

**JURISDICTION** : SUPREME COURT OF WESTERN AUSTRALIA

**TITLE OF COURT** : THE COURT OF APPEAL (WA)

**CITATION** : CPB CONTRACTORS PTY LTD -v- JKC  
AUSTRALIA LNG PTY LTD  
[No 2] [2017] WASCA 123

**CORAM** : BUSS P  
MURPHY JA  
BEECH JA

**HEARD** : 25 MAY 2017

**DELIVERED** : 30 JUNE 2017

**FILE NO/S** : CACV 45 of 2017

**BETWEEN** : CPB CONTRACTORS PTY LTD  
Appellant

AND

JKC AUSTRALIA LNG PTY LTD  
Respondent

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**ON APPEAL FROM:**

**Jurisdiction** : SUPREME COURT OF WESTERN AUSTRALIA

**Coram** : LE MIERE J

**Citation** : CPB CONTRACTORS PTY LTD -v- JKC  
AUSTRALIA LNG PTY LTD [2017] WASC 112

**File No** : CIV 1453 of 2017

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*Catchwords:*

Building and construction - Provision for performance bonds - Party entitled to have recourse to performance bonds to recover amounts that are payable by other party - Whether recourse not permitted when other party disputes that it is obliged to pay the amount - Proper construction of contract - Whether injunction should be granted restraining recourse

Words and phrases - Payable - Due and payable

*Legislation:*

Nil

*Result:*

Appeal dismissed

*Category:* A

**Representation:**

*Counsel:*

Appellant : Mr J A Thomson SC & Mr M R Collins  
Respondent : Mr S K Dharmananda SC & Mr T J Palmer &  
Mr T N Owen

*Solicitors:*

Appellant : King & Wood Mallesons  
Respondent : DLA Piper Australia

**Case(s) referred to in judgment(s):**

Alcatel Australia Ltd v Scarcella [1998] NSWSC 483; (1998) 44 NSWLR 349  
Amev-UDC Finance Ltd v Austin [1986] HCA 63; (1986) 162 CLR 170  
Anaconda Operations Pty Ltd v Fluor Daniel Pty Ltd [1999] VSCA 215  
Australasian Conference Association Ltd v Mainline Constructions Pty Ltd  
(in liq) [1978] HCA 45; (1978) 141 CLR 335

- Australis Media Holdings Pty Ltd v Telstra Corporation Ltd (1998) 43 NSWLR 104
- Bachmann Pty Ltd v BHP Power New Zealand Ltd [1998] VSCA 40; [1999] 1 VR 420
- Bateman Project Engineering Pty Ltd v Resolute Ltd [2000] WASC 284; (2000) 23 WAR 493
- Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd [1998] 2 WLR 860
- Brooks v Burns Philp Trustee Co Ltd [1969] HCA 4; (1969) 121 CLR 432
- Clough Engineering Ltd v Oil & Natural Gas Corporation Ltd [2008] FCAFC 136; (2008) 249 ALR 458
- Clyne v Deputy Commissioner of Taxation [1981] HCA 40; (1981) 150 CLR 1
- EGL Management Services Pty Ltd v Northern SEQ Distributor-Retailer Authority [2011] NSWSC 1234
- Fletcher Construction Australia Ltd v Varnsdorf Pty Ltd [1998] 3 VR 812
- Geldof Metaalconstructie NV v Simon Carves Ltd [2010] EWCA Civ 667; (2010) 4 All ER 847
- George 218 Pty Ltd v Bank of Queensland Ltd (No 2) [2016] WASCA 182
- Griffin Energy Group Pty Ltd v ICICI Bank Ltd [2015] NSWCA 29; (2015) 317 ALR 395
- Helou v Mulligan Pty Ltd [2003] NSWCA 92; (2003) 57 NSWLR 74
- HJ Wigmore & Co Ltd v Rundle [1930] HCA 27; (1930) 44 CLR 222
- Laing O'Rourke Australia Construction Pty Ltd v Kawasaki Heavy Industries Ltd [2017] NSWSC 541
- Lucas Drilling Pty Ltd v Armour Energy Ltd [2013] QCA 111
- Lucas Stuart Pty Ltd v Hemmes Hermitage Pty Ltd [2010] NSWCA 283; (2010) 5 BFRA 76
- Mack v The Commissioner of Stamp Duties [1920] HCA 76; (1920) 28 CLR 373
- Mackay v Dick (1881) 6 LR App Cas 251
- Marcon Pty Ltd v Kerman Contracting Pty Ltd [2015] WASCA 7
- Rankilor v Circuit Travel Pty Ltd [2013] WASCA 148
- RCR O'Donnell Griffin Pty Ltd v Forge Group Power Pty Ltd (in liq) [2016] QCA 214
- Saipem Australia Pty Ltd v GLNG Operations Pty Ltd (No 2) [2015] QSC 173; [2016] 1 Qd R 254
- Secured Income Real Estate Australia Ltd v St Martins Investments Pty Ltd [1979] HCA 51; (1979) 144 CLR 596
- Servcorp WA Pty Ltd v Perron Investments Pty Ltd [2016] WASCA 7; (2016) 50 WAR 226
- Simic v New South Wales Land and Housing Corporation [2016] HCA 47; (2016) 91 ALJR 108
- Sugar Australia Pty Ltd v Lend Lease Services Pty Ltd [2015] VSCA 98

Water Board v Moustakas [1988] HCA 12; (1988) 180 CLR 491

Whisprun Pty Ltd v Dixon [2003] HCA 48; (2003) 77 ALJR 1598

WMC Resources Ltd v Leighton Contractors Pty Ltd [1999] WASCA 10;  
(1999) 20 WAR 489

Wood Hall Ltd v Pipeline Authority [1979] HCA 21; (1979) 141 CLR 443

## REASONS OF THE COURT:

### Introduction

1 The respondent (JKC) is the head contractor for the Ichthys LNG Project. The appellant (CPB) entered a subcontract (the Subcontract) with JKC as contractor for CPB as subcontractor to perform engineering procurement, construction and commissioning works relating to the on-shore buildings associated with the Ichthys LNG Project.

2 Under the terms of the Subcontract the subcontractor was obliged to procure performance bonds in favour of the contractor in total amounts of about \$26.1 million, that being 10% of the Subcontract price. The contractor has demanded from the subcontractor payment of liquidated damages of more than \$39 million. The subcontractor disputes the contractor's entitlement to those liquidated damages. The contractor has given notice that, based on its claimed entitlement to liquidated damages, it intends to have recourse to the performance bonds.

3 The primary judge dismissed the subcontractor's application for an interlocutory injunction restraining the contractor from demanding payment by the bank under the performance bonds. The subcontractor appeals against that decision. The main ground of appeal is that the primary judge misconstrued the provision entitling the contractor to have recourse to the performance bonds.

4 For the reasons that follow, we would dismiss the appeal. In summary, on the proper construction of the Subcontract, the contractor has a right of recourse to the performance bonds where in the circumstances it has an honest claim (ie a bona fide claim) to immediate payment under the Subcontract. On that construction, which does not differ materially from the trial judge's construction, the appeal fails.

### The Subcontract

5 The Subcontract is comprised of a number of documents including the Subcontract Form of Agreement (SFA), Subcontract General Terms and Conditions (GC), Schedule of Compensation and Work Time Schedule.<sup>1</sup>

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<sup>1</sup> Green AB 134 - 135.

6 Clause 2 of the SFA sets out, in general terms, the scope of work under the Subcontract, as set out more fully in Exhibit A - the Scope of Work.<sup>2</sup>

### Overview

7 In general terms, the Subcontract has the following features:

- (a) the subcontractor promises to perform the 'Works' in accordance with the subcontract documents (SFA cl 1(a));
- (b) the 'Works' are all those works and services described in detail in exhibit A, as may be modified by 'Change Orders' (definition of 'Works' in GC 2.1);
- (c) the 'Works' must be completed by 14 May 2015 or such other date as amended in accordance with the GC (SFA 1(b));
- (d) the subcontractor's compensation is the Subcontract Price, being the aggregate of all sums payable in accordance with exhibit D, as may be modified by Change Orders or adjusted in accordance with exhibit B (SFA 3);
- (e) the subcontractor must perform the Works to achieve the Completion Dates specified in exhibit C - Work Time Schedule, perform the Works in strict compliance with GC 'Works' so that the Completion Dates are met at no additional costs to the contractor (SFA 4); and
- (f) there is an initial Warranty Period for 12 months after the issue of a Provisional Acceptance Certificate, which may be extended in certain circumstances so as to give a total Warranty Period of 24 months (SFA 5).

### Performance - workmanship

8 In relation to the general performance of the Works, the subcontractor must not deviate from the subcontract documents or from documents approved by the contractor without the contractor's prior approval (GC 14.1). The subcontractor must carry out the Works in accordance with the subcontract documents, exercising all reasonable skill, care, diligence and good judgment, and in a professional manner in accordance with (in general terms) sound engineering practice (GC 14.1).

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<sup>2</sup> GAB 141.

**Work Time Schedule, Completion Dates and extensions of time**

9 Clause 4 of the SFA and GC 15.1(a) provide that the subcontractor must perform the Works in accordance with the Work Time Schedule and must complete each separate designated part of the Works on or before the key dates and times for completion including Milestone Dates and Completion Dates set out in the Work Time Schedule. The Work Time Schedule at exhibit C to the Subcontract provides Completion Dates for three separately designated parts of the Works.<sup>3</sup>

10 GC 15.5 provides that if the subcontractor can demonstrate that the Completion Dates or Milestone Dates will be delayed due to one or more of the specified reasons affecting the critical path of the latest Work Time Schedule, the subcontractor is entitled to a time extension to the Completion Dates and Milestone Dates, with the corresponding modification to the Work Time Schedule for that part of the work so affected. GC 15.6 sets out certain conditions precedent to any time extension in favour of the subcontractor.

11 GC 15.7 provides that any and all extensions to the Completion Date(s) and Milestone Date(s) and corresponding modifications to the Work Time Schedule must be made under sub-GC 15.5. Failing agreement between the parties, the contractor will fairly determine any question of extension. The subcontractor is entitled to dispute any determination made by the contractor.

12 Thus, the effect of GC 15 is that extensions to the Completion Date and Milestone Date are as determined by the contractor acting fairly, subject to the subcontractor raising a dispute under GC 57, in which case the position will be as ultimately resolved through agreement or arbitration.

13 By GC 15.9, the Work Time Schedule and the Completion Dates must not be modified by the subcontractor unless approved or by means of a time extension in accordance with GC 15.

**Hand Over and Provisional Acceptance Certificate**

14 GC 19 deals with provisional acceptance by the contractor for work done by the subcontractor. GC 19.1 provides for the issue of Hand Over Certificates when all relevant works for a specific phase of the Works have been completed (save for minor outstanding work which does not affect the safe operation of the Plant). GC 19.3 provides for the issue of a

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<sup>3</sup> GAB 433.

Provisional Acceptance Certificate. In substance, a Provisional Acceptance Certificate is a certificate issued by the contractor that the subcontractor has duly completed the relevant Works in accordance with the Subcontract requirements.<sup>4</sup> As its name suggests, the issue of a Provisional Acceptance Certificate does not release the subcontractor from responsibilities or liabilities which expressly or by their nature survive the relevant certificate.<sup>5</sup> Among these responsibilities and liabilities are those in GC 20, referred to immediately below.

## Warranties

15 GC 20 provides for guarantee and warranty obligations on the part of the subcontractor. GC 20.3 sets out detailed obligations of rework, repair or replacement, and makes various other provisions. By GC 20.4(a), the subcontractor must make good any defects or deficiencies in the Works for an initial Warranty Period of 12 months from the date of the Provisional Acceptance Certificate, and as extended under GC 20.4(b) and GC 20.4(c) (which relate to rework and periods of plant stoppages respectively). The maximum duration of the extended Warranty Period is 24 months from the Provisional Acceptance Certificate.<sup>6</sup> See also cl 5 of the SFA.<sup>7</sup>

16 Under GC 21, at the end of the Warranty Period the subcontractor is entitled to a Final Acceptance Certificate if it has complied with its obligations under the Subcontract, and has paid and satisfied in full all outstanding obligations against the Plant and Works.

## Variations - Change Orders

17 In relation to, in effect, variations, the Subcontract provides for both Change Orders initiated by the contractor, and Change Orders initiated by the subcontractor. Where the contractor initiates, by direction, a Change Order, the subcontractor must promptly submit details of the consequences of the direction, including as to the Subcontract price and Work Time Schedule and Completion Dates. If the contractor decides to proceed with the Change Order and accepts the subcontractor's estimate of consequences, the contractor must issue a written Change Order (GC 22.1). If there is a dispute about the valuation of a change in the Subcontract price, the contractor is to make a determination, although the

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<sup>4</sup> GAB 203.

<sup>5</sup> GC 19.4.

<sup>6</sup> GC 20.4(e).

<sup>7</sup> GAB 142.

subcontractor may dispute the determination under the dispute resolution procedure, including in arbitration, in GC 57 (GC 22.2).

18 Where a change involves an adjustment to the Work Time Schedule, any adjustment is to be calculated in accordance with GC 15.

19 The subcontractor may initiate a Change Order where the costs of performing the Works are increased by certain events, including any breach by the contractor (GC 22.4(a)). The subcontractor is not entitled to a subcontractor initiated Change Order unless it provides certain information and gives certain notice (GC 22.4(b) - (f)). The contractor is to determine the subcontractor's claim for costs increases in accordance with GC 22.2 (GC 22.4(g)).

### **Price and Invoices**

20 GC 32 provides for the Subcontract price. After execution of a deed of amendment, the Subcontract price was (a minimum of) \$261 million.<sup>8</sup>

21 GC 34 deals with the procedures for invoicing and payment. The effect of GC 34 and GC 34.2 is that when the subcontractor submits a progress claim, the contractor can dispute it or parts of it, and may withhold payment of any disputed part of any progress claim until resolution of the dispute. GC 34.5(a) provides that the contractor may deduct from any sums due to the subcontractor all or any sums due to the contractor by the subcontractor under the Subcontract including any sums due as a result of the matters specified in subpars (i) - (vi) par (a) of GC 34.5. GC 34.5(c) provides that if sums due by the subcontractor exceed the amount of sums due by the contractor, the subcontractor must immediately pay the difference to the contractor. GC 34.5 provides for final assessment and the final invoice. Within 50 days after the issue of the last Provisional Acceptance Certificate, the subcontractor will submit a detailed final assessment of all sums paid and payable by each to the other.<sup>9</sup>

### **Advance payment to subcontractor**

22 The Subcontract provides for the contractor to pay the subcontractor an Advance Payment of \$10 million. That payment is to be reduced over the contract period through percentage deductions, at the rate of 8%, of the amounts invoiced for each subsequent invoice issued by the subcontractor (GC 34.9, exhibit B).

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<sup>8</sup> Primary reasons [8].

<sup>9</sup> GC 34.6(a).

**GC 35: Bank Guarantees**

23 The introductory part of GC 35 provides that the subcontractor thereby agrees to provide irrevocable guarantee(s) provided by an approved bank, insurance company or other financial institution (as the case may be) payable on first demand of the contractor and a Parent Company Guarantee to guarantee the due performance of the subcontractor's obligations under the Subcontract as provided in the remaining part of GC 35. The irrevocable guarantees provided by an approved bank, insurance company or other financial institution are referred to in the Subcontract as Bank Guarantees. GC 35.1(a) prescribes the form of Bank Guarantees. It provides that:

- (i) ... the Bank Guarantees must be capable of being drawn upon and enforced by Contractor in Australia.
- ...
- (iii) each Bank Guarantee must contain an unconditional and irrevocable undertaking by the Approved bank, insurance company or other financial institution (as the case may be) to pay to Contractor the amount of the security on demand without notice being given to Subcontractor by the bank, insurance company or other financial institution ... each proforma in [Annexure 1A (form of Bank Guarantee) is approved].

24 The proforma Bank Guarantee includes the following provisions:

- 2. The Financial Institution hereby irrevocably and unconditionally undertakes to pay to the Contractor, forthwith upon written demand from the Contractor, any amount specified in such demand, which when aggregated with all such amounts previously paid under this document does not exceed the Guaranteed Amount.
- 3. The Financial Institutions' obligation to make payment under this document shall arise on receipt of a demand without proof of any breach or any other conditions and notwithstanding any contest or dispute by the Subcontractor. The Financial Institution shall not be required or permitted to make any other investigation or enquiry or notify the Subcontractor prior to the satisfaction of the demand.
- ...
- 6. The obligations of the Financial Institution under this document act as primary obligor and not by way of surety. The Financial Institution shall not be entitled as against the Contractor to make

any withholding or deduction on account of any set-off or counterclaim whatsoever and howsoever arising.<sup>10</sup>

25 GC 35.1(b) provides that the initial amount of the Bank Guarantee be 10% of the Subcontract price, to be provided as two guarantees: the Initial Bank Guarantee and the Warranty Bank Guarantee each equal to 5% of the price.

26 GC 35.1(c) provides for the duration of the Bank Guarantees. The Initial Bank Guarantee is required to be valid until the effective date of the last Provisional Acceptance Certificate issued pursuant to GC 19.3. The Warranty Bank Guarantee is required to be valid until 30 days after the expiry of the last Warranty Period, being the periods stipulated in GC 20.4. By GC 35.1(f) the contractor must return the Initial Bank Guarantee when the last Provisional Acceptance Certificate is issued, and must return the Warranty Bank Guarantee within 40 days after the expiry of the last Warranty Period.

27 GC 35.2 provides for a Parent Company Guarantee by Leighton Holdings Ltd of the subcontractor's performance of all its obligations under the Subcontract. The form of Parent Company Guarantee provides that it creates primary obligations on the part of the guarantor Leighton, and that the contractor was not obliged to take any step or make any claim against the subcontractor before enforcing its rights under the Parent Company Guarantee.

28 The proper construction of GC 35.3 is the central issue in this appeal. GC 35.3 provides as follows:

- (a) Contractor may have recourse to the Bank Guarantee(s) at any time in order to recover any amounts that are payable by Subcontractor to Contractor on demand.
- (b) Subcontractor waives any right that it may have to obtain an injunction or any other remedy or right against any party in respect of Contractor having recourse to the Bank Guarantee(s).

29 GC 35.4 makes provision as to the proceeds of security as follows:

- (a) If Contractor calls on a Bank Guarantee or a Parent Company Guarantee at any time, the balance of the proceeds (if any) after deducting amounts due and payable to Contractor by Subcontractor must be deposited by Contractor into an interest bearing account with an Australian bank (as defined in the *Corporations Act 2001* (Cth)) in the name of Contractor.

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<sup>10</sup> GAB 303 - 304.

- (b) Any interest accrued on the account balance must be retained by Contractor in the account and added to the balance of the proceeds held.
- (c) Contractor is entitled to withdraw from the account amounts due and payable to it by Subcontractor from time to time.
- (d) Neither Contractor nor the bank by whom the proceeds are held is to be deemed to hold the proceeds (or the balance thereof from time to time) on trust for Subcontractor, but Contractor must pay the balance in the account (if any), including all accrued interest, to Subcontractor on the expiry of the Warranty Period.

### Liquidated damages

30 GC 36 provides for liquidated damages to be payable by the subcontractor to the contractor in accordance with Exhibit B, Schedule of Compensation if the subcontractor fails to complete the relevant part of the Works by the relevant Completion Date or Milestone Date. Clause 5 of the Schedule of Compensation provides a daily rate of liquidated damages payable for each of the six stipulated completion events, in each case based on the absence of a Handover Certificate in relation to the relevant part of the Works.<sup>11</sup> GC 36.1(b) provides:

Subject to Contractor's rights and remedies provided for under Article 35, sub-Articles 36.3 to 36.5 and Article 50, the payment of liquidated damages under sub-Article 36.1(a) is the sole and exclusive financial remedy of Contractor in respect of Subcontractor's failure to complete the relevant part of the Works by the Completion Date(s) or Milestone Date(s).

31 Liquidated damages are agreed at 15% of the Subcontract price. Taking into account the amendment, the cap for liquidated damages is \$39.225 million. GC 36.3, 36.4 and 36.5 provides as follows:

#### 36.3 Other obligations

Without prejudice to sub-Article 36.1, the payment of liquidated damages under this Article 36 or elsewhere in the Subcontract does not prevent Contractor from exercising any other rights and remedies provided for under the Subcontract (including for the avoidance of doubt its rights under Article 20, sub-Article 35.3 and Article 50), and does not relieve Subcontractor from its obligations to diligently complete the Works ...

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<sup>11</sup> GAB 418 - 419.

**36.4 Genuine Pre-Estimate**

All amounts of such liquidated damages for which Subcontractor may become liable under the Subcontract are agreed to be a genuine pre estimate of the loss which may be sustained by Contractor in the event that Subcontractor fails to comply with the relevant obligation under the Subcontract and are not a penalty.

**36.5 Enforceability of liquidated damages**

If liquidated damages are found not to be payable or the provisions in the Subcontract in relation to liquidated damages are found to be invalid or unenforceable for any reason, then the Parties agree that Subcontractor's liability to Contractor will instead be for general damages at law for Subcontractor's failure to comply with the relevant obligation which shall in no event exceed the amount of the Liquidated Damages calculated in accordance with the Subcontract.

**Dispute Resolution**

32 GC 57 is a dispute resolution clause. It provides as follows:

- (a) In the event of Dispute between the subcontractor and contractor, either party may give the other party a written notice adequately identifying the matters the subject of the Dispute.
- (b) The parties must endeavour to settle by negotiation any Dispute and all the consequences thereof. The parties must confer at least once within 10 days of the notice of dispute to attempt to resolve the Dispute and failing resolution of the Dispute to explore alternative methods of resolving the Dispute. At any such conference each party must be represented by a person having authority to agree to a resolution of the Dispute.
- (c) The parties will endeavour to settle such Dispute by negotiation within 35 days from receipt of the notice of Dispute.
- (d) All Disputes are to be settled by final and binding arbitration. If the parties fail to settle the Dispute by negotiation within the period of time set out in sub-GC 57.3, either party may refer the Dispute to international arbitration in accordance with GC 57.

33 GC 57(m) provides that neither party is prevented or restrained by GC 57 from applying to a court to seek urgent relief (including injunction or conservatory measures).

**The background to this dispute**

34 The following background facts are taken from the primary judge's reasons, and are not challenged.

35 Pursuant to its obligation under GC 35 of the Subcontract, the subcontractor procured four unconditional undertakings, by two of which Swiss Re undertook to pay upon demand from the contractor any amount not exceeding \$6,363,091.05, and by two of which Swiss Re-undertook to pay to the contractor upon demand any amount that does not exceed \$6,686,936.00. The primary judge referred to the four unconditional undertakings as the Bonds. We will do the same. The Bonds are in the same terms as the proforma Bank Guarantee of Annexure 1A of the Subcontract.<sup>12</sup> They total approximately \$26 million, being 10% of the Subcontract price.

36 Between April 2015 and December 2016, the subcontractor submitted eight extensions of time claims (EOT claims). The contractor rejected entirely three of the EOT claims, and granted time extension and delay costs in relation to the remaining claims. Between 24 March 2016 and 23 February 2017 the subcontractor issued notices of dispute under GC 57 of the Subcontract in relation to the contractor's rejection or assessment of the subcontractor's eight EOT claims. The subcontractor has made a further EOT claim which was also rejected by the contractor.<sup>13</sup>

37 By letter of 28 February 2017 the contractor asserted that the completion dates incorporating the extensions granted had not been achieved and that the subcontractor was liable to pay liquidated damages in the contractual maximum amount of \$39.225 million.

38 On 10 March 2017, the subcontractor wrote to the contractor setting out in detail the reasons the subcontractor asserted that the contractor had no present entitlement to liquidated damages and giving notice under GC 57(a) of the dispute in relation to the demand for liquidated damages. The subcontractor's letter demanded that the contractor either withdraw its demand for payment of liquidated damages or provide an undertaking that it would not pursue payment of liquidated damages including by way of relief by making demand for payment under the Bonds. By letter of 16 March 2017, the contractor took issue with the subcontractor's

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<sup>12</sup> Primary reasons [15].

<sup>13</sup> Primary reasons [17].

assertions and said that it would not withdraw its demand for payment of liquidated damages nor provide any undertakings.<sup>14</sup>

39 By letter of 16 March 2017, the contractor stated that the due date for payment of liquidated damages had passed, asserting that those damages in the sum of \$39.225 million were due and payable and reserving all rights including under GC 35.3 of the Subcontract.<sup>15</sup>

40 On 17 March 2017 the subcontractor wrote again requesting confirmation that the contractor had no intention of calling on the subcontractor's security.<sup>16</sup>

41 On 18 March 2017, the subcontractor issued a notice of dispute under GC 57 (the Bond Dispute Notice). The notice stated that the dispute related to the contractor's entitlement to call on the Bonds in reliance on its demand for the payment of liquidated damages in the sum of \$39.225 million. In its letter of 18 March 2017 in response, the contractor stated that as it had not made any call on the Bonds GC 57 was not properly engaged and any attempt to engage that Article was premature. Further, the contractor's letter stated that engagement of the GC 57 process on the question of entitlement to call on the Bonds would defeat the very purpose of the Bonds, and no such undertaking would be provided.<sup>17</sup>

**The subcontractor commences proceedings**

42 On 20 March 2017, the subcontractor commenced the primary proceedings, claiming an injunction restraining the contractor from demanding or receiving any payment from Swiss Re pursuant to the Bonds until after the determination of the validity and extent of the EOT claims made by the subcontractor. In the alternative, the subcontractor claimed an injunction requiring the contractor to comply with the dispute resolution process in GC 57 and restraining the contractor from taking any step, including calling upon the Bonds, which would prevent the contractor from complying with a dispute resolution process in GC 57 in respect of the Bond Dispute Notice.

43 At the same time, the subcontractor applied for an interlocutory injunction in the same terms.

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<sup>14</sup> Primary reasons [20].

<sup>15</sup> Primary reasons [21].

<sup>16</sup> Primary reasons [21].

<sup>17</sup> Primary reasons [22].

44 The primary judge granted an ex parte interim injunction on 21 March 2017. On 22 March 2017 he extended the operation of that injunction until the application for an interlocutory injunction could be heard.

45 That brings us to the primary judge's reasons on the subcontractor's application for an interlocutory injunction.

### **The primary judge's reasons**

46 The primary judge first dealt with the contractor's contention to him that the proceedings before him should be stayed and the parties referred to arbitration because the Dispute was the subject of an arbitration agreement. The primary judge found that the proceedings generally were within the exception, referred to as the 'carve out', in GC 57(m).<sup>18</sup>

### **The proper construction of GC 35.3(b)**

47 The primary judge then considered the contractor's contention that the effect of GC 35.3(b) was that the subcontractor had waived the right to seek an injunction from the court and that the subcontractor could only seek relief from an arbitral tribunal. In the primary proceedings, both parties agreed that if the clause was construed according to its ordinary meaning it was an impermissible ouster of the court's jurisdiction and consequently was invalid and unenforceable. However, both parties submitted to the primary judge that the clause was to be read down so that it was not an impermissible ouster of the court's jurisdiction, albeit that the parties put different contentions as to how the clause was to be construed.<sup>19</sup>

48 The contractor submitted to the primary judge that GC 35.3(b) should be interpreted as a waiver of the right to seek urgent relief otherwise provided for in GC 57, in other words a waiver of a right that it might have to seek urgent relief from the court pursuant to GC 57(m) in relation to the Bank Guarantees. The primary judge found that GC 35.3(b) was not capable of being read in that restricted way given its broad language, including the words 'any right'. Further, the clause provides that the subcontractor waives any right to obtain 'any remedy', which encompasses an award of damages or relief other than urgent relief the subject of GC 57(m).<sup>20</sup>

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<sup>18</sup> Primary reasons [33] - [42].

<sup>19</sup> Primary reasons [44].

<sup>20</sup> Primary reasons [51].

49 The primary judge found that on its proper construction GC 35.3(b) provides that the subcontractor waives any right that it may have to obtain an injunction or any other remedy from a court or an arbitral tribunal and waives any right against any party, including the contractor and the bank issuing the Bank Guarantees, in respect of the contractor having recourse to the Bank Guarantees.<sup>21</sup>

### **GC 35.3(b) as an ouster of the court's jurisdiction**

50 His Honour then found that, in accordance with the concessions made by both parties, GC 35.3(b) as he had construed it was an impermissible ouster of the court's jurisdiction and was thereby invalid.<sup>22</sup> His Honour referred to the distinction between contracts which seek to oust the jurisdiction of the courts and those which place a limit on the rights and remedies available to parties. He found that GC 35.3(b) takes away not only the subcontractor's right to obtain an injunction, but also the subcontractor's right to obtain damages or any other remedy in respect of the contractor's breach of contract in having recourse to the Bank Guarantees in breach of the relevant terms of the Subcontract. Consequently, GC 35.3(b) was a provision ousting the jurisdiction of the court and was void.<sup>23</sup>

### **The effect of the Bond Dispute Notice**

51 His Honour then considered and rejected the subcontractor's contention that the effect of the Bond Dispute Notice was, on a proper construction of the Subcontract, that the final determination of the proper construction and application of GC 35.3(a) to the Bond Dispute had been committed to arbitration and could not be determined by the court, in that if the contractor called upon the Bonds the arbitration process would be defeated. He found that nothing in GC 57 or any other part of the provisions of the Subcontract restrained the contractor from exercising any right under the Subcontract merely because the subcontractor had given notice of a dispute in which the subcontractor asserted that the contractor was not entitled to exercise the right. Rather, the contractor was free to exercise any right under the Subcontract unless and until it was restrained from doing so, by an order of the court or arbitrator, notwithstanding that the subcontractor had invoked the dispute resolution process.<sup>24</sup>

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<sup>21</sup> Primary reasons [52].

<sup>22</sup> Primary reasons [53] - [56].

<sup>23</sup> Primary reasons [56].

<sup>24</sup> Primary reasons [61].

**The proper construction of GC 35.3(a)**

52 The primary judge determined that, because the subcontractor's application for an interlocutory injunction turns on the proper construction of GC 35.3(a), and because there was nothing in the circumstances that made it not practicable or appropriate to do so, the court should determine the proper construction of GC 35.3(a).<sup>25</sup> In doing so, his Honour followed the approach taken by the Court of Appeal of Victoria in *Sugar Australia Pty Ltd v Lend Lease Services Pty Ltd*.<sup>26</sup> Before the primary judge the subcontractor did not challenge that approach, and invites the same approach by this court on appeal.<sup>27</sup>

53 The primary judge considered some of the authorities regarding injunctions restraining payment under performance bonds. He identified three major categories of cases in which such injunctions have been granted: where the demand is fraudulent; where the demand is unconscionable; or where the contract between the parties contains conditions preventing the beneficiary of the performance bond from calling on the guarantee in the events that have happened.

54 His Honour outlined the approaches taken in *Clough Engineering Ltd v Oil & Natural Gas Corporation Ltd*,<sup>28</sup> and in *Lucas Stuart Pty Ltd v Hemmes Hermitage Pty Ltd*.<sup>29</sup> The primary judge observed that in *Lucas Stuart*, the court took as a starting point the existence of only the purpose of providing security in the event of insolvency of the contractor and looked for indications that might support the possible second purpose, namely to be a risk allocation device pending determination of the dispute between the parties. In *Clough Engineering*, the court gave weight to the nature of performance bonds as an unconditional undertaking and the importance of such bonds in the construction industry, and presumed that both purposes were intended unless expressly qualified.<sup>30</sup>

55 On appeal, the subcontractor does not criticise his Honour's analysis of the cases, but points out, correctly, that his Honour did not identify which of the two approaches he preferred.

56 His Honour then turned to the central question of the proper construction of GC 35.3(a). His Honour gave the following reasons for

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<sup>25</sup> Primary reasons [62] - [66].

<sup>26</sup> *Sugar Australia Pty Ltd v Lend Lease Services Pty Ltd* [2015] VSCA 98 [53], [11].

<sup>27</sup> Subject to ground 1: appellant's submissions [47].

<sup>28</sup> *Clough Engineering Ltd v Oil & Natural Gas Corporation Ltd* [2008] FCAFC 136; (2008) 249 ALR 458.

<sup>29</sup> *Lucas Stuart Pty Ltd v Hemmes Hermitage Pty Ltd* [2010] NSWCA 283; (2010) 5 BFRA 76.

<sup>30</sup> Primary reasons [72].

rejecting the subcontractor's contention that the contractor's right to call on the Bank Guarantees is conditioned upon the objective fact that an amount is payable on demand.

57 First, the structure of the Subcontract is inconsistent with the contractor only having the right to demand payment of an amount if the amount is actually and indisputably payable. GC 35 is found in ch V, the subject matter of which is Financial Conditions of the Subcontract. The settlement of disputes is dealt with in GC 57, found in ch XI.<sup>31</sup>

58 Secondly, GC 35 provides, in its introductory component, that the subcontractor agrees to provide irrevocable guarantees 'payable on first demand of Contractor'. The primary judge found that a first demand guarantee is, by its nature, a guarantee that must be honoured by the guarantor and upon the beneficiary's demand. The purpose of such a guarantee would be defeated if the beneficiary were required to establish by an arbitration award or court judgment or some other means that the amount demanded was actually and indisputably payable.<sup>32</sup>

59 Next, his Honour found that the form of the guarantee militates against the subcontractor's construction. The bank's obligation is unconditional. It arises without proof of any breach and notwithstanding any contest or dispute by the subcontractor. Thus, both parties know that the bank's obligation is to pay despite any disputes between the parties. Further, the contractor is not required to notify the subcontractor before making demand to the bank and the bank may not notify the subcontractor before satisfying the demand. The primary judge found that the essence of such notice provisions reinforced the conclusion that the contractor's entitlement to call on the Bank Guarantees was not conditional upon it being established that the amount demanded is actually and indisputably payable.<sup>33</sup>

60 The judge observed that the provision in GC 35.3(a) that recourse may be had 'at any time' and that recourse could be had to recover amounts that were payable 'on demand' both militated against the subcontractor's construction.<sup>34</sup>

61 The primary judge also referred to GC 35.4(a) which provides for any balance of proceeds to be deposited by the contractor into an interest

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<sup>31</sup> Primary reasons [74].

<sup>32</sup> Primary reasons [75].

<sup>33</sup> Primary reasons [76].

<sup>34</sup> Primary reasons [77].

bearing bank account. His Honour observed that the prospect of a balance pointed against the subcontractor's construction.<sup>35</sup>

62 The primary judge also considered it was unlikely that by GC 35 the subcontractor agreed to provide a Parent Company Guarantee that guarantees due performance without the need to establish that the amount was actually and indisputably payable, while also providing for a bank guarantee that provides for payment only after it is established that the amount was actually and indisputably payable.<sup>36</sup>

63 His Honour rejected the subcontractor's submission that the absence of a provision for repayment if it is found later upon arbitration to have been wrongly called upon militated in favour of its construction. The primary judge considered that the absence of a recovery provision was neutral in that it was consistent with the parties intending that the subcontractor was left to its general law remedies to recover such amounts.<sup>37</sup>

64 His Honour concluded that the text and structure of GC 35, in the context of the Subcontract as a whole, including the proforma bank guarantee, revealed that the purpose of the provisions relating to the Bank Guarantees was not only to protect the contractor from the insolvency of the subcontractor but also to ensure that the contractor would have the funds during the dispute between the parties. That is, the clause was an allocation of risk where there is a dispute.<sup>38</sup>

65 Thus, his Honour concluded that the subcontractor had not made out its case that on the proper construction of GC 35.3(a) the contractor was only entitled to have recourse to the Bank Guarantees if an amount was actually objectively or indisputably payable by the subcontractor to the contractor. On that ground the subcontractor's application failed.

### **Balance of convenience**

66 His Honour went on to say, in the alternative, that if he had found that the subcontractor had made out a prima facie case, he would have refused the injunction because the balance of convenience favoured the refusal of an interlocutory injunction. In that respect his Honour observed that the Bank Guarantees are a risk allocation device, and that the subcontractor had agreed to provide to the contractor unconditional

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<sup>35</sup> Primary reasons [78].

<sup>36</sup> Primary reasons [79].

<sup>37</sup> Primary reasons [80].

<sup>38</sup> Primary reasons [81].

irrevocable Bank Guarantees payable on first demand without notice to the subcontractor. His Honour concluded that the purpose of the Bank Guarantees, and the provisions in the Subcontract relating to them, would be defeated if the contractor was restrained from calling on the Bank Guarantees until the dispute concerning extensions of time and liquidated damages had been resolved by arbitration.<sup>39</sup>

**Grounds of appeal**

67 The subcontractor's grounds of appeal are as follows:

1. (a) The primary judge erred in law in holding that no part of article 57 of the subcontract general terms and conditions in the subcontract between the parties restrained the respondent from exercising its right under article 35.3(a) to call upon bank guarantees, where the existence of this right was disputed and the appellant had invoked the dispute resolution process in article 57 to resolve this dispute.
- (b) The primary judge should have held that it was an implied term of the subcontract that the respondent was bound to do all things necessary on its part to enable the appellant to have the benefit of the contractually agreed dispute resolution process in article 57 in respect of a dispute over the proper construction of article 35.3(a) which had been properly committed to that process.
- (c) The primary judge should have further held that an injunction should be granted to restrain the respondent from calling upon bank guarantees pursuant to article 35.3(a) of the subcontract until completion of the dispute resolution process in article 57 in respect of a dispute over the proper construction of article 35.3(a).
2. (a) Alternatively to ground 1, the primary judge erred in law in holding that, upon its proper construction, article 35.3(a) of the subcontract between the parties does not contain an implied negative stipulation that the respondent will not demand payment under bank guarantees unless an amount is actually, objectively or indisputably payable by the appellant to the respondent.
- (b) The primary judge should have construed article 35.3(a) of the subcontract between the parties as containing an implied negative stipulation that the respondent will not demand payment under bank guarantees unless an amount

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<sup>39</sup> Primary reasons [84].

is actually, objectively or indisputably payable by the appellant to the respondent.

3. (a) Further to ground 2, the primary judge erred in law in determining that, if he had been required to determine the balance of convenience upon the basis of the construction of article 35.3(a) referred to in ground 2(b), he would have refused an injunction upon the basis that calls upon bank guarantees under article 35.3(a) were for the purposes of allocating risk between the parties as to who was to be in possession of funds pending determination of a dispute between the parties,
- (b) The primary judge ought to have finally determined that article 35.3(a) should be construed as referred to in ground 2(b).

**Notice of contention**

68 The contractor contends that the primary judge's decision should be upheld on the basis that GC 35.3(b) is not, contrary to the judge's findings, void as an ouster of the court's jurisdiction, but operates to prevent the subcontractor from seeking injunctive relief in relation to the performance bonds.

69 We begin with consideration of the merits of the contractor's contention insofar as it relates to the proper construction of GC 35.3(b). That is because, as we will explain, GC 35.3(b), properly construed, bears significantly upon the proper construction of GC 35.3(a).

**The merits of the notice of contention: the proper construction of GC 35.3(b)**

70 The contractor's submissions in support of its notice of contention involve two steps. First, the contractor submits that the primary judge erred in his construction of GC 35.3(b). Secondly, the contractor submits that, on the correct construction of the clause, it is not an ouster of the court's jurisdiction.

71 As the contractor concedes,<sup>40</sup> by its contention the contractor advances a construction of GC 35.3(b) that it did not advance to the primary judge.

72 Generally, a party will not be permitted to raise a point on appeal that was not raised at trial. However, where all the facts have been established

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<sup>40</sup> Respondent's contention submissions [3].

or where the point is one of construction or of law, an appeal court may find that it is in the interests of justice to entertain the point.<sup>41</sup> The subcontractor properly conceded that it was not prejudiced by the new argument of construction advanced by the contractor.<sup>42</sup> This is a case where the point could not possibly have been met by further evidence at trial, and where it is in the interests of justice to allow the point to be run on appeal.

73 The primary judge found that the waiver in GC 35.3(b) encompasses all rights and remedies in relation to recourse to the Bank Guarantee by the contractor, including a claim by the subcontractor for damages on the ground that the contractor had recourse to the Bank Guarantee when it was not entitled to do so.<sup>43</sup> For the reasons explained immediately below, we respectfully take a different view as to the proper construction of GC 35.3(b).

74 In our opinion, the language of GC 35.3(b), and its context within GC 35 as a whole, support a construction of the clause as relating only to prospective relief in advance of recourse to the Bank Guarantees by the contractor. The waiver is expressed to be in respect of the contractor 'having recourse to the Bank Guarantee', not having had recourse, and not as a consequence of recourse had by the contractor. That language reflects and reveals an objective intention that the subcontractor waives its right to claim any relief as to prospective recourse by the contractor. There is no waiver of rights and remedies in relation to recourse already had by the contractor. Although the subcontractor's written submissions suggested otherwise,<sup>44</sup> in oral submissions the subcontractor conceded that this was so.<sup>45</sup> Thus, a claim by the subcontractor for damages arising from the contractor having had recourse to the Bank Guarantees in circumstances when it was not entitled to do so would not be affected by GC 35.3(b). GC 57(m) preserves the right of each party to apply to a court for urgent relief, including an injunction. That general provision is subject to the specific provision in GC 35.3(b) concerning injunctions or other remedies in respect of the contractor having recourse to the Bank Guarantee. The waiver in GC 35.3(b) applies to both court proceedings and to an application for orders in an arbitration.

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<sup>41</sup> *Water Board v Moustakas* [1988] HCA 12; (1988) 180 CLR 491, 497; *Whisprun Pty Ltd v Dixon* [2003] HCA 48; (2003) 77 ALJR 1598 [51] - [52]; *Rankilor v Circuit Travel Pty Ltd* [2013] WASCA 148 [18].

<sup>42</sup> Appellant's reply submissions [2].

<sup>43</sup> Primary reasons [51], [56].

<sup>44</sup> Appellant's reply submissions [8] - [13].

<sup>45</sup> Appeal ts 137.

75 The question then would be whether GC 35.3(b), so construed, is void as an attempt to oust the jurisdiction of the court. It is not necessary to deal with that question because, as we explain in dealing with ground 2, even if GC 35.3(b) were void as contrary to public policy, it would nevertheless be permissible and appropriate to have regard to it in construing GC 35.3(a), and because, for the reasons below, both grounds of appeal fail.

**Ground 1: the effect of the Bond Dispute Notice**

76 By ground 1, the subcontractor asserts that the primary judge erred in failing to grant an injunction to restrain the contractor from calling upon the Bank Guarantees while the bond dispute was subject to the dispute resolution process in GC 57. In support of that contention, it submits as follows:

- (1) A dispute had arisen in relation to the contractor's threat to call upon the Bank Guarantees, and the subcontractor had committed that dispute to the agreed dispute resolution process under GC 57.
- (2) If the contractor exercises its disputed right to call upon the Bank Guarantees, the dispute resolution process will be defeated because the Bank Guarantees would have been called and could never be reinstated. Whether the subcontractor was entitled to return of an amount from the contractor would be a different issue the subject of a different dispute process.<sup>46</sup>
- (3) Every party to a contract is bound to do all things necessary on its part to enable the other party to have the benefit of the contract.<sup>47</sup>
- (4) In order to enable the subcontractor to have the benefit of the contractually agreed dispute resolution process, it having committed the bond dispute to that process, the contractor was bound to do all things necessary to enable the subcontractor to have the benefit of that process.
- (5) Consequently, the contractor should be restrained from calling upon the Bank Guarantees because to do so would undermine the contractually agreed dispute resolution process.<sup>48</sup>

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<sup>46</sup> Appellant's submissions [35].

<sup>47</sup> Referring to *Secured Income Real Estate Australia Ltd v St Martins Investments Pty Ltd* [1979] HCA 51; (1979) 144 CLR 596, 607; *Mackay v Dick* (1881) 6 LR App Cas 251, 263.

<sup>48</sup> Appellant's submissions [39] - [43].

77 In our view, the implied duty to cooperate does not sustain the subcontractor's contentions in ground 1. The implied duty to cooperate does not rise above the promises made by the parties to the contract. The duty 'cannot override the express provisions of the contract'.<sup>49</sup> A duty to cooperate cannot be imposed on a party so as to compel that party to bring about a circumstance or result which the contract does not require.<sup>50</sup> By GC 35.3(a) the contractor has a right against the subcontractor to have recourse to the Bank Guarantee(s) at any time. The implied duty of cooperation cannot be extended so as to substantially impair the contractor's express contractual right under GC 35.3(a).

78 On a proper construction of the Subcontract the fact that a party has invoked the contractual dispute resolution procedure in respect of a dispute does not mean that the status quo must be preserved pending resolution of the dispute. We agree, with respect, with the primary judge's conclusion that no part of GC 57, or any other provision of the Subcontract, or we would add, any implied duty of cooperation, restrains the contractor from exercising any right under the Subcontract merely upon the subcontractor having given notice of a dispute in which the subcontractor asserts that the contractor is not entitled to exercise the right.<sup>51</sup>

79 For these reasons, ground 1 fails. We turn to ground 2.

### **Ground 2: the subcontractor's submissions**

80 Ground 2 asserts that the primary judge erred in his construction of GC 35.3(a). The subcontractor submits that on a proper construction of GC 35.3(a), an amount is 'payable' within the meaning of that clause only if, objectively and indisputably, in the events that have happened, the subcontractor has a contractual obligation under the Subcontract to pay the amount. On the subcontractor's construction, if and to the extent that the subcontractor disputes its liability to pay an amount, and has invoked GC 57 in relation to that dispute, no amount is payable within the meaning of GC 35.3(a) unless and until it is so determined after arbitration under the dispute resolution procedure.<sup>52</sup> C 35.3(a) should be

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<sup>49</sup> *Alcatel Australia Ltd v Scarcella* [1998] NSWSC 483; (1998) 44 NSWLR 349, 368; *Servcorp WA Pty Ltd v Perron Investments Pty Ltd* [2016] WASCA 7; (2016) 50 WAR 226 [82].

<sup>50</sup> *Australis Media Holdings Pty Ltd v Telstra Corporation Ltd* (1998) 43 NSWLR 104, 124- 125; *Servcorp v Perron* [83].

<sup>51</sup> Primary reasons [61].

<sup>52</sup> Ground 2(b); appellant's submissions [76]; appeal ts 79 - 80, 83, 95 - 96, 107.

construed as serving the sole purpose of protection of the contractor against the risk of insolvency of the subcontractor.<sup>53</sup>

81 The subcontractor's submissions in support of that construction include the following:

- (1) The language of GC 35.3(a) ('amounts that are payable') does not make any reference to the opinion or belief of the contractor. Rather, it makes the criterion the apparently objective fact that an amount is payable. That may be contrasted with various other parts of the Subcontract in which there is reference to the opinion of the contractor.<sup>54</sup>
- (2) The Subcontract does not make any provision for repayment by the contractor of an amount it recovers under the Bank Guarantee which exceeds the amount ultimately found to be payable for liquidated damages. That absence of express provision itself indicates that it is only amounts that are actually and objectively payable that can be recovered under GC 35.3(a).<sup>55</sup>
- (3) It is wrong to give, and the primary judge erred in giving, weight, or excessive weight, to the unconditional form of the performance bond. The form of the performance bond reflects the obligations of the financial institution, and can be seen as being for the protection of that institution. Consequently, it should not be taken as indicative of the objective contractual intention as between the contractor and the subcontractor.<sup>56</sup>
- (4) In GC 35.4(a) and GC 35.4(c), the word payable, used in the phrase 'due and payable' is evidently intended to mean payable in an objective sense, rather than in the sense of an amount which the contractor considers payable. The word payable in GC 35.3(a) should be construed as having the same objective meaning.<sup>57</sup>
- (5) Further, GC 35.4 suggests that the contractor is only entitled to be 'in the money' in relation to amounts that are due and payable, and that cannot be said of amounts in dispute.<sup>58</sup>

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<sup>53</sup> Appeal ts 83, 107.

<sup>54</sup> Appellant's submissions [65] - [68]; appeal ts 104, 109.

<sup>55</sup> Appellant's submissions [69] - [71]; appeal ts 77, 79 - 80.

<sup>56</sup> Appellant's submissions [53] - [55], [72] - [75]; appeal ts 71.

<sup>57</sup> Appellant's submissions [58] - [60].

<sup>58</sup> Appeal ts 85, 87.

- (6) The use of the word 'recover' in GC 35.3(a) supports the subcontractor's construction because it should be taken as a reference to obtaining an amount to which the subcontractor is entitled.<sup>59</sup>
- (7) The phrase 'on demand' in GC 35.3(a) supports the subcontractor's construction in that it is a reference to the contractor having the right to demand and having first demanded payment of the amount to which it is entitled, before it may have recourse to the Bank Guarantee.<sup>60</sup>
- (8) The opening words of GC 36.5 'if liquidated damages are found not to be payable' indicates the sense in which the word 'payable' is used in GC 35.3, namely objectively or indisputably found to be payable after arbitration.<sup>61</sup>
- (9) The opposing construction produces a commercially unlikely result, in that it is objectively unlikely that a subcontractor in the position of the subcontractor would take the risk of being susceptible to adverse determinations by the contractor of extension of time claims allowing recourse to the performance bond on account of liquidated damages, even if, objectively, the extension of time claims were justified.<sup>62</sup>

## **The merits of ground 2: the proper construction of GC 35.3(a)**

### **Introductory observations**

82 For the reasons that follow, we do not accept the subcontractor's construction of GC 35.3(a). In our view, on a proper construction, it entitles the contractor to have recourse to the Bank Guarantees if at any time the contractor has an honest claim (ie a bona fide claim) in the events that have happened to immediate payment under the Subcontract.

83 As French CJ explained in *Simic v New South Wales Land and Housing Corporation*,<sup>63</sup> performance bonds, sometimes (as in the Subcontract) misleadingly called bank guarantees,<sup>64</sup> are typically issued by financial institutions at the request of one party to a contract, often a construction contract, in favour of another party pursuant to a requirement of the contract. They take the form of a promise by the

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<sup>59</sup> Appeal ts 104.

<sup>60</sup> Appeal ts 93 - 95.

<sup>61</sup> Appeal ts 131.

<sup>62</sup> Appeal ts 81, 83.

<sup>63</sup> *Simic v New South Wales Land and Housing Corporation* [2016] HCA 47; (2016) 91 ALJR 108 [2].

<sup>64</sup> See also *Wood Hall Ltd v Pipeline Authority* [1979] HCA 21; (1979) 141 CLR 443, 445.

issuing institution that it will pay to the beneficiary named in the bond an amount up to the limit set out in the bond unconditionally or on specified conditions and without reference to the terms of the contract between the parties.

84 In many respects, as between the institution and the beneficiary of the performance bond, the institution's unconditional promise to pay on demand has the character of cash.<sup>65</sup>

85 Where under a construction contract a party is obliged to procure an institution to provide a performance bond, it is a question of construction of the contract when and in what circumstances the other party is entitled to have recourse to the performance bond.<sup>66</sup>

86 The requirement for a performance bond in a construction contract will often objectively be intended to serve either or both of two purposes: to provide security against the risk of insolvency of the contractor; or to allocate the risk between the parties as to who is to be out of pocket pending the resolution of a dispute between them. Whether in a particular contract the object is the first or second or both of these is a question of construction.<sup>67</sup>

87 A number of cases have suggested that the widespread commercial practice that performance bonds are treated as the equivalent of cash is a significant factor in construing a provision of a construction contract regulating recourse to a performance bond.<sup>68</sup> Some cases appear to start from a presumption arising from the nature of a performance bond that the beneficiary has an unfettered right to call upon the bond, and frame the question of construction in terms of whether the provisions of the contract *qualify* the right to call upon the performance bond.<sup>69</sup> Some of what was said on this topic in *Clough Engineering* has been doubted in two recent appellate decisions.<sup>70</sup> In these recent cases it has been suggested that the

<sup>65</sup> *Wood Hall* (445, 453, 457 - 458); *Clough Engineering Ltd v Oil & Natural Gas Corporation Ltd* [2008] FCAFC 136; (2008) 249 ALR 458 [76].

<sup>66</sup> *Wood Hall* (459); *Clough Engineering* [77], [85]; *Fletcher Construction Australia Ltd v Varnsdorf Pty Ltd* [1998] 3 VR 812, 826; *Marcon Pty Ltd v Kerman Contracting Pty Ltd* [2015] WASCA 7 [59].

<sup>67</sup> *Fletcher Construction* (821, 826 - 827); *Clough Engineering* [79]; *Lucas Stuart v Hemmes* [2010] NSWCA 283 [39] - [40]; *Lucas Drilling Pty Ltd v Armour Energy Ltd* [2013] QCA 111 [42]; *Sugar Australia Pty Ltd v Lend Lease Services Pty Ltd* [2015] VSCA 98 [20] - [23], [29], [123].

<sup>68</sup> *Wood Hall* (457 - 458); *Fletcher Construction* (822, 827); *Clough Engineering* [81] - [82]; *Sugar Australia* [138].

<sup>69</sup> *Wood Hall* (459); *Clough Engineering* [82] - [85].

<sup>70</sup> *Lucas Stuart v Hemmes* [43]; *RCR O'Donnell Griffin Pty Ltd v Forge Group Power Pty Ltd (in liq)* [2016] QCA 214 [94], see also *EGL Management Services Pty Ltd v Northern SEQ Distributor-Retailer Authority* [2011] NSWSC 1234 [64]; *Laing O'Rourke Australia Construction Pty Ltd v Kawasaki Heavy Industries Ltd* [2017] NSWSC 541 [80] - [81].

unconditional nature of the financial institution's promise to pay the principal has 'limited relevance' to the construction of the underlying contract and could be seen as serving merely the purpose of protecting the principal from the risk of the contractor's insolvency.<sup>71</sup>

88 Counsel for the subcontractor submits that this appeal raises an important point of general principle arising from this difference of approach.<sup>72</sup> That is not how we view this appeal. While we accept that some differences of view have emerged in recent appellate decisions, in our view the resolution of this appeal lies in the proper construction of the provisions of the Subcontract, rather than in attempting to state general principles of broad application or in reconsidering the questions of construction of the different contractual provisions in the other decisions.

89 The subcontractor rightly accepts that when, as here, the Subcontract annexes and approves the form of the performance bond, in construing the terms of the Subcontract, the unconditional nature of the performance bond, and its terms generally, can be taken into account.<sup>73</sup> That is an application of the basic principle that in construing a term of a contract, regard must be had to the terms of the contract as a whole. However, the terms of the performance bond do not control the question of construction of the Subcontract. The significance of the terms of the performance bond in the process of construction of the underlying contract will fall to be assessed in the light of all of the particular terms of the underlying contract.

### **The significance of GC 35.3(b)**

90 The primary question is the proper construction of par (a) of GC 35.3 permitting the contractor to have recourse to the Bank Guarantees 'at any time in order to recover any amounts that are payable by [the subcontractor] to [the contractor] on demand'. In our opinion, for the reasons that follow, the other paragraph of GC 35.3, namely GC 35.3(b), creates a substantial obstacle to the subcontractor's construction of GC 35.3(a).

91 By GC 35.3(b), the subcontractor waives any right it may have to obtain an injunction or other remedy or right against any party, in particular against the contractor and against the issuing financial

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<sup>71</sup> *RCR O'Donnell* [94]; *Lucas Stuart v Hemmes* [43].

<sup>72</sup> Appeal ts 58.

<sup>73</sup> Appeal ts 61, 68; *Wood Hall* (445, 457 - 458); *Fletcher Construction* (821 - 822, 828); *Clough Engineering* [85]; *Bateman Project Engineering Pty Ltd v Resolute Ltd* [2000] WASC 284; (2000) 23 WAR 493 [35]; *Sugar Australia* [138].

institution, in respect of the contractor having recourse to the Bank Guarantee(s). On the subcontractor's construction of GC 35.3(a), the contractor can only have recourse to the Bank Guarantee in respect of an amount that has been admitted by the subcontractor or adjudicated by an arbitrator to be payable by the subcontractor to the contractor. In such circumstances, there would be no occasion for any application by the subcontractor for an injunction in respect of the contractor having recourse to the Bank Guarantee. In oral submissions, counsel for the subcontractor effectively accepted that par (b) of GC 35.3 would serve no discernible purpose if GC 35.3(a) is construed as the subcontractor contends.<sup>74</sup> By contrast, GC 35.3(b) would operate harmoniously with the primary judge's construction of GC 35.3(a). On the primary judge's construction of GC 35.3(a), one of the purposes of GC 35 is to ensure that the contractor may recover funds, to the extent of the Bank Guarantees, during a dispute between the parties, so that it is a risk allocation device between them.<sup>75</sup> On the primary judge's construction, if, in the events that have happened, the contractor has an honest claim that an amount is payable by the subcontractor to it, the contractor may have recourse to the Bank Guarantee to recover that amount. GC 35.3(b) reinforces that construction of par (a) by providing that the subcontractor waives any right to obtain an injunction to prevent the contractor exercising its right under par (a) to have recourse to the Bank Guarantees. That waiver advances the risk allocation purpose.

92 In short, on the subcontractor's construction of GC 35.3(a), the inclusion of GC 35.3(b) makes no sense and serves no purpose.

93 Contractual prohibitions or limits on seeking an injunction restraining a party's recourse to a performance bond may shed light on the purpose of the right to recourse.<sup>76</sup> In our opinion GC 35.3(b) confirms that the object of the provision in GC 35 for the Bank Guarantee(s) is to provide a risk allocation device as to who is to be out of pocket pending the resolution of any dispute between them. Of course, a question of construction invites attention to the whole of the contract. When that is done in this case, GC 35.3(b) remains a powerful obstacle to the subcontractor's construction. In any event, as we will explain, the construction of GC 35.3(a) suggested by GC 35.3(b) is supported by a consideration of all the other terms of the Subcontract.

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<sup>74</sup> Appeal ts 99 - 100.

<sup>75</sup> Primary reasons [81].

<sup>76</sup> See, for example, *Saipem Australia Pty Ltd v GLNG Operations Pty Ltd (No 2)* [2015] QSC 173; [2016] 1 Qd R 254 [4], [48], [51].

94 If, as the primary judge held, GC 35.3(b) were unenforceable as an ouster of the jurisdiction of the court, in our opinion for the reasons that follow it would nevertheless be appropriate to take into account the terms of par (b) in construing par (a) of GC 35.3.

95 A contract is to be construed as a whole. Ascertainment of the meaning of one provision may be assisted by consideration of other provisions. In our opinion, a finding that GC 35.3(b) ousts the court's jurisdiction does not require that GC 35.3(b) be ignored in the process of construction of GC 35.3(a). If, on its proper construction, a provision ousts the jurisdiction of the court, it is on that account contrary to public policy. Some judgments state that the provision is consequently unenforceable, while others say that the provision is void. In our view it would be wrong to insert the adjectival label 'void' and then deduce a legal consequence from it, namely that the contract must be treated for all purposes as if GC 35.3(b) did not exist.<sup>77</sup> The policy of the law against the ouster of the court's jurisdiction means that a provision which purports to do so will not be enforced. Protection of that policy does not require or justify the ignoring of GC 35.3(b) in the process of construction of GC 35.3(a). To have regard to par (b) in the process of construction of par (a) does not in any way offend or engage the policy against the ouster of the court's jurisdiction.

96 Support for this view may be found in *Anaconda Operations Pty Ltd v Fluor Daniel Pty Ltd*.<sup>78</sup> In that case, Brooking JA (Ormiston and Buchanan JJA agreeing) found that it did not matter that the provision by which the contractor agreed not to seek an injunction to prevent a demand for payment may arguably have been unenforceable as ousting the jurisdiction of the courts; it nevertheless demonstrated with clarity the intention that the owner was at liberty to call on the security at any time.

97 Thus, a conclusion that GC 35.3(b) is void as an ouster of the court's jurisdiction would not affect our construction of GC 35.3(a).

98 Further and in any event, if GC 35.3(b) is unenforceable on the ground that it ousts the jurisdiction of the court, and if, contrary to our opinion, for that reason it is impermissible to have regard to it in construing GC 35.3(a), the following considerations of text, context and object, independent of GC 35.3(b), lead us to construe GC 35.3(a) in the same fashion.

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<sup>77</sup> Compare *Brooks v Burns Philp Trustee Co Ltd* [1969] HCA 4; (1969) 121 CLR 432, 458.

<sup>78</sup> *Anaconda Operations Pty Ltd v Fluor Daniel Pty Ltd* [1999] VSCA 215 [15].

### Other textual considerations

99 The word 'recourse' in GC 35.3(a) does not merely mean convert the guarantee into cash (ie, change the form of the security), but involves the notion of appropriating the proceeds of conversion.<sup>79</sup> That is reinforced by the use of the word 'recover'.

100 The power to have recourse to the bank guarantee for this purpose is a 'right' or 'remedy' given to the contractor (see, eg, GC 36.1(b), GC 15.1(b)). The power is exercisable 'at any time', and is not expressed to be conditional upon an admission of liability by the subcontractor or an arbitral determination. There is no requirement for notice to be given to the Subcontractor before exercising the right or remedy. The power would need to be exercised honestly and for proper purposes. The central question raised for consideration by ground 2 is whether the word 'payable' circumscribes the scope of the power so as to confine its exercise to circumstances where the amount in question is not in dispute, either because of an admission by the subcontractor or because of an arbitral determination favourable to the contractor.

101 The subcontractor contends that the exercise of the power is so circumscribed. Its proposition is that the contractor 'may only make a demand upon the bank guarantees where it is *objectively established* that the amount demanded is *due and payable*'.<sup>80</sup> It contends that an amount is objectively established 'where it has been *authoritatively established* that it is *due and payable*, by agreement or determination, by an arbitrator or court'.<sup>81</sup>

102 As the subcontractor accepts,<sup>82</sup> there is no provision in the Subcontract which expressly provides that an amount is payable by the subcontractor to the contractor 'on demand'. The subcontractor's submission is, however, that the words 'on demand' in GC 35.3(a) support its construction. It submits that the words 'on demand' serve to indicate that at the point of demand, the amount being demanded must be indisputably due and payable by the subcontractor either because the amount has been admitted, or because the liability for it has been the subject of arbitral or curial determination.

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<sup>79</sup> See, eg, *Australasian Conference Association Ltd v Mainline Constructions Pty Ltd (in liq)* [1978] HCA 45; (1978) 141 CLR 335, 351; *Fletcher Construction Australia Ltd v Varnsdorf Pty Ltd* [1998] 3 VR 812, 825 - 826.

<sup>80</sup> Appellant's submissions, par 45 (emphasis added).

<sup>81</sup> Appellant's submissions, par 48 (emphasis added).

<sup>82</sup> Appeal ts 94.

103 An agreement to pay 'on demand' an amount that has been established by arbitral or curial determination, or by agreement between the parties, is, prima facie, an unusual use of the phrase 'on demand'.

104 In our view, the words 'on demand' do not qualify or describe the 'amounts that are payable' in GC 35.3(a). Rather, the words 'on demand' in GC 35.3(a) are to be read with the words 'in order to recover'. They identify the object or purpose of GC 35.3(a). The purpose of having recourse to the bank guarantee is to recover 'on demand' amounts that are 'payable'. The 'demand' is made to the bank, without notice to the subcontractor (GC 35.1(a)(iii)). The evident purpose is to enable the contractor to recover amounts 'payable' by the subcontractor, by merely making demand (emphasised by the words 'first demand')<sup>83</sup> on the bank, without notice to the subcontractor. The provision appears, prima facie, designed not merely to protect against the risk of insolvency of the subcontractor, but to provide immediate recovery by the contractor without any delay, including, it may be inferred, delays associated with the resolution of disputes.

105 There are other features of the Subcontract which also tend against the subcontractor's construction.

### **The contractual terms as to Bank Guarantees**

106 In our view, an important feature of the Bank Guarantees, namely their duration, is inconsistent with the subcontractor's contention that the Bank Guarantees are provided for the sole purpose of providing security to the contractor against the risk of the subcontractor's insolvency. If the contractor is not permitted to have recourse under GC 35.3 to the Bank Guarantees unless an amount is, if disputed, determined by an arbitrator to be payable, the contractual stipulation concerning the duration of the Bank Guarantees means there would be a real risk that the relevant Bank Guarantee would expire before the question of whether an amount was payable had been determined by the completion of the arbitration process. We proceed to explain that proposition.

107 As we have said, the Initial Bank Guarantee is required to be valid until the effective date of the last Provisional Acceptance Certificate issued pursuant to GC 19.3. The Warranty Bank Guarantee is required to be valid until 30 days after the expiry of the last Warranty Period, being the periods stipulated in GC 20.4.

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<sup>83</sup> GC 35.

108 GC 36, providing for liquidated damages, is a significant provision under which an amount may become payable by the subcontractor to the contractor. As the subcontractor accepts in this appeal,<sup>84</sup> a claim by the contractor that it was entitled to liquidated damages arising from the late completion of the Works would not justify a refusal to issue the Provisional Acceptance Certificate upon the completion of the Works. The trigger for liquidated damages is the delay in the issue of the Handover Certificate at the required time, and not the issue of the Provisional Acceptance Certificate. Nevertheless, in circumstances where the subcontractor disputed the contractor's claim to liquidated damages, and invoked GC 57, there is no reason for the contracting parties to suppose that the arbitration process would have progressed to the point of completion by the time a Provisional Acceptance Certificate is issued. Thus, as the subcontractor accepted on appeal,<sup>85</sup> the effect of the provisions of the Subcontract is that there is a risk that the Initial Bank Guarantee might expire before a dispute about liquidated damages was resolved.

109 The subcontractor sought to avoid this difficulty by arguing that, from a practical point of view, it would not arise because the issue of the Provisional Acceptance Certificate was wholly within the power of the contractor and the contractor could refuse to issue the certificate.<sup>86</sup> The Subcontract is not to be construed on the footing that the party may exercise or refuse to exercise a power for an improper purpose. As we have said, and as the subcontractor accepts, delay in completion is not, on a proper construction, a ground for refusing to issue the Provisional Acceptance Certificate.

110 There is a similar risk in relation to the Warranty Bank Guarantee. The Warranty Bank Guarantee expires at 30 days after the expiry of the last Warranty Period. By GC 20.4(e), the maximum duration of the extended Warranty Period is 24 months from the Provisional Acceptance Certificate. The existence of an unresolved dispute will not affect the operation of that provision. Thus, disputes arising in relation to Warranty Work and other disputes arising during the Warranty Period may not be resolved by the expiry of that period.

111 In other cases concerned with questions of a like nature to this appeal, the fact that, under the contract, the stipulated performance bond was liable to expire prior to the determination of disputes has been found

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<sup>84</sup> Appeal ts 89, 92, 132.

<sup>85</sup> Appeal ts 89, 92, 132.

<sup>86</sup> Appeal ts 132.

to be an indication militating against a construction of the provision for a performance bond as solely directed to securing the principal against the risk of the contractor's insolvency.<sup>87</sup>

112 In our view, these features of the stipulated duration of the Bank Guarantees militate strongly against the subcontractor's construction of GC 35.3(a). The subcontractor submits that its sole purpose is to provide security against the risk of the subcontractor's insolvency. That purpose would be defeated to the extent that the stipulated Bank Guarantee would expire before, on the subcontractor's construction, the contractor may become entitled to call upon it. By contrast, the stipulated duration of the Bank Guarantees is consistent with the purpose of GC 35.3 being for the contractor to be in the money, to the extent of the Bank Guarantees, pending resolution of any dispute.

113 This difficulty with the subcontractor's construction is illustrated by the circumstances of this case, as they have developed in the course of the subcontractor's performance of the Subcontract. As at the hearing of the appeal, the Bank Guarantees were due to expire on 16 June 2017, and the disputes between the parties as to liquidated damages and extensions of time had not been the subject of any completed arbitration. Thus, the Bank Guarantees were liable to expire before the dispute as to the subcontractor's liability was determined.<sup>88</sup> While these subsequent events do not influence construction, they are illustrative of the points of construction to which we have just drawn attention.

114 There are also features of the proforma Bank Guarantees annexed to the Subcontract which tend to confirm that the word 'payable' in GC 35.3(a) does not signify only an admitted sum or a sum objectively or authoritatively established by arbitral or curial determination.

115 The approved proforma Bank Guarantee provides that the financial institution's obligation to make payment arises on receipt of demand without proof of any breach, and notwithstanding any contest or dispute by the subcontractor. Moreover, it provides that the financial institution is not permitted to notify the subcontractor prior to the satisfaction of the demand.

116 We accept that, as the subcontractor's submissions emphasise, these features of the proforma Bank Guarantee do not control the question of

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<sup>87</sup> See, for example, *Bachmann Pty Ltd v BHP Power New Zealand Ltd* [1998] VSCA 40; [1999] 1 VR 420 [55]; *Bateman Project Engineering v Resolute* [63] - [64].

<sup>88</sup> After the court reserved its decision the subcontractor procured an extension of the term of the Bank Guarantees until after the delivery of the court's reasons on the appeal.

construction of GC 35.3(b). They no doubt provide a measure of protection to the financial institution, and provisions of that kind in an agreed proforma document might be explicable on that basis, whatever may be the purpose of the performance bond as between the beneficiary of the bond and the bank's customer. Nevertheless, the agreed proforma document in these terms tends to confirm that the parties to this contract contemplated that recourse should be effectuated in favour of the contractor, irrespective of the existence or prospect of an underlying dispute between the contractor and subcontractor.

**GC 35.4: 'due and payable'**

117           Next, we turn to the phrase 'due and payable' in GC 35.4(a) and (c). The subcontractor submits that an amount which is in dispute is not 'due and payable' and that the word 'payable' in GC 35.3(a) should be construed consonantly as meaning payable in the sense of objectively or authoritatively established by arbitral or curial determination, or by admission.

118           Another possible construction of GC 35.3 and GC 35.4 arose in the course of argument on the appeal and is as follows.<sup>89</sup> If the contractor has an honest claim that an amount is then due to be paid to it by the subcontractor it can, acting under GC 35.3, convert the Bank Guarantee into cash. To the extent that the subcontractor disputes its liability and has invoked the dispute resolution procedure in GC 57, the amount is not 'due and payable'. Consequently, the amount converted to cash must be retained in the bank account set up in the contractor's name under GC 35.4 pending resolution of the dispute.

119           For the reasons that follow, we do not accept that either of these represents the proper construction of GC 35.3 and GC 35.4. In short, we do not accept a premise of both constructions: that an amount the liability for which is disputed is, on account of the dispute, not 'due and payable' within the meaning of GC 35.4. That is because in our opinion the phrase 'due and payable' in GC 35.34, like the word 'payable' in GC 35.3, is used to denote an obligation presently payable as opposed to an obligation due but not yet payable. The phrase 'due and payable' does not connote the absence of or resolution of a dispute about whether the events that have happened have given rise to the obligation.

120           Further, the alternative construction would give fundamentally different meanings to 'payable' in GC 35.3(a), on the one hand, and to 'due

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<sup>89</sup> Appeal ts 132 - 134.

and payable' in GC 35.4(a) and (c) on the other. An amount would be payable under GC 35.3(a) if the contractor had an honest claim to immediate payment in the circumstances. That would be so notwithstanding that the subcontractor disputed its liability. But, in the event of such a dispute the amount would not be 'due and payable' within the meaning of GC 35.4(a). In our view this alternative construction requires too much work to be done, both in terms of the ordinary meaning of the language used and its sense derived from context, by the words 'due and' in the phrase 'due and payable' in cl 35.4.

121 We proceed to explain these views by reference to conventional usage of the words due and payable and by reference to the usage of those words and like phrases throughout the Subcontract.

122 In ordinary parlance, the meaning of the word 'due' includes 'immediately payable' or 'owing, irrespective of whether the time for payment has arrived'.<sup>90</sup> The word 'due' in a legal context is sometimes used in the sense of 'payable', but prima facie means any sum that a person is legally liable to pay, irrespective of whether the time for payment has arrived, ie, irrespective of whether it is then 'payable'.<sup>91</sup> A debt may be said to be 'payable' if it is not only due (in the sense of owing), but is presently payable in the sense that the time for payment has arrived, and an action could be maintained in respect of it.<sup>92</sup> In the expression 'due and payable', the word 'payable' often means required to be immediately or presently paid.<sup>93</sup> Thus, the words 'due and payable' may often be tautological in the sense that an amount which is 'payable' will at least generally first be owing in the sense of due.<sup>94</sup> In other words to say that an amount is 'due and payable' will often not add anything to a statement that the amount is 'payable'. In ordinary parlance, a debt may be said to be 'payable' prior to any admission that it is payable, or any legal adjudication in respect of it.

123 There are a number of other provisions in the Subcontract (apart from 'payable' in GC 35.3(a) and 'due and payable' in GC 35.4(a) and (c)) which use the words 'payable', 'due', 'owing', or a combination of them.<sup>95</sup>

<sup>90</sup> *Macquarie Online Dictionary*.

<sup>91</sup> See *Mack v The Commissioner of Stamp Duties* [1920] HCA 76; (1920) 28 CLR 373, 382 - 383; *HJ Wigmore & Co Ltd v Rundle* [1930] HCA 27; (1930) 44 CLR 222, 228; *Clyne v Deputy Commissioner of Taxation* [1981] HCA 40; (1981) 150 CLR 1, 8 - 10, 15 - 16, 24; *Griffin Energy Group Pty Ltd v ICICI Bank Ltd* [2015] NSWCA 29; (2015) 317 ALR 395 [53] - [54].

<sup>92</sup> *Mack* (383); *Griffin Energy Group Pty Ltd v ICICI Bank Ltd* [54].

<sup>93</sup> *Helou v Mulligan Pty Ltd* [2003] NSWCA 92; (2003) 57 NSWLR 74 [26].

<sup>94</sup> *Clyne* (8).

<sup>95</sup> eg, GC 2.2(d), GC 20.3(c), GC 25.18(a), GC 33.3, GC 34.5(a), GC 34.5(c), GC 39.1(a)(ii) and (iii), GC 46.6(b) and GC 50.5(c).

The creation of the subcontractor's payment obligations is expressed in a number of different ways in various clauses, including, eg, 'a debt due and owing';<sup>96</sup> 'a debt due and payable';<sup>97</sup> the contractor may perform a stipulated function 'at [the subcontractor's] expense';<sup>98</sup> '[the subcontractor] is liable to reimburse [the contractor]';<sup>99</sup> '[the subcontractor] must immediately pay the difference ... to [the contractor]';<sup>100</sup> and '[the subcontractor] will pay ... to [the contractor]'.<sup>101</sup> The phrase '*then* due and owing' in GC 2.2(d) (emphasis added) indicates that the liability referred to is one which is presently payable. The word 'due' in GC 34.5(a) and (c) refers to amounts which the subcontractor is legally obliged to pay, whether the time for payment has arrived or not. The reference in GC 34.5(c) to 'immediately pay the difference' indicates that once the obligation arises, it becomes immediately payable. All of these provisions are, *prima facie*, ones which potentially attract the operation of GC 35.3(a). Bearing in mind that the power in GC 35.3(a) may be exercised 'at any time', thus including prior to the giving of any notice of any dispute or resolution of any dispute, the words 'amounts ... payable' in GC 35.3(a) are apt to refer to those amounts for which the contractor has an honest claim to immediate payment in the circumstances.<sup>102</sup>

124 Furthermore, in the case of GC 34.5(a), the right of deduction with respect to sums 'due' to the contractor is given to the contractor 'at any time during the performance of the subcontract'. It is difficult to suppose that the right of deduction was intended to be exercised only in the event of an admission by the subcontractor, or following an arbitral determination.<sup>103</sup> Thus, the contractor's self-help remedy of deduction could be applied notwithstanding that the subcontractor disputed that it owed the sum claimed by the contractor. Further, under GC 34.5(c), the result of the deduction may leave an amount 'due' to the contractor which the subcontractor 'must immediately pay'. Again, it is difficult to suppose that these words mean other than what they appear to say, ie, that the

<sup>96</sup> GC 20.3(c), GC 56.2(a).

<sup>97</sup> GC 25.18(a), GC 39.1(a)(ii), GC 46.6(b).

<sup>98</sup> GC 30.5(d).

<sup>99</sup> GC 33.1(a), GC 33.2(b).

<sup>100</sup> GC 34.5(c).

<sup>101</sup> GC 36.1.

<sup>102</sup> A similar construction was reached, albeit on different wording, in the case of *Bachmann Pty Ltd v BHP Power New Zealand Ltd* [1999] 1 VR 420, 437. As we have said, in the present context we use honest claim and bona fide claim interchangeably.

<sup>103</sup> See, eg, *Fletcher* (822); *Bachmann Pty Ltd* (436 - 437); cf *Geldof Metaalconstructie NV v Simon Carves Ltd* [2010] EWCA Civ 667; (2010) 4 All ER 847, where, in a set off clause in a supply agreement, the words 'all amounts *lawfully due*' (emphasis added) were held to mean 'claimed to be due and which are recognised or recognisable at law', rather than 'adjudicated or agreed to be due', notwithstanding that the latter construction was 'possible' as a matter of language: *Geldof* [54].

amount is payable immediately, and not dependent on admission or determination in subsequent arbitral proceedings.

125 In our view, the contractor's self-help remedy of recourse to the Bank Guarantee, like its self-help remedy of deduction under GC 34, is not affected by the subcontractor disputing the contractor's claim, and need not await admission or subsequent arbitral determination.

126 Further, in the case of liability to pay liquidated damages, the liability to pay arises where the Completion Dates have not been met (GC 36.1(a)) in a context where there is a detailed procedure for determining extensions of time. The determination is made by the contractor, who is obliged to act 'fairly' and to approve or reject claims 'as soon as reasonably practicable' (see GC 15 generally and in particular GC 15.7(a) and (e)). It is not uncommon for parties to a building contract to confer such powers on the party who engages the other to do the work.<sup>104</sup> The express right of dispute in GC 15.7(a), given for the 'avoidance of ... doubt', indicates, it may be assumed (without deciding), that the contractor's determination of the extension claim is not intended to be conclusive. Nevertheless, it is, at the least, a 'machinery' provision by which the rights and duties of the parties at any given moment are at least provisionally determined with some precision.<sup>105</sup> The right of dispute does not in terms, or impliedly, suspend the effect of any determination under GC 15.7(e) pending resolution of the dispute. This operation of GC 15 and GC 36, read together, is consonant with our construction of GC 35.3.

127 Although the subcontractor submitted that cl 36.5 provides support for its construction, that submission cannot be accepted. Clause 36.5 is either neutral on the question of the proper construction of cl 35.3(a) or, if anything, tends against an acceptance of the subcontractor's construction. As to the latter point, the word 'found' in the phrase 'found not to be payable' tends to indicate that the parties used the language of dispute resolution where that was intended. As to the former point, the clause operates in, at least, two respects. The first is that it avoids any implication (albeit accepting that the implication would not readily be drawn in any event) that the parties had agreed that the failure to meet the Completion Date(s) would sound only in unliquidated damages, even if they were found to be a penalty, or that the contractor had, for example, waived or was estopped from asserting its rights to liquidated damages. Secondly, and perhaps more importantly, the clause operates expressly for

<sup>104</sup> *WMC Resources Ltd v Leighton Contractors Pty Ltd* [1999] WASCA 10; (1999) 20 WAR 489 [45] - [46].

<sup>105</sup> *Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd* [1998] 2 WLR 860, 868.

the benefit of the subcontractor to impose a limit on the common law damages which the contractor may recover.<sup>106</sup>

128 That brings us back to GC 35.3 and GC 35.4. In our view, GC 35.3(a) is the primary provision. As we have said, it deals not only with converting the security into cash, but also with appropriating the proceeds of the conversion. In our view, GC 35.4 is a procedural provision giving effect to the exercise of power under GC 35.3(a) and dealing with any balance remaining from the converted bond.

129 Under the contractual scheme, the contractor may have recourse to the Bank Guarantee by making demand for an amount that exceeds the amount then payable. There is no express term requiring that the contractor exercise its right of recourse under GC 35.3 by demanding only the amount then payable to it by the subcontractor. It is unlikely that a term to that effect could be implied. Apart from anything else, there is no requirement under the Subcontract that the Bank Guarantee procured by the subcontractor permit multiple demands.<sup>107</sup> Further and in any event, it is possible that, in a large and complex contract such as this one, by the time the Bank Guarantee was converted to cash and available to the contractor, the amount payable by the subcontractor had decreased. Accordingly, the amount due and payable at the time the proceeds have been converted into cash may be less than the amount demanded by the contractor in exercise of its right of recourse under GC 35.3. That would give rise to a question as to how any balance is to be treated. Thus, GC 35.4 deals with the balance of funds remaining from any conversion of the bond.

130 GC 35.4 recognises, in GC 35.4(a), that the preliminary step in having 'recourse' is to 'call' on the bank guarantee. GC 35.4(a) involves the contractor first deducting amounts 'due and payable' by the subcontractor. What is left from the call and first recourse (if anything) is then deposited into the bank account. The balance remains in the bank account until recourse is further had by withdrawing amounts that are 'due and payable' from time to time (GC 35.4(c)). Ultimately, at the expiration of the Warranty Period, the balance of the account is to be paid to the subcontractor.

131 A starting point for the process of construction is to strive to give meaning to each and all of the words used, although the weight to be

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<sup>106</sup> cf *Amev-UDC Finance Ltd v Austin* [1986] HCA 63; (1986) 162 CLR 170, 192; see also Ramsay V & Furst S, *Keating on Construction Contracts* (10th ed, 2016) [10-002], [10-003], [10-028] - [10-029].

<sup>107</sup> A term to that effect is in the approved proforma in Annexure 1A, but it is not required by GC 35.1.

given to this precept will be influenced by the nature and terms of the contract.<sup>108</sup> Nevertheless, taking into account the observations we have made, we do not think that the words 'due and' in the phrase 'due and payable' in GC 35.4(a) and (c) add anything to or detract from what is inherent in the word 'payable' in GC 35.3(a). In other words, an amount that is 'payable' under GC 35.3(a), justifying recourse to the Bank Guarantee, will be due and payable under GC 35.4(a) and GC 35.5, and so can be deducted from the proceeds of the call on the Bank Guarantee. In both respects, the fact that the subcontractor disputes its liability in relation to the amount will not affect the availability of the contractor's remedy under GC 35.3(a) and right of deduction under GC 35.4(a).

### **Other submissions of the subcontractor**

132 Like the primary judge, we do not think that the absence of an express provision for repayment of monies recovered under the Bank Guarantee, in the event that it is determined at arbitration that the contractor is not entitled to the amount it recovered, assists on the central question of construction in this case. On our construction of GC 35.3(a), and of the Subcontract as a whole, if an arbitrator determined that the subcontractor was not liable in respect of an amount for which the contractor had recourse under the Bank Guarantee, the arbitrator would have power to order repayment of that amount, or its crediting against any other liability of the subcontractor.

133 We do not accept the subcontractor's submission that the primary judge's construction produces a commercially unlikely result because it means that the subcontractor was taking the risk of being susceptible to adverse determinations by the contractor of extension of time claims and recourse by the contractor to the performance bond even where, objectively, the extension of time claims were justified. We are not persuaded that our construction of GC 35.3(a) can be said to produce an uncommercial result. Provisions entitling a principal to recourse on the basis of an honest but disputed claim are not uncommon in large construction contracts. In any event, the commerciality of the construction of GC 35.3(a) is not to be judged in isolation from the contract as a whole, and the court is in no position to make judgments about the myriad of competing commercial considerations involved in matters such as price, time, quality requirements and many others, particularly in a subcontract such as this where the subcontractor is provided with a very substantial advance payment.

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<sup>108</sup> *George 218 Pty Ltd v Bank of Queensland Ltd (No 2)* [2016] WASCA 182 [88] and cases there cited.

134 In oral submissions, the subcontractor advanced an alternative construction of 'payable' in GC 35.3(a). Its alternative construction is that an amount is payable only if the events that have happened have, as a matter of fact and law as ultimately objectively determined by an arbitrator or court, given rise to an obligation on the part of the subcontractor to pay the amount.<sup>109</sup> On this construction, the contractor's entitlement to have recourse to the Bank Guarantees in respect of an amount the ultimate liability for which was disputed by the subcontractor would depend upon something that was not ascertainable at the time of the proposed recourse: namely, the arbitrator's ultimate determination of the merits of the dispute. This construction produces an unacceptably high degree of uncertainty as to when and whether the contractor may exercise its rights and remedies under GC 35.3(a). That degree of uncertainty does not sit easily with the self-help character and evident purpose of a provision enabling recourse to performance bonds. Moreover, on this construction, if the subcontractor demonstrates an arguable case that it does not owe the disputed amount, an interlocutory injunction should ordinarily be granted restraining the recourse to the Bank Guarantees. As a matter of practical reality, on this construction the contractor would not be able to have recourse in respect of a disputed amount until after the arbitral adjudication of the dispute.

135 For these reasons, as well as the reasons already given, the subcontractor's alternative construction should be rejected.

136 For all these reasons we do not accept the subcontractor's construction of GC 35.3(a). Consequently, ground 2 fails.

### **Ground 3**

137 As all parties accepted, the merits of ground 3 depend upon the question of construction to be determined under ground 2. Ground 2 having failed, ground 3 must also fail.

### **Conclusion**

138 For the reasons we have given, we would dismiss the appeal.

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<sup>109</sup> Appeal ts 95 - 96, 100 - 103.