is no time for payment specified, remains unpaid after *5 business days* after demanding payment; or
>
> (b) in respect of any *claim* to payment (liquidated or otherwise), the *Principal* may have against the *Contractor* under the *Contract* which remains unpaid after *5 business days* after demanding payment.
>
> The definition of 'debt' is moneys owed, that which one party is bound to pay the other.
>
> The provisions of this subclause 5.2 survive the termination or expiration of the Contract." (emphasis added)

[12] The building work began to fall behind schedule. That led to a commercial solution whereby the contract price would be increased, the completion date extended and the building contract novated from Descon to Innovative D&B Company Pty Ltd (D&B). All this was subject to various conditions.

[13] Pursuant to the commercial resolution, Descon and Merivale, together with a number of other parties, entered into a deed styled "Supplemental Building Multiparty Deed" (the First Side Deed) on 5 July 2023.

[14] The terms of the First Side Deed disclose that on 11 February 2022 the parties had entered into an earlier multiparty deed which was not in the material before me. Presumably, that agreement contains provisions relevant to the financing of the payment as the First Side Deed has provisions concerning such matters. The First Side Deed is to replace the earlier multiparty deed.

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[3] Relevantly, the bonds.

[15] Also on 5 July 2023, Descon, Merivale and D&B entered into a deed styled "Akin Residences - Second Side Deed" (the Second Side Deed). It effected a novation of the building contract to D&B on various preconditions, including that:

> "3.1.2.1 the Contractor and the New Entity will use best endeavors to obtain a licence required by the *Queensland Building and Construction Commission Act 1991* (Qld) (**QBCC Licence**) for the New Entity. The class of QBCC Licence to be obtained by the New Entity must be sufficient to allow the New Entity to carry out the Works."

[16] The First Side Deed contained a provision concerning security. Clause 9.1 provides:

> "**9.1 Security provided by the Builder under the Building Contract**
>
> The Builder and the Borrower each agree that the Builder Performance Security[4] to be provided to the Borrower under the Building Contract must be:
>
> (a) in favour of the Borrower;
>
> (b) in the form of unconditional and irrevocable bank guarantees or insurance bonds;
>
> (c) in an aggregate amount of not less than 5% of the contract sum under the Building Contract, comprised of:
>
> (i) one unconditional and irrevocable bank guarantee or insurance bond in an amount of no less than 2.5% of the Contract Sum under the Building Contract; and
>
> (ii) one unconditional and irrevocable bank guarantee or insurance bond in an amount of no less than 2.5% of the Contract Sum;
>
> (d) capable of being called upon immediately and without notice or reference to, or the consent of, the Builder where:
>
> (i) work has been taken out of the hands of the Builder or the Building Contract has been terminated; or
>
> (ii) the Builder Performance Security is to be used to make a payment into court to satisfy a notice of claim of charge under the Security of Payment Act;[5]
>
> (e) issued by a bank or insurer with a minimum credit rating from Standard & Poor's of A+ and otherwise satisfactory to the Secured Party; and
>
> (f) otherwise in form and substance satisfactory to the Secured Party, acting reasonably." (emphasis added)

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4 Defined in the deed as relevantly including the insurance bonds.

5 Defined in the deed as the *Building Industry Fairness (Security of Payment) Act* 2017.

[17] The Second Side Deed also contains provisions concerning security. By clause 1 of the deed:

> "***Existing Security*** means the unconditional undertakings given by the Contractor to the Principal under the Contract, copies of which are attached in Schedule 9."

And by clause 3.1.5:

> "3.1.5 The Contractor also acknowledges and agrees that, as further consideration for the novation under clause 3.1.3 occurring on the Novation Date:
>
> 3.1.5.1 the Principal will be entitled to retain the Existing Security and the Contractor will not take any action to seek to have the Existing Security returned to the Contractor;
>
> 3.1.5.2 the Principal will be entitled to call on the Existing Security as if it was the Security provided by the New Entity under the Contract, providing security for the performance by the New Entity of the Contract; and
>
> 3.1.5.3 the Contractor will not take any action to seek to inhibit or injunct the Principal from calling on the Existing Security." (emphasis added)

[18] There are various triggers which bring the Second Side Deed into operation and these have not been fulfilled.

[19] It is not necessary on an interlocutory application such as this to analyse fully all the issues that have arisen between the parties. The following summary will suffice:

1. Mr Gao, the controlling mind of Merivale, says that Descon's subcontractors complained that they had not been paid. Merivale paid them.

2. Descon made three progress claims, July 2023, August 2023 and September 2023. Descon said that it was owed $4,591,005.08, being:

   (a) the unpaid portion of the July claim - $494,814.76;

   (b) the amount of $4,096,190.32 being the amount of the September payment claim which includes the August payment claim. Merivale pointed to various provisions of the building contract and submitted that the prerequisites for payment of those claims had not yet been met.

3. The September progress claim was considered by Mr Mark Pritchard, the Managing Director of Empire Project Management Pty Ltd, which is the Superintendent. He certified that progress claim in this way:

   (a) total certified value of contractor's progress - $24,440,406.08 excluding GST;

   (b) total value of payments made either to Descon or its suppliers and subcontractors - $27,997,681.09;

(c) Descon was indebted to Merivale in the sum of $3,557,275.01.

[20] On 21 September 2023, Merivale issued a show cause notice. That complained that:

1. the construction program was behind;
2. a provision in the Second Side Deed, whereby Descon was to obtain a QBCC licence for D&B, has been breached;
3. Descon has not provided proof of professional indemnity insurance;
4. breaches of various warranties had been committed by Descon.

[21] As required, Descon purported to show cause, but on 3 October 2023, Merivale acted pursuant to clause 39 of the building contract and took the work out of Descon's hands.

[22] Descon considers that Merivale is indebted to it, so recourse to the bonds would be inappropriate. Fearing that Merivale may call on the bonds, it sought interlocutory relief.

[23] On 3 October 2023, various orders were made, relevantly for present purposes:

> "4. The Respondent is restrained from undertaking the following in that the Respondent, must not in any way, call upon, dispose of, deal with or diminish the value of the Insurance Bonds held by Vero issued on 17 December 2021 ('the Security').
>
> 5. The Respondent be restrained from taking any action pursuant to clause 9.1 of the 2023.06 Supplemental Building Multiparty Deed (Queensland)."

[24] On 4 October 2023, Descon purported to terminate the building contract.

[25] Those injunctions were extended. Full argument was heard on 26 October 2023. The injunctions were ordered to remain in place until judgment is delivered.

Relevant legal principles

[26] As Descon moves for interlocutory injunctive relief, it must prove:

1. a *prima facie* entitlement to the injunction;
2. that the balance of convenience favours extending the injunction pending trial.[6]

[27] Where, pursuant to contractual terms reached between parties, one party provides a bank or insurance bond for the benefit of another, various legal rights and obligations arise. Where, as here, the bonds are unconditional as between Merivale and Vero, there is a right in Merivale to payment upon demand and an obligation

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6 *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 at [65]-[72] per Gummow and Hayne JJ and Gleeson CJ and Crennan J adopting those comments at [19] following *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618.

upon Vero to pay.[7] However, as between Merivale and Descon, there are contractual terms between them prescribing the circumstances upon which Merivale can exercise its right to call upon the bonds.

[28] The rights and obligations as between the issuer of the bond and the beneficiary on the one hand, and the obligations and rights between the contracting parties which have led to the issue of the bond, may be very different. For instance, the obligations of the institution issuing the bond may be to pay upon demand and those obligations are not qualified by the terms of the contract which resulted in the issue of the bond.[8] As between the issuer of the bond and the beneficiary of it, judicial intervention will generally only be justified when there has been fraud or unconscionable conduct.

[29] In *Wood Hall v Pipeline Authority*,[9] Gibbs J (as his Honour then was) recognised the fraud exception when his Honour observed:

> "It was not submitted that if the Authority had been actuated by an improper or impermissible motive when it made its demands that would have meant that its actions constituted breaches of contract, but rather that the existence of such a motive tended to support the view that the Authority had made the demands when it was not entitled to do so."[10]

[30] In *Hortico (Australia) v Energy Equipment Co (Australia)*,[11] Young J examined various authorities concerning bank guarantees and commercial letters of credit and recognised the jurisdiction to intervene in cases of fraud.[12] Unconscionable conduct of the beneficiary of the bond was recognised as a jurisdictional basis to enjoin the bank or insurance company from paying on the guarantee in cases such as *Olex Focas Pty Ltd v Skodaexport Co Ltd*.[13]

[31] However, as between the parties to the contract which resulted in the bonds being held, there may be conditions limiting the right of a party to call upon the bonds for payment. In such circumstances, the ordinary principles governing the granting of interlocutory injunctions apply. The beneficiary of the security may be enjoined from calling upon it if those conditions amount to implied negative contractual stipulations prohibiting the beneficiary from calling on the bonds.[14]

[32] Here, Mr Cook for Descon sought to demonstrate unconscionable conduct, but in the course of oral argument, it became apparent that Descon's best argument was

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7 *Wood Hall v Pipeline Authority* (1979) 141 CLR 443 at 451.

8 *Wood Hall v Pipeline Authority* (1979) 141 CLR 443 at 451 and *Simic v New South Wales Land and Housing Corporation* (2016) 260 CLR 85 at [8].

9 (1979) 141 CLR 443.

10 At 451.

11 (1985) 1 NSWLR 545.

12 Pages 549-552 and see *Reed Construction Services Pty Ltd v Kheng Seng (Australia) Pty Ltd* (1999) 15 BCL 158.

13 [1998] 3 VR 380, *Reed Construction Services Pty Ltd v Kheng Seng (Australia) Pty Ltd* (1999) 15 BCL 158 and *Clough Engineering Ltd v Oil and Natural Gas Corporation Ltd* (2008) 249 ALR 458 at [77].

14 *Wood Hall v Pipeline Authority* (1979) 141 CLR 443 at 451, *Reed Construction Services Pty Ltd v Kheng Seng (Australia) Pty Ltd* (1999) 15 BCL 158 and *Clough Engineering Ltd v Oil and Natural Gas Corporation Ltd* (2008) 249 ALR 458 at [77].

that the provisions of the various agreements, properly construed, provided preconditions to the right of Merivale (as against Descon) to call upon the bonds, and there is a *prima facie* case that these preconditions have not been fulfilled. Therefore, if the balance of convenience favours Descon, it should have an injunction restraining Merivale from calling upon the bonds until trial.

Construction of the three agreements

[33] Central to the current issues is the construction of the agreements.

[34] A number of issues of construction arose during argument. These were:

1. Is the Second Side Deed relevant in construing the building contract and/or the First Side Deed?

2. Do the various security provisions operate as implied negative contractual stipulations qualifying the right of Merivale to call on the bonds and, if so, what are those conditions?

3. Do the security provisions operate after termination of the agreements?

4. Are the security provisions a risk allocation mechanism?

[35] The three agreements are commercial ones. In *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd*,[15] French CJ, Nettle and Gordon JJ followed *Codelfa Construction Pty Ltd v State Rail Authority (NSW)*[16] and *Electricity Generation Corporation v Woodside Energy Ltd*[17] and summarised the relevant principles in construing a commercial agreement as follows:

> "46 The rights and liabilities of parties under a provision of a contract are determined objectively,[18] by reference to its text, context (the entire text of the contract as well as any contract, document or statutory provision referred to in the text of the contract) and purpose.[19]
>
> 47 In determining the meaning of the terms of a commercial contract, it is necessary to ask what a reasonable businessperson would have understood those terms to mean.[20] That inquiry will require consideration of the language used by the parties in the contract, the circumstances addressed by the contract and the commercial purpose or objects to be secured by the contract.[21]"[22]

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15 (2015) 256 CLR 104.
16 (1982) 149 CLR 337.
17 (2014) 251 CLR 640.
18 *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at 656 [35].
19 *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 at 350 (citing *Reardon Smith Line Ltd v Hansen-Tangen* [1976] 1 WLR 989 at 995-996; [1976] 3 All ER 570 at 574), 352. See also Sir Anthony Mason, "Opening Address", *Journal of Contract Law*, vol 25 (2009) 1, at p 3.
20 *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at 656 [35].
21 *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at 656-657 [35].
22 See also Kiefel J (as her Honour then was) and Keane J at [109].

[36] Later, in *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd*,[23] the High Court observed:

> "It is well established that the terms of a commercial contract are to be understood objectively, by what a reasonable businessperson would have understood them to mean, rather than by reference to the subjectively stated intentions of the parties to the contract.[24] In a practical sense, this requires that the reasonable businessperson be placed in the position of the parties. It is from that perspective that the court considers the circumstances surrounding the contract and the commercial purpose and objects to be achieved by it[25]."[26]

[37] The exercise of construction is to objectively determine the intention of the parties from the text and in so doing take into account matters of context including the commercial nature of the document, and its purpose. It is not an exercise of consideration of the commercial wisdom of what was, or might have been agreed.

Is the Second Side Deed relevant to construing the other agreements?

[38] As later explained, Mr Whitten and Mr Tassell for Merivale submit that the contracts between the parties ought to be construed so that the intended use of the bonds was a "risk allocation mechanism".

[39] The Second Side Deed never came into operation. However, no doubt irresistibly tempted by clause 3.1.5.3 of the Second Side Deed,[27] Mr Whitten and Mr Tassell submitted:

> "60. **Second**, Clause 3.1.5.3 of the Second Side Deed provides that Descon "*will not take any action to seek to inhibit or injunct [35 Merivale] from calling on the [Insurance Bonds]*." This type of clause has been interpreted as "a clear manifestation" of a risk allocation in favour of the holder of the performance bond.[28]
>
> 61. In *CPB Contractors v JKC Australia*,[29] the Court considered that contractual limits on seeking an injunction restraining a party's recourse to the bank guarantee may shed light on the purpose of the right to recourse and confirmed that the object of such contractual limits was to provide a risk allocation

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23 (2017) 261 CLR 544.

24 *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at 656 [35] and the cases at fn 58; [2014] HCA 7.

25 *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at 656-657 [35] and the cases at fn 60

26 At [16], followed in *Laundy Hotels (Quarry) Pty Ltd v Dyco Hotels Pty Ltd* (2023) 97 ALJR 194 at [27].

27 Set out at paragraph [17] of these reasons.

28 *Daewoo Shipbuilding & Marine Engineering Co Ltd v INPEX Operations Australia Pty Ltd* (2022) 404 ALR 503 at [92] in relation to clause 35.3(b) of the contract in question which provided: "… *Contractor waives any right that it may have to obtain an injunction or any other remedy or right against any party in respect of Company having recourse to the Bank Guarantee*."

29 [2017] WASC 112.

> device as to who was to be out of pocket pending the resolution of any dispute."[30]

[40] In my view, the terms of clause 3.1.5 are of no assistance in construing either the building contract or the First Side Deed. The Second Side Deed postdates the building contract. While the two side deeds were executed on the same day, the second only comes into operation when certain conditions are fulfilled. As earlier observed, the Second Side Deed has not come into operation and D&B have not been novated to the position of builder under the building contract.

[41] Once the Second Side Deed comes into operation, Descon is no longer the builder. However, Descon is a company related to D&B which becomes the builder by novation to the building contract. In those circumstances, the parties have agreed as to how the security should be dealt with. The bonds provided by Descon remain[31] to be dealt with under the building contract and Descon, no longer a party, shall not enjoin or otherwise take action to restrain Merivale from calling on the bonds.[32]

[42] The clear intention of clause 3.1.5 is to place Merivale and D&B in the same position that Merivale and Descon were originally under the building contract and exclude Descon from exercising rights over the bonds. That throws no light on the proper construction of contractual documents to which Descon remains a party.

Do the security provisions in the contracts operate as implied negative contractual stipulations qualifying the right of Merivale to call on the bonds?

[43] The starting point are the bonds. They are "unconditional". Nothing on the face of them limits Merivale's rights to call for payment.

[44] While the building contract provides for the provision of the security, it then, by clause 5.2, determines the circumstances in which Merivale "may have recourse to [the bonds]". Questions arise as to whether these conditions, properly construed, are implied negative contractual stipulations prohibiting Merivale from access to the bonds unless the preconditions are met.[33]

[45] In my view, on a proper construction of clause 5.2, and even though the clause is expressed in permissory language, it prescribes the preconditions, as between Descon and Merivale, which must exist before Merivale may have access to the unconditional bonds. That is so because the right in Merivale to call on the bonds only arises where:

1. there is an amount "due"; and
2. demand has been made for payment; and

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30 *CPB Contractors Pty Ltd v JKC Australia LNG Pty Ltd* [2017] WASC 112 at [93]; as cited in *Daewoo Shipbuilding & Marine Engineering Co Ltd v INPEX Operations Australia Pty Ltd* (2022) 404 ALR 503 at [101].

31 Clause 3.1.5.1 of the Second Side Deed.

32 Clause 3.1.5.3 of the Second Side Deed.

33 *Pearson Bridge (NSW) Pty Ltd v State Rail Authority of New South Wales* [1982] 1 Aust Const LR 81, *Clough Engineering Ltd v Oil and Natural Gas Corporation Ltd* (2008) 249 ALR 458 at [82]-[85], *Daewoo Shipbuilding & Marine Engineering Co Ltd v INPEX Operations Australia Pty Ltd* (2022) 404 ALR 503 at [90].

3. the amount "due" remains unpaid; or

4. there is a "claim" to payment (whether liquidated or otherwise); and

5. demand has been made for payment; and

6. the claim remains unsatisfied for five days.

[46] It seems common ground that clause 9.1 of the First Side Deed operates cumulatively upon clause 5.2 of the building contract. In other words, clause 9.1 does not supersede clause 5.2. Clause 9.1(d) provides that the "unconditional and irrevocable bank guarantees or insurance bonds"[34] are "capable of being called upon immediately … where" and then three circumstances are mentioned. The drafting is a little unfortunate in that clause 9.1(d) is expressed in terms of the capacity of the "unconditional irrevocable bank guarantees or insurance bonds".[35]

[47] On a proper construction of clause 9.1(d), the circumstances in paragraphs 9.1(d)(i) and (ii) are preconditions to the right of Merivale to access the bonds. This is because by clause 9.1 of the First Side Deed, access to the bonds may be made only where:

1. the work has been taken out of Descon's hands; or

2. the building contract has been terminated; or

3. there has been a notice of charge issued under the *Building Industry Fairness (Security of Payment) Act* 2017 (Qld).[36]

Do the security provisions operate after termination of the agreements?

[48] Clause 5.2 of the building contract expressly provides that it survives "the termination or expiration of the [building contract]".

[49] Mr Cook for Descon, submitted that the provisions of clause 9.1 do not similarly survive termination.

[50] That submission ought to be rejected. One of the circumstances under which a call on the bonds may be made is where "the building contract has been terminated". In that circumstance, the bonds may be "called upon immediately". On a proper construction of clause 9.1, the right to call upon the bonds bestowed by clause 9.1(d) may therefore be exercised after termination.

Are the security provisions a risk allocation mechanism?

[51] Mr Whitten and Mr Tassell submit that the security provisions set up a "risk allocation mechanism" the effect of which is that once the parties are in dispute the contracts are intended to allow Merivale access to the bonds pending resolution of the dispute.

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34 Clause 9.1(b).

35 "The Builder Performance Security … is capable of being called on…"

36 Defined in the First Side Deed as the "Security of Payment Act".

[52] Calloway JA, in *Fletcher Construction Australia Pty Ltd v Varnsdorf*,[37] explained the concept in this way:

> "There are broadly two reasons why the beneficiary may have stipulated for a guarantee. One is to provide security. If it has a valid claim and there are difficulties about recovering from the party in default, it 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. The beneficiary is then able to call upon the guarantee even if it turns out, in the end, that the other party was not in default. Compare *Burleigh Forest Estate Management Pty. Ltd. v. Cigna Insurance Australia Ltd.* [1992] 2 Qd. R. 54 at 59 and *Themehelp Ltd. v. West* [1996] Q.B. 84 in the dissenting judgment of Evans L.J. at 103. It is a question of construction of the underlying contract whether the guarantee is provided solely by way of security or also as a risk allocation device. Remembering that we are speaking of guarantees in the sense of standby letters of credit, performance bonds, guarantees in lieu of retention moneys and the like, the latter purpose is often present and commercial practice plays a large part in construing the contract. No implication may be made that is inconsistent with an agreed allocation of risk as to who shall be out of pocket pending resolution of a dispute and clauses in the contract that do not expressly inhibit the beneficiary from calling upon the security should not be too readily construed to have that effect. As I have already indicated, they may simply refer to the kind of default which, if it is alleged in good faith, enables the beneficiary to have recourse to the security or its proceeds."[38] (emphasis added)

[53] As can be seen, his Honour identifies allocation of risk as a purpose relevant to the ultimate issue which must be the proper construction of the contractual provisions.

[54] His Honour's comments have been consistently adopted and followed, often though, with warnings that ultimately the issue is the proper construction of the contract rather than a general categorisation of relevant considerations.[39] In my view, it is clear from his Honour's judgment in *Fletcher Construction* that the contract must prevail. His Honour's comments concern identification of the parties' objective purpose and intention which is part of the construction exercise.

[55] The Court of Appeal of Victoria considered these principles in *Sugar Australia Pty Ltd v Lend Lease Pty Ltd*[40]. There, it was observed that if the purpose of the contractual provisions was to give one party access to the security pending resolution of any dispute, then the granting of an interlocutory injunction defeats that agreed objective.[41] However, the Court also observed:

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37 [1998] 3 VR 812.
38 At 826-827.
39 *CPB Contractors v JKC Australia LNG Pty Ltd* [2017] WASC 112 at [88] and *Clough Engineering Ltd v Oil and Natural Gas Corporation Ltd* (2008) 249 ALR 458 at [85].
40 [2015] VSCA 98.
41 At [29].

> "25 The fact that a performance bond is intended to operate as a risk allocation device is not, of course, necessarily determinative of the right of a party to have recourse to it. It may be subject to a contractual qualification or limitation upon the circumstances in which recourse may be had. Nevertheless, the fundamental characteristic of a risk allocation device informs the task which the Court must undertake in resolving whether or not to grant an injunction."

[56] In the end, it is the proper construction of the agreements which must prevail. If the intention of the parties is that Merivale should have access to bonds pending resolution of any dispute, then that construction may defeat Descon's assertion of a *prima facie* right to enjoin Merivale from accessing the bonds. It is also relevant to questions of the balance of convenience. However, if there are clear preconditions to Merivale's rights of access and those have not been fulfilled, then a *prima facie* case will be shown, notwithstanding any general intention that the bonds operate as a risk allocation mechanism.

[57] Clause 5.2 of the building contract, as earlier observed, permits recourse to the bonds where there is "any amount due" or any "claim to payment". Therefore, provided demand has been made, the only requirement is a "claim" not a proved entitlement.

[58] By clause 9.1(d) of the First Side Deed, the bonds can be "called on immediately and without notice" to Descon in certain circumstances. The circumstances include where work has been taken out of the hands of Descon. There is a procedure for that to occur. It is prescribed by clause 39 which provides for a show cause procedure, ultimately leading to a determination as to whether just cause has been shown.

[59] No doubt, when Merivale purports to act under clause 39, it is meant to do so *bona fide*. However, there are specific limitations. Clause 9.1(d) must be read with clause 39. Clause 39 only applies when Descon "… commits a substantial breach of the [building contract]". The rights in Merivale which flow from the service of a show cause notice are extreme. There is not only a right to take the contract out of the hands of Descon, but also a right to terminate, to take possession of Descon's plant, to take the benefit of any contracts with its consultants and subcontractors and to use the design documents. Then, by clause 39.6, a debt arises, being the difference between the costs of Merivale finishing the work and the outstanding money due under the building contract. That debt becomes a charge upon Descon's plant.

[60] Access to the bonds is yet another consequence of Merivale taking the contract out of the hands of Descon, or terminating the contract.

[61] Clause 5.2 contains an express limitation upon Merivale's right to recourse to the bonds. There must be demand, and the sum due or claimed must "remain unpaid after five days after demanding payment".

[62] Just as a party who has negotiated an allocation of risk mechanism should not be frustrated by an injunction which prevents access to security pending resolution of the dispute, so is a party entitled[42] to rely upon clear preconditions to the right of the other party to access the security. The intent is obvious. Descon has successfully negotiated a period of five day's grace to meet any claim (by payment within five days) to avoid access to the bonds.

[63] I would not construe either the building contract or the First Side Deed as preventing Descon from mounting a claim for interlocutory relief by establishing a *prima facie* case:

1. as to any claim by Merivale under clause 5.2 of the building contract, by establishing a failure to give five days notice; or

2. as to any claim by Merivale under clause 9.1 of the First Side Deed by raising a dispute as to Merivale's right to take the contract from Descon's hands and/or terminate the building contract.

Has Descon shown a *prima facie* case?

[64] In *Daewoo Shipbuilding & Marine Engineering Co Ltd v INPEX Operations Australia Pty Ltd*,[43] Rees J stated:

> "[86] A *prima facie* case is not 'one size fits all'. On an application to injunct a call on a bank guarantee, the plaintiff must demonstrate a strong or serious *prima facie* case. In order for the Court to be satisfied that an interlocutory injunction should be granted, it may be necessary for the Court to construe the contractual provisions. …"

[65] I reject the submissions made on behalf of Merivale that Rees J was stating some legal principle relevant to the ascertainment of a *prima facie* case where what is sought to be enjoyed is access to security. His Honour's comments should, in my respectful view, be understood as observing that the strength of a *prima facie* case sufficient to give rise to a discretion to enjoin a party depends on all the circumstances of the case, including the nature of the relevant contractual provisions. His Honour's remarks must be put in the context of his Honour's earlier reference to a passage in the judgment of Gleeson CJ in *ABC v Lenah Game Meats Pty Ltd*:[44]

> "The extent to which it is necessary, or appropriate, to examine the legal merits of a plaintiff's claim for final relief, in determining whether to grant an interlocutory injunction, will depend upon the circumstances of the case. There is no inflexible rule. It may depend upon the nature of the dispute. For example, if there is little room for argument about the legal basis of a plaintiff's case, and the dispute is about the facts, a court may be persuaded easily, at an interlocutory stage, that there is sufficient evidence to show, prima facie, an entitlement to final relief. The court may then move n to

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42 Subject to balance of convenience considerations.
43 (2022) 404 ALR 503.
44 (2001) 208 CLR 199.

> discretionary considerations, including the balance of convenience."[45]

[66] To the extent that Merivale might rely on clause 5.2 of the building contract, Descon has shown a *prima facie* case. That is because, for the reasons already explained, the condition precedent to the right to access is demand which remains unanswered for five days. It is common ground that demand, pursuant to clause 5 was not made.

[67] Recourse to the bonds was sought by Merivale pursuant to clause 9.1 of the First Side Deed on the basis that the building work has been taken out of the hands of Descon pursuant to clause 39 of the building contract. As earlier observed, a show cause notice was given pursuant to clause 39 and an answer to the show cause was delivered.

[68] Greg Sneeden swore affidavits on behalf of Descon. In his affidavit filed 5 October 2023, Mr Sneeden exhibited the show cause notice and exhibited the show cause response. He does not swear to the truth of the contents of the response to the show cause notice. Merivale did not take the point that there is therefore no sworn evidence challenging the show cause notice. The application proceeded on the understanding that Mr Sneeden's affidavit constituted evidence of the truth of the allegations in the show cause response.

[69] The response to the allegation that the build is behind time is weak. Merivale relies upon a report prepared by King Planning. In response, Descon:

1. complains that it does not have access to the underlying assumptions in the King Planning Report;
2. asserts that it can achieve practical completion by the date for practical completion;
3. says that it is content to discuss various options with Merivale; and
4. baldly asserts that it is not behind time.

[70] Mr Gao, in his affidavit filed 16 October 2023, explains that in the period up to early 2023, the project became delayed and this led to a number of concerns being raised with a group called the "Project Control Group". Mr Gao includes in his affidavit extracts from minutes of the meetings of the Project Control Group recording the delays. The minutes from which these extracts were taken are contemporaneous notes of the progress of the project.

[71] Mr Gao explains that the financier was concerned about the delays and that led to the arrangements in the two side deeds which the parties envisaged would lead to the novation of the building contract from Descon to D&B.

[72] Descon did not seek to cross-examine Mr Gao on his affidavit. There is no evidence throwing doubt upon the minutes of the Project Control Group and, apart from the general denials in the show cause response, there is nothing meeting Mr Gao's evidence of delays. Descon, in my view, has not shown a *prima facie* case that it has shown reasonable cause to Merivale's assertion that it had a right to

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45 At [18]; in *Daewoo* at [84].

take the contract out of Descon's hands because of the delays. It follows then that Descon has not shown a *prima facie* case that Merivale does not have a right to call upon the bonds.

[73] It is unnecessary to consider Descon's responses to the other allegations made in the show cause notice.

Balance of convenience

[74] If I am wrong and Descon has shown a *prima facie* case, then I would still refuse to extend the injunction as the balance of convenience favours Merivale.

[75] Descon asserts that it has terminated the contract. Merivale asserts that Descon has been removed as builder of the apartments. On either version, the parties are no longer mutually involved in the completion of the apartments. Both parties have money claims against each other.

[76] Descon made significant progress claims which were not certified at the time the contract came to an end. Whether it can now make the claims under the contract or the *Building Industry Fairness (Security of Payment) Act* 2017, it will still have to prove its claims. Merivale, on the other hand, has a certified claim against Descon for $3,557,275.01.

[77] Merivale did not base its show cause proceedings on the certified claim of $3,557,275.01. It could have, and there is no serious suggestion that Descon would, or could, have paid it.

[78] The intention of the parties manifested in the First Side Deed was that if the building work was taken out of the hands of Descon, then Merivale would have access to the bonds. If, contrary to what I have found, there is a *prima facie* dispute as to Merivale's right to take the works from Descon, then there is a *prima facie* case that Merivale is not entitled to access the bonds. However, Merivale appears to have a certified claim for $3,557,275.01. Clause 5.2 of the building contract survives termination of the building contract and there is no reason why claim could not be made by Merivale for that sum now.

[79] Submissions were made by Descon that there were doubts as to the financial stability of Merivale. Merivale raised similar questions as to the financial situation of Descon.

[80] The financial position of Descon is less important in the exercise of discretion then the financial position of Merivale. Descon does not seek to have the bonds released. It has no doubt provided money or other security to cause Vero to issue the bonds and seeks to maintain the status quo. Merivale seeks payment of money secured by the bonds to it so its financial position becomes relevant to its capacity to repay the amount of the bonds to Descon if Descon ultimately establishes a right to payment.

[81] It is common ground that Merivale is a single purpose corporate vehicle which exists only for the purposes of developing the apartments. Mr Gao exhibits a financial feasibility report which estimates a development profit of approximately $18 million, although this does not take into account any loss or damage resulting

from taking the works out of the hands of Descon. There is no challenge to that report and Mr Gao was not cross-examined on any aspects of his affidavit.

[82] Descon's approach to Mr Gao's evidence is confusing. In addressing the balance of convenience, it was submitted on Descon's behalf:

> "46. The Respondent[46] by its own admission can afford to pay the claims if they go to trial and lose. There is no financial hardship for the Respondent in paying for the work provided beyond the standard financial burdens imposed on any buyer of goods and services."[47] (emphasis added)

[83] Then, when addressing the application for freezing orders, Descon referred to the possibility that it will obtain a judgment against Merivale and then submitted:

> "55. Second, there is a tangible risk that if a freezing order is not made in respect of the insurance bonds, the Respondent will call upon the bonds and not satisfy the judgment."

[84] Descon's submissions go on to refer to clause 5.2 of the building contract and observe that no demand was made for payment which went unpaid for five days. Merivale is criticised for making a claim on the bonds in those circumstances when it is said the money was not due. Merivale has not paid the progress claims to Descon. What is then submitted by Descon is:

> "63. The combination of the absence of basis to call on the insurance bonds and the absence of basis to avoid paying the Applicant for work completed demonstrates there is a real risk that any judgment will not be satisfied by the Respondent."

[85] This overlooks two points:

1. clause 9 of the First Side Deed provides that claim can be made on the bonds once the work is taken out of the hands of Descon; and
2. the progress claims are not certified and therefore not payable. They are only payable under the Act if the work has been done. There is a dispute about the value of the work.

[86] In all the circumstances, the balance of convenience favours Merivale.

Freezing order

[87] Application is made, both under the inherent jurisdiction of the court and under r 260A of the *Uniform Civil Procedure Rules* 1999 (UCPR), for a freezing order enjoining Merivale from calling on the bonds and thereby dissipating the proceedings.

[88] In *Parbery v QNI Metals Pty Ltd*,[48] Bond J exhaustively analysed the principles relevant to both the exercise of the inherent power and the power under the Rules.

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46 Merivale.
47 Paragraph 46 of Descon's written submissions quoting paragraph 43 of Mr Gao's affidavit.
48 (2018) 358 ALR 88.

His Honour identified three principal considerations to the exercise of the inherent jurisdiction, namely:

1. the strength of the claimant's case;

2. the risk to the integrity of the prospective court processes of execution enforcement; and

3. the interests of justice.

[89] Rule 260A of the UCPR provides as follows:

> "**260A Freezing order**
>
> (1) The court may make an order (a ***freezing order***) for the purpose of preventing the frustration or inhibition of the court's process by seeking to meet a danger that a judgment or prospective judgment of the court will be wholly or partly unsatisfied.
>
> (2) A freezing order may be an order restraining a respondent from removing any assets located in or outside Australia or from disposing of, dealing with, or diminishing the value of, those assets."

[90] As Bond J observed:

> "[54] Rule 260A confers on the Court a wide jurisdiction to make freezing orders. A freezing order is an order made for the purpose of preventing the frustration or inhibition of the court's process by seeking to meet a danger that a judgment or prospective judgment of the court will be wholly or partly unsatisfied."

[91] Both the inherent jurisdiction and r 260A have a common primary purpose, namely avoiding the frustration of the court's process in the sense that assets may be dissipated, thereby making execution of any judgment impossible, or at least difficult. I have found that Merivale is likely to be able to satisfy any judgment.

[92] By the terms of the building contract, Merivale may have access to the bonds if there is a debt due and owing to it which has not been paid within five days after demand. No such debt has arisen as yet. However, under the terms of the First Side Deed, Merivale may have access to the bonds where the work has been taken out of the hands of Descon. I have found that Descon has no *prima facie* defence to that action.

[93] Both the right to take the work out of the hands of Descon and the right to thereafter claim on the bonds, are contractual rights which Descon conceded by its bargains and now wishes to deny Merivale. Although the proposed freezing order does not operate against tangible property of Merivale,[49] it would deny Merivale the exercise of its contractual rights.

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49 *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at [50]-[51].

[94] I would not, in exercise of discretion, make a freezing order, whether under the Rules or under the inherent jurisdiction, denying Merivale the exercise of its contractual rights except where there is clear evidence of a realistic prospect that Merivale would not meet any damages award.

[95] For the reasons I have given, there is no evidence of such a danger and, in the circumstances, I would refuse the application for a freezing order.

Conclusions and orders

[96] The injunction ought to be dissolved.

[97] Descon seeks orders that the application proceed as if it was a claim and there be directions that it file and serve a statement of claim.

[98] Merivale seeks an order that the application be dismissed. It submits that Descon can file a claim with a pleading if it sees fit.

[99] In my view, there is no point in dismissing the application only to see Descon file a fresh claim. It should be ordered that the application proceed as if it were a claim. I will direct the filing of a statement of claim. The filing of other pleadings is prescribed by the UCPR.

[100] I will order the exchange of written submissions on costs and that the determination on costs be made on those written submissions without further oral hearing unless a party applies for leave to make oral submissions on costs.

Orders

[101] The orders are:

1. The injunction made on 3 October 2023 and extended on each of 5 October, 23 October and 26 October 2023 are dissolved.
2. The matter proceed as if started by claim.
3. The application is otherwise dismissed.
4. The parties exchange written submissions on costs by 4.00 pm on 15 December 2023.
5. In the absence of any application being filed by 4.00 pm on 22 December 2023 seeking leave to make oral submissions on costs, the question of costs will be decided without further oral hearing.