Enforcing Security Bonds, Guarantees and Injunctions

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Performance bonds, guarantees or securities, providing an unconditional promise to pay by a third party, are now common in the construction industry.
This article by eminent construction lawyer Robert Hunt deals with the principles which Australian Courts have applied in considering the various issues involved in calling up this type of security and dealing with the proceeds.

Introduction

Over the past 25 years or so, it has become common in the construction industry for contracts to contain requirements for the provision of security for performance of the construction contract in a form other than a retention fund deducted from progress payments under the contract. The performance bonds, guarantees or securities provided commonly take the form of an unconditional promise to pay issued by a bank or financial institution (the surety) at the request of the party required to provide the security (the grantor) on demand by or on behalf of the party entitled to the benefit of the security (the beneficiary).

During that period, a substantial body of case law has emerged in Australia in relation to the respective rights and obligations of the parties when the beneficiary seeks to call up the security.

Various issues emerge from the case law which the writer will consider in this article, namely:

1. The rights of the beneficiary against the surety.
2. The rights of the grantor to restrain the beneficiary from calling up a security.
3. The rights of the grantor to restrain the beneficiary from dealing with a security.
4. Whether rights of the beneficiary to call up and deal with the security may be exercised following termination or rescission of the primary contract.
5. Differing considerations where interim injunctive relief is sought pending determination of the substantive contractual dispute between the grantor and the beneficiary.

In considering these issues, reference will be made to the various standard form construction contracts presently used in Australia, the relevant provisions of which are contained in Appendix 1 (AS 4000-1997),[1] Appendix 2 (AS 2124-1992), Appendix 3 (NPWC 3) and Appendix 4 (JCC-C 1994).[2]

The decision of the High Court in *Wood Hall Ltd v The Pipeline Authority*[3] provides a logical starting point. The case concerned a contract for construction of a pipeline which contained a condition requiring the contractor to provide a cash security or, alternatively, a bank guarantee as security for the contractor's due and faithful performance of the work. A second condition entitled the owner to retain 10 per cent of the progress payments due to the contractor until the work had been performed and accepted in accordance with the contract. The owner, at the

1 The relevant provisions of AS 4901-1998, AS 4902-2000 and AS 4903-2000 are expressed in similar terms.
2 The relevant provisions of JCC-D 1994, JCC-E 1994 and JCC-F 1994 are expressed in similar terms.
3 (1979) 141 CLR 443.

contractor's request, agreed to accept a bank guarantee in lieu of the moneys retained. By each of the guarantees, the bank unconditionally undertook to pay the owner on demand any sum up to the limit specified in each guarantee. When the work was almost complete, the owner demanded payment from the bank under the guarantees. The High Court held that the owner was entitled to demand and be paid the amount of the performance guarantees whether or not there had been a want of due and faithful performance of the work. Gibbs J (with whom Barwick CJ and Mason J agreed) said at 451:

> "By each of the bank guarantees, the Bank 'unconditionally' undertakes 'to pay on demand' the sum demanded up to the limit specified in the bank guarantee. To hold that the bank guarantees are conditional upon the making of a demand that conforms to the requirements of the contract between the Authority and the contractor would of course be quite inconsistent with the express statement in the bank guarantees that the undertaking of the Bank is unconditional. To hold that the Bank should not pay on receiving a demand, but should be bound to enquire into the rights of the Authority and the contractor under a contract to which the Bank was not a party would be to depart from the ordinary meaning of the undertaking that the Bank is to pay on demand. It would be contrary to the settled rules governing the implication of terms in contracts to imply provisions that would contradict the ordinary meaning of the words of the bank guarantees in this way."

Similar views were expressed by Stephen J, who said at 457:

> "Their Honours were, with respect, entirely correct in their conclusion that none of the four guarantees is, by any process of implication or construction, to be deprived of the unqualified operation which its express words dictate. Not only does the clear, indeed empathic [sic], language of these guarantees preclude the introduction of any such qualification: to introduce such a qualification would be to deprive them of the quality which gives them commercial currency. Once a document of this character ceases to be the equivalent of a cash payment, being instantly and unconditionally convertible to cash, it necessarily loses acceptability. *Only so long as it is 'as good as cash' can it fulfil its useful purpose of affording to those to whom it is issued the advantages of cash while involving for those who procure its issue neither the loss of use of an equivalent money sum nor the interest charges which would be incurred if such a sum were to be borrowed for the purpose. Being 'as good as cash' in the eyes of those to whom it is issued is essential to this function.*" (Emphasis added)

Stephen J, at 459, referred to an argument (the first proposition) advanced by the contractor that the Authority was in fact in breach of its contract with the contractor in making its demands for payment. He said:

> "It is, then, *the very nature of the performance guarantees which in their case renders unacceptable the contractor's first proposition. Had the construction contract itself contained some qualification upon the Authority's power to make a demand under a performance guarantee, the position may well have been different.* In fact the contract is silent on the matter.
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> It is instructive to recall that had the parties adhered to the concept of security in the form of a cash payment, which is what cl G4 primarily contemplates, there would be no doubt as to the position: once paid, that cash would thereafter be held by the Authority as security and it would perform that function from the moment that it was paid. It would, I think, be curious were the substitution of a guarantee for such a cash payment to affect detrimentally the secured position of the Authority. Yet this is a necessary consequence of the acceptance of the contractor's submission, since it is said that the Authority must first establish some want of due and faithful performance on the contractor's part before it may, by making a demand, place itself in as favourable a position as it would have occupied had the security originally been provided in cash. To regard this as the consequence of the giving by the contractor of the present performance guarantees, unqualified as they are in form, appears to me to be more curious still."

(Emphasis added)

1. Rights of the beneficiary against the surety

This issue can be dealt with relatively shortly.

Since the decision of the High Court in *Wood Hall Ltd v The Pipeline Authority*, Australian courts have steadfastly maintained that the duty of the surety is to comply with the terms of its promise to pay. Where those terms comprise an unconditional promise to pay on demand, the courts will only restrain the surety from paying on demand where there are exceptional circumstances, such as a clear case of fraud.[4]

In the Victorian Court of Appeal in *Olex Focas Pty Ltd v Skodaexport Co Ltd*,[5] Charles JA said, at pp 2-4:

> "*the courts will intervene to prohibit a bank from paying under a performance guarantee in very limited circumstances. The wholly exceptional case in which an injunction might be granted at common law is where it is proved that the bank knows that any demand for payment already made, or which may thereafter be made, will clearly be fraudulent*; *Bolivinter Oil SA v Chase Manhattan Bank and Ors* [1984] 1 Lloyds Rep 251, at 257 per Donaldson MR. Otherwise the whole commercial purpose of such guarantees (or, for that matter, irrevocable letters of credit) would be destroyed and the international reputation of a bank issuing such documents would be at risk of serious damage when the bank is caught between the competing demands of the guarantor (its customer) and the beneficiary of the guarantee. The bank is in no way concerned with any dispute the guarantor may have with the beneficiary; *Power Curber International Ltd v National Bank of Kuwait* [1981] 3 All ER 607 per Lord Denning MR at 612-613, and per Griffiths LJ at 614.
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> In the present case the primary judge accepted that there was a serious case to be tried that the conduct of the first defendant was unconscionable within the meaning of s 51AA of the *Trade Practices Act* 1974, at least to the extent that demand was made under the mobilisation and procurement guarantees in relation to the advances which the evidence showed had been repaid. His Honour accepted that the effect of the *Trade Practices Act* was to work a substantial inroad into the common law autonomy of letters of credit and performance guarantees. But even if it be accepted that a breach of the *Trade Practices Act*, by virtue of s 51AA, may suffice to entitle the plaintiffs to obtain an injunction restraining the bank, as being within the wholly exceptional case to which Sir John Donaldson MR referred in *Bolivinter*, the plaintiffs here have not established any evidentiary basis, in my view, for any further injunctions beyond those granted by the primary judge, pending the determination of this appeal. Banks will be placed in an impossible situation in deciding whether or not to meet a demand for payment on such a guarantee unless the 'wholly exceptional' situation in which they may refuse to pay arises only where there is clear evidence of which the bank has knowledge of fraud, or (where the *Trade Practices Act* is raised), unconscionable conduct; see *Bolivinter*, per Sir John Donaldson MR at 257; *United Trading Corporation SA v Allied Arab Bank Ltd* [1985] 2 Lloyds Rep 554 per Ackner LJ at 561; *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159 per Lord Denning MR at 171, per Browne LJ at 172-173, and per Geoffrey Lane LJ At 175."
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> (Emphasis added)

2. Rights of the grantor to restrain the beneficiary from calling up a security

Since *Wood Hall Ltd v The Pipeline Authority*,[6] there have been a significant number of Australian cases which have considered whether "the construction contract itself contained some qualification upon the (beneficiary's) power to make a demand under a performance guarantee"[7].

4 See, for example, *Hortico (Australia) Pty Ltd v Energy Equipment (Australia) Pty Ltd* [1985] 1 NSWLR 545 at 554.

5 (unreported, Vic Sup Ct, CA, No 7050/1996, 17 September 1996).

6 (1979) 141 CLR 443.

7 Ibid, Stephen J at 459.

In almost all of those cases, the contract contained no express qualification on the beneficiary's power to make a demand, such that the argument usually concerned whether or not the contract contained an implied negative stipulation to that effect.

In *Fletcher Construction Australia Ltd v Varnsdorf Pty Ltd*,[8] the Victorian Court of Appeal held that no such negative stipulation should be implied unless it satisfies the test for implication of a term enunciated by the majority of the Privy Council in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*.[9] Callaway JA, with whom Batt JA agreed, said, at 826 ((1999) 15 BCL 450 at 462)):

> "In *Group Josi Re v Walbrook Insurance Co Ltd* [1996] 1 WLR 1152 at 1161-1162 Staughton LJ said that the effect on the lifeblood of commerce is precisely the same whether the guarantor, typically a bank, is restrained from paying or the beneficiary is restrained from asking for payment. There is nevertheless an important difference between restraining a bank from honouring a guarantee and restraining the beneficiary from calling upon it. In the former case the moving party seeks to prevent the bank from performing its contract; in the latter case the moving party seeks to prevent the beneficiary from breaching a provision of the underlying contract. A moment's reflection will show that *the beneficiary, unlike the bank, may be restrained if there is an express prohibition in the underlying contract against calling upon the guarantee. In theory an implicit or implied prohibition is just as good. The practical problem is that it is much harder to establish. That is not because of a requirement that an implicit or implied prohibition against calling upon a guarantee must be clear. It is because the implication cannot be made if it would stultify, or even if it would be inconsistent with, the purpose for which the guarantee was taken.*
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> I should explain the sense in which I am speaking of express, implicit and implied prohibitions. By an express prohibition I mean a provision of the underlying contract, which may be positive or negative in form but is specifically directed to calling upon the guarantee, as for example a provision saying that it shall not be called upon during stage 1 of a contract to be performed in stages or, as in this case, that it is necessary to give 10 days' notice before calling upon it. A provision simply saying that recourse may be had to the guarantee for moneys due or the like is not an express prohibition in the sense that I intend. *The question in a case like that is whether a prohibition against recourse is implicit in the words of the contract. By an implied term I mean a term of the kind associated with the decision of the Privy Council in BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266. Implication is the process of discerning either an implicit or an implied term.*" (Emphasis added)

Unlike the standard form contracts considered later in this article, the contract in *Fletcher* contained no specific provision for recourse to the security in the event that performance damages were payable. The Court of Appeal held that, on the proper construction of the contract, the relevant commercial purpose of the contract was to allocate the risk pending determination of any disputed entitlement, such that "the letters of credit are like money in the hands of Varnsdorf from which it may make a deduction",[10] and that no term could be implied into the contract to the effect that recourse to the security was only available if Varnsdorf's entitlement to performance damages was undisputed.

In *Bachmann Pty Ltd v BHP Power New*

8 [1998] 3 VR 812; (1999) 15 BCL 450.

9 (1977) 180 CLR 266 at 282-283 (cited with approval by Mason J in *Codelfa Constructions Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 357) where their Lordships said:

> "for a term to be implied, the following conditions (which may overlap) must be satisfied:
> (1) it must be reasonable and equitable;
> (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;
> (3) it must be so obvious that 'it goes without saying';
> (4) it must be capable of clear expression;
> (5) it must not contradict any express term of the contract."

10 See per Callaway JA at 829 and Charles JA at 821 (with whom Batt JA agreed).

Zealand Ltd,[11] the Victorian Court of Appeal went further in refusing an injunction to restrain the purchaser (the beneficiary) from calling up the security. The court held that, on the proper construction of the contract between the parties, it was the common intention of the parties that the supplier (the grantor) should be the party "who should be out of pocket" pending the resolution of any dispute between the parties, notwithstanding an express contractual limitation on the circumstances in which the purchaser could convert the security into cash. One factor the court took into account in reaching this conclusion was that the security took the form of an unconditional promise to pay on demand without reference to the supplier.

In his judgment, Brooking JA (with whom Tadgell and Ormiston JJA agreed) said at 428 ((2000) 16 BCL 26 at 32):

> "25. I mentioned at the outset that it was becoming more common for the contractor or supplier under a building or engineering contract to seek an injunction against the owner to prevent the calling up of a security. So far as I am aware, of the cases which have come before the courts in this country the present may be said to be novel in one respect and unusual in another. It is novel in the sense that the present case raises for the first time the effect of an express, albeit qualified, contractual prohibition (in the underlying contract) on the conversion of a security into cash. The novelty resides in the circumstance that the present contract contains an express, but qualified, prohibition on conversion of a security into cash — express in the sense that it is in form a negative stipulation ('a party shall not convert ... until the party becomes entitled'). In some of the other cases a court has had to consider whether a provision of the contract in form enabling the owner to convert to cash, or have recourse to, a security in a certain event did on its proper construction prohibit the owner from doing so except in that event.
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> 26. The present case, while not novel in a further respect, is unusual in that the security actually provided under the contract was by way of standby letter of credit, the name used to distinguish between letters of credit performing the traditional function of providing payment to the seller of goods when he performs his part of the contract of sale by delivering documents of title to the bank, and letters of credit performing the function of providing security against the danger that a party to a contract will fail to perform it. International trade is facilitated by traditional credits, which provide a mechanism for performance of contracts of sale. Standby credits are a safeguard which comes into play where there is a suggestion that contracts (whose subject-matter can vary widely) have been broken: Jack, *Documentary Credits*, 2nd ed, para [2.39]; Dolan, *Law of Letters of Credit*, Revised ed, para [1.04]; *Benjamin's Sale of Goods*, 5th ed, paras [23-032] and [23-217]-[23-219]."

His Honour continued, at 436-437 ((2000) 16 BCL 26 at 39):

> "53. In the present case the matters of conversion of and recourse to the security are dealt with by two general conditions, which should if possible be construed so as to work in harmony. *Clause 5.5 prohibits conversion into money until the purchaser becomes entitled to exercise a right under the contract in respect of the security*. Clause 22.4 entitles the purchaser to deduct from moneys otherwise due to the supplier any moneys due from the supplier to the purchaser and, if those moneys are insufficient, entitles the purchaser to have recourse to the security. Like cl 3.13(b) in *Fletcher*, it confers a right of recourse against the security to obtain the balance if the exercise of the right of set-off which it also confers leaves a balance outstanding in favour of the purchaser. It would, as Charles JA said in *Fletcher*, be strange if the clauses concerned in that case and this — cll 3.13(b) and 22.4 — conferred the practical right of recourse only where moneys were 'due' from the supplier to the purchaser in some such sense as actually or indisputably due. *I would treat cll 5.5 and 22.4 of the present contract, read in conjunction, as entitling the purchaser, as between itself and the supplier, to have recourse to the security where according to a*

11 [1999] 1 VR 420; (2000) 16 BCL 26.

> *bona fide claim made by the purchaser moneys are due to it from the supplier which exceed any moneys due from it to the supplier*.
> 54. *The fact that one of the forms of security recognised by cl 5.3, when regard is had to the approved undertaking which is attached, is cast in the now familiar form of an unconditional promise to pay on demand without reference to the supplier and notwithstanding any notice by it not to pay supports the view that the parties contemplated that it was the supplier who should be out of pocket pending the resolution of any dispute*." (Emphasis added)

While, on the facts of *Bachmann*, it was open to the court to have regard to the form of the performance bond as an aid to construction of the primary contract, this would not be appropriate if the performance bond (or the form thereof) did not come into existence until after the primary contract. As Ipp AJA (with whom Meagher and Heydon JJA agreed) said in *C H Magill v National Australia Bank Ltd*:[12]

> "50. The admissibility of subsequent conduct as an aid to the construction of a contract remains to be authoritatively resolved. It is sufficient to point to the differing views flowing from *Hide & Skin Trading Pty Limited v Oceanic Meat Traders Limited* (1990) 20 NSWLR 310 expressed by Santow J in *Spunwill Pty Limited v Bab Pty Limited* (1994) 36 NSWLR 290 (where subsequent conduct was held to be potentially admissible) and by Bryson J in *Sportsvision Australia Pty Limited v Tallglen Pty Limited* (1998) 44 NSWLR 103 (where the contrary was held).
> 51. In my respectful opinion the views expressed in *Sportsvision Australia Pty Limited v Tallglen Pty Limited* are to be preferred. Like Bryson J, I consider the reasoning of Lord Reid in *James Miller & Partners Limited v Whitworth Street Estates (Manchester) Limited* [1970] AC 583 at 603 to be unanswerable. His Lordship there said:
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> > 'I must say that I had thought that it is now well settled that it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made. Otherwise one might have the result that a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or year later.'
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> 52. …
> 53. Other intermediate courts of appeal have concluded that subsequent conduct is not admissible for the purposes of construing a contract: see *FAI Traders Insurance Company Limited v Savoy Plaza Pty Limited* [1993] 2 VR 343; *Hamfray Carpets Australia Pty Limited v Hycraft Carpets Pty Limited* (1996) ACLC 555; *Winstonu Pty Ltd t/as Harvey Norman Electrics v Pitson* [2001] FCA 541. This is the law of England: *L Schuler AG v Wickman Machine Tools Sales Limited* [1974] AC 235. I would adopt this rule."

The standard form contracts — calling up the security

AS 4000-1997 (and AS 4901-1998, AS 4902-2000 and AS 4903-2000)

In cl 3 of this form of contract, "security" is defined. Clause 5 then deals with the provision of security and the circumstances in which recourse may be had to the security.

It is notable that cl 5.1 provides that all security, other than cash or retention moneys, shall be transferred in escrow, namely that the security has been provided on the basis that it be held until the conditions on which it was provided have been satisfied.

Clause 5.5 provides that, generally speaking, any portion of the security which is cash or retention moneys shall be held in trust for the party providing it until the principal or the contractor is entitled to receive them.

Clause 5.3 allows a party providing retention moneys or cash security to substitute another form of security. It says nothing about the rights of the beneficiary of a security to convert a non-cash security into cash.

Clause 5.4 deals with reduction and release of

12 [2001] NSWCA 221 (13 Aug 2001). See also *Fletcher Construction Australia Ltd v Varnsdorf Pty Ltd* [1998] 3 VR 812 per Callaway JA at 828; (1999) 15 BCL 450.

security, in terms which suggest that the security is to be returned in the form in which it has been provided.

Applying the canon of contractual construction "expressio unius est exclusio alterius", the express provisions of cl 5.3 dealing with the substitution of security by the provider of that security would suggest that there is no implied right in the beneficiary of a security to convert a non-cash security into cash unless and until the beneficiary is entitled to have recourse to the security in accordance with the provisions of the contract. The issue of recourse is dealt with further below.

Having regard to the terms of cl of AS 4000, it seems likely that a court would imply a negative stipulation to the effect that the security not be called up unless and until the beneficiary is entitled to have recourse to the security in accordance with the provisions of the contract.

AS 2124-1992

Clause 5 of this form of contract sets out detailed requirements in respect of security, retention moneys and performance undertakings. Clause 5.1 sets out the purpose for security, retention moneys and performance undertakings as being "for the purpose of ensuring the due and proper performance of the Contract". Clause 5.3 deals with the form of the security as including "an approved unconditional undertaking given by an approved financial institution or insurance company". Clause 5.5 sets out the circumstances in which a party may have recourse to retention moneys and/or security and/or may convert into money security that does not consist of money. Those circumstances are where:

(a) the party has become entitled to exercise a right under the contract in respect of the retention moneys and/or security; and
(b) the party has given the other party the requisite notice of its intention to have recourse to the retention moneys and/or cash security and/or to convert the security; and
(c) that period has elapsed since the notice was given.

Clause 42.1 provides for the certification by the superintendent of amounts due under the contract, including amounts payable by the contractor to the principal. Clause 42.1 further provides that such payment is to be made within 28 days after receipt by the superintendent of a claim for payment or within 14 days of issue by the superintendent of the superintendent's payment certificate, whichever is the earlier.

Clause 42.11 provides that, where a party fails to pay the other party an amount due and payable under the contract within the time provided by the contract, the other party may, subject to cl 5.5, have recourse to retention moneys (if any), and if those moneys are insufficient, then to security under the contract. A similar provision is contained in cl 42.10 in respect of deduction by the principal from moneys due to the contractor any money due from the contractor to the principal otherwise than under the contract.

AS 2124-1992 contains various provisions in which costs incurred by a principal are recoverable from the contractor as "a debt due from the Contractor to the Principal". Those circumstances include cl 30.3 (defective materials or work), cl 35.6 (liquidated damages), cl 37 (defects liability), cl 38 (cleaning up), cl 39 (urgent protection) and cl 44.6 (adjustment on completion of work taken out of the hands of the contractor).

Having regard to the detailed provisions of cl 5.5, it seems likely that a court would imply a negative stipulation to the effect that a party may not convert any non-monetary security into money otherwise than in accordance with the provisions of the contract which are referred to above.

It is worthy of note that, in *Barclay Mowlem Construction Ltd v Simon Engineering (Australia) Pty Ltd*,[13] Rolfe J granted an interlocutory injunction to restrain a principal from calling up an unconditional bank guarantee provided under cl 5 of the AS 2124-1981 form of contract, which did not contain the express provisions contained in cl 5.5 of AS 2124-1992.

NPWC 3

Clause 5 of NPWC 3 deals with security, retention moneys and other performance undertakings. Clause 5.1 provides that the purpose of those securities etc shall be "for the purpose of ensuring the due and proper performance of the Contract and of satisfying the obligations of the

13 (1991) 23 NSWLR 451.

Contract under the Contract". Clause 5.3 specifies the form of security, as including "an unconditional undertaking or security in a form approved in writing by the Principal and given by a bank approved in writing by the Principal". Clause 5.5 provides that if "the Principal becomes entitled to exercise all or any of his rights under the Contract in respect of the security, the Principal may convert into money any security that does not consist of money", and shall not be liable for any loss occasioned by such conversion.[14]

Clause 42.1 provides the time in which payment of moneys shall be made under a progress certificate, namely, within 14 days after issue of that progress certificate. The amount of the progress payment shall take account of "any other amount that the Principal may be entitled to deduct from the moneys due under that progress certificate".

Clause 46 of NPWC 3 gives the principal very wide powers to deduct moneys on account of "any debt due from the Contractor to the Principal under or by virtue of any provision of the Contract". The clause goes on to provide that any such debt may be deducted from moneys payable to the contractor and, if such moneys are insufficient for the purpose, "then from the Contractor's security under the Contract".

NPWC 3 provides for various circumstances in which the principal may recover various costs incurred by the principal as "a debt due from the Contractor to the Principal which may be deducted or recovered by the Principal pursuant to Clause 46". Those provisions are contained in cl 30.3 (materials or work not complying with the contract), cl 35.5 (liquidated damages), cl 37.2 (defects liability), cl 39 (urgent repairs), and cl 44.4 (adjustment of costs on completion of the works when the works have been taken out of the contractor's hands).

Having regard to the wording of cl 5.5 of NPWC 3, it seems likely that a court would imply a negative stipulation to the effect that the principal may not convert non-monetary security into money otherwise than if it becomes entitled to exercise any of its rights under the contract, consistent with the decision of Rolfe J in in *Barclay Mowlem Construction Ltd v Simon Engineering (Australia) Pty Ltd*.[15]

However, based on what was said by Brooking JA in *Bachmann*,[16] in the passage in paras [53] and [54] of his Honour's judgment, there may be a contrary argument that the reference in cl 5.3 to "an unconditional undertaking" indicates that the common intention of the parties is that such security may be converted into cash without notice to the grantor and accordingly the beneficiary would not be in breach of the contract if it did so.

JCC-C 1994 (and JCC-D 1994, JCC-E 1994 and JCC-F 1994)

Clause 10.20 of this form of contract provides that the builder shall provide security "for the due performance of his obligations under this Agreement". Clause 10.21 provides that the security shall be in the form of either an unconditional undertaking from a bank or an amount retained progressively by the proprietor (called a Retention Fund), which is to be held by the proprietor and the builder on joint account (as provided in cl 10.23).

Unlike the other standard form contracts considered above, there appears to be no express provision governing the circumstances in which a proprietor may convert a performance bond (an unconditional undertaking by a bank) into cash. The only clause which suggests to the contrary is cl 10.22.02, which provides that any bank guarantee provided shall be maintained effective until practical completion. However, a court would probably construe this provision as a clause for the benefit of the proprietor such that it would not assist in the implication of a negative stipulation that the proprietor not call up the bank guarantee unless it was entitled to have recourse to the funds.

Clause 10.25 deals with the availability of security. The words of the clause suggest that it is directed at the proprietor having recourse to the security, rather than calling up any non-monetary security. It provides that any security (cash or non-monetary) shall be available to the proprietor whenever the proprietor shall be entitled to the payment of moneys by the builder under or in consequence of the contract or whenever the

14 Clause 5.5 of NPWC 3 is expressed in similar terms to cl 5.6 of AS 2124-1981 considered by Rolfe J in *Barclay Mowlem*.

15 Op cit n 12 and 13.

16 Op cit n 10.

proprietor shall be entitled to reimbursement of moneys paid to others under the contract.

There are various circumstances specified in the contract which give rise to an entitlement to the payment of moneys by the builder or reimbursement of moneys paid by the proprietor to others. These provisions are contained in cl 5.06.03 (employment of others on the builder's default), cl 6.11.05 (making good of defects), cl 10.14.02 (liquidated damages) and cl 10.15 (provisional withholding of damages).

JCC-D was the subject of consideration by Austin J of the New South Wales Supreme Court in *Reed Construction Services Pty Ltd v Kheng Seng (Australia) Pty Ltd*.[17] Although his Honour was then dealing with an application for interlocutory injuntive relief, he observed, at 160:

> "The parties explored whether all or part of their dispute could be resolved on a final basis, perhaps by trying the question of construction of the contract as a separate question on agreed facts but they were not able to reach agreement on a basis for doing so. I must therefore deal with the matter on an interlocutory basis at this stage.
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> However, in doing so I am mindful of what Rolfe J said in *Barclay Mowlem Construction Ltd v Simon Engineering (Australia) Pty Ltd* (1991) 23 NSWLR 451 and 456. His Honour there remarked that in matters such as this, although the argument is only on an interlocutory basis, interlocutory orders may have the effect of determining the substantial issue between the parties. In such a case, as his Honour said, to the extent that a pure question of law arises based on facts not in contest, it is the duty of the court to decide the relevant question of law."[18]

Austin J held that a negative stipulation should be implied to the effect that the proprietor may not convert non-monetary security into money unless it becomes entitled to exercise any of its rights under the contract. He held that, on the proper construction of JCC-D, the proprietor must establish substantially more than a "bare claim to be entitled to reimbursement" under cl 5.06.03 and more than "a bona fide claim to unliquidated damages for breach of contract" to be entitled to call up the performance bond under cl 10.25. He said, at 165-167:

> "The circumstances in which the defendant may call upon the bond are dealt with in cl 10.25. The clause says that the security 'shall be available' to the proprietor in certain circumstances. 'Available' refers to the availability of the moneys which are the subject of the security: *Hughes Bros Pty Ltd v Telede Pty Ltd* (1989) BCL 210 at 216. That is, cl 10.25 deals with the circumstances in which a proprietor is permitted by the building contract to call upon the issuer of the security (where the security is a bank guarantee or bond rather than a retention fund) for payment. In my opinion there is implied in cl 10.25 a prohibition on the proprietor calling up the security except where cl 10.25 authorises the proprietor to do so, for the very purpose of specifying the occasions upon which the security is 'available' is to limit the availability of the security to those occasions: compare *Sabemo Pty Ltd v Malaysia Hotel (Aust) Pty Ltd* (unreported, NSW Sup Ct, Hodgson J, 5 July 1990). In other words, my view is that there is in this case a contractual stipulation between the plaintiff and the defendant which limits what would otherwise be the defendant's absolute entitlement to insist on payment under the security: see *Wood Hall* at 459 and *Barclay Mowlem* at 458. The limitation is enforceable by injunction.
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> Clause 10.25 envisages two sets of circumstances in which the security 'shall be available' to the proprietor, namely whenever:
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> (a) the proprietor shall be entitled to the payment of moneys by the builder under or in consequence of the contract ('the payment limb'); or
>
> (b) the proprietor shall be entitled to reimbursement of any moneys paid to others under the contract ('the reimbursement limb').
>
> In these proceedings the security is available to the proprietor 'as if the security were a sum of money due or to become due to the builder by the proprietor'. These words deal with the status of the payment or reimbursement for the

17 (1999) 15 BCL 158.

18 See also section "5" below.

purposes of the claim on the security and any set-off against the security moneys; they are not directed to defining the circumstances in which the proprietor's claimed entitlement arises as against the builder. In the *Hughes Bros* case Cole J expressed the opinion that in a clause which was in this respect the same, the words 'builder' and 'proprietor' were inadvertently transposed. I note, however, that in a note to the report of the *Hughes Bros* case, the editor of the *Building and Construction Law Reports* defends the drafting of the clause in the following words:

> 'It is suggested that the phrases are correct as they appear in the contract. They were inserted to overcome the problems which came to light in *Australasian Conference Association Ltd v Mainline Constructions Pty Ltd* (1979) 53 ALJR 66, where the bank guarantee could not be used to reimburse the proprietor for payments made to subcontractors, because it was not a "sum due" to the builder. This reference to a "sum due" is to an amount due to the builder from which an amount owing to the proprietor may be deducted.'

It is not necessary for me to resolve this issue, but I must say if the clause is intended to operate in the way the editor asserts, the drafting is strikingly inadequate to convey the drafter's intention.

The reimbursement limb of cl 10.20 does not arise on the present facts because there is no evidence that the proprietor has incurred and is claiming reimbursement for costs, of a kind which could be the subject of such a claim under the contract. But the same words, 'shall be entitled', are used in both the reimbursement and the payment limbs.

In the case of reimbursement, cl 5.06.03 sets out the circumstances in which the proprietor may claim on the security for reimbursement of costs properly incurred in having works executed, where the builder has failed to comply with the architect's instruction to carry out the works. According to Cole J in *Hughes Bros* at 216, it is not necessary for the proprietor to show the amount claimed for reimbursement has been determined by the architect, an arbitrator or the court. However, *it is plain that the claim for reimbursement out of the security under cl 5.06 arises only if the procedure of that clause is followed and the expenditure is in fact incurred. I infer that in the context of the reimbursement limb of cl 10.25, the words 'shall been entitled' must require substantially more than having a bare claim to be entitled to reimbursement.*

My opinion is that the same is to be said of the words 'shall be entitled' in the payment limb of cl 10.25. That those words do not require the entitlement to be recognised in a judgment or award is clear from the concluding words of the clause, which require an enabling award or judgment (or written consent of the builder) only in the special case where the employment of the builder is terminated. *However, in my opinion a mere claim to entitlement is not sufficient. The words 'shall be' reflect the fact that at the time when the contract speaks, the relevant entitlement is necessarily in the future rather than that it is hypothetical or merely possible*. I believe that this interpretation accords with other uses of the words 'shall be entitled' in the contract: See cll 4.06, 4.07.06, 4.09.02, 10.9 and 10.10.

Nor, in my opinion, is it enough that the proprietor has a bona fide claim to unliquidated damages for breach of contract, at any rate where the architect has not issued any relevant notice or certificate and there is no evidence to quantify the claim in money terms. On the natural meaning of the words one would not say that in such a case the proprietor is entitled to the payment of money under the contract.

It cannot be said, however, that the proprietor must prove an actual entitlement, even on the balance of probabilities, before the issuer of the security can safely meet the proprietor's claim for payment. Where the issuer of the security acts on the claim, it will be protected by the unconditional nature of the security (assuming it is an unconditional promise), as explained by the observations of the High Court in *Wood Hall*, extracted above. The issuer of the security is not a party to any contractual constraint in the building contract unless the terms of the building contract are imported into the security: compare *Barclay Mowlem Construction Ltd v Simon Engineering (Aust) Pty Ltd* (1991) 23 NSWLR 451 and 457 ff per Rolfe J.

If the builder puts the question of entitlement

in issue by taking proceedings against the proprietor to enjoin a claim on the security, the question of entitlement in fact will be an issue to be addressed in those proceedings. It will be addressed on the basis on which such issues are addressed in interlocutory proceedings, in accordance with the principles enunciated in such cases as *Kolback Securities Ltd v Epoch Mining NL* (1987) 8 NSWLR 533).

It is implied in what I have said that while I accept the reasoning of Cole J in the *Hughes Bros* case, I regard that decision as clearly distinguishable. In that case the relevant clause, also cl 10.25, defined the proprietor's entitlement to claim on the security as arising when 'the proprietor may be entitled to the payment of moneys by the builder' under the contract (emphasis supplied). *I regard the difference between 'may be' and 'shall be' as critical*. In that case Cole J dealt with submissions very similar to the ones put to me by the legal representatives of the parties in this case. He said, relying on the use of the word 'may', that the clause did not require the proprietor's claim to be either determined in the form of a declared sum or to be rendered such, by agreement or arbitral award. He said (at 216) that 'may be entitled' could not be read as 'is entitled'. He observed that 'had that been intended it could have been simply stated'. He concluded (at 216) that under the clause before him, the security was available to the proprietor if it had a claimed entitlement against the builder for payment which was not 'specious or fanciful'. In my view the difference in wording indicates that the present cl 10.25 is the very kind of clause that Cole J distinguished from the one before him, that is to say *it is a clause which states an intention that the proprietor's entitlement must be an actual entitlement*." (Emphasis added)

3. Rights of the grantor to restrain the beneficiary from dealing with a security

A distinction should properly be drawn between calling up a security (namely, converting it into cash) and having recourse to or dealing with the proceeds of that security.

In *Malaysia Hotel (Australia) Pty Ltd v Sabemo Pty Ltd*,[19] Sheller JA (with whom Kirby P and Mahoney JA agreed) said, at 58:

> "Even if the occasion for the proprietor to have recourse to the security has not yet arrived, no process of implication or construction of the contract, in my opinion, deprives the proprietor of the right it has exercised to demand payment under the guarantee. *The cash paid on demand to the proprietor is not held by it beneficially but as security and consistent with cl 30* (of the Edition 5b form of contract) must be placed to the credit of an interest bearing deposit in the joint names of the proprietor and the builder at a bank nominated by the builder and approved by the proprietor. Recourse may be had to it in accordance with the terms of the contract. As Gibbs ACJ said 'One has recourse to a security by resorting to it for the purpose of gaining some benefit from it'. Otherwise it must be accounted for in accordance with cl 31(f) and (g). In short *it remains open to the proprietor under this arrangement to change from security by way of a bank document to a cash security. By calling upon the guarantee the proprietor does not have recourse to the security but changes its form*. The contract permits the proprietor to do this." (Emphasis added)

Whether the beneficiary may "have recourse to the security" will depend on the terms of the contract. In *Anaconda Operations Pty Ltd v Fluor Daniel Pty Ltd*,[20] the Victorian Court of Appeal held that the terms of that contract were such that the beneficiary was entitled to have recourse to the security.

The contract in *Anaconda* expressly provided (in cl 4.3 (c)) that "the Contractor accepts that the Owner may call upon the Approved Security at any time and the Contractor shall not seek an injunction against either the Owner or the issuer of the Approved Security preventing a demand on payment under such security".

The Court of Appeal held, that, on the proper construction of the contract, there was no express or

19 (1995) 11 BCL 50.
20 (2000) 16 BCL 230.

implied prohibition on the owner calling up and dealing with the security.

In his judgment, Brooking JA (with whom Ormiston and Buchanan JJA agreed) said, at 234:

> "15. It has not been suggested that a prohibition or restriction, either on the calling up of the security or on the application of the proceeds, is to be found anywhere in the contract except in cl 4, itself. There is no express prohibition or restriction on the calling up of the security. In *Fletcher*, at 826, Callaway JA suggested that it would be difficult to establish an implied one. But the present case is entirely clear. For *cl 4.3(c) is an express provision negativing any prohibition or restriction: the contractor accepts that the owner may call upon the security at any time and agrees not to seek an injunction to prevent a demand for payment. It matters not that it may be argued that the latter part of this provision is bad as ousting the jurisdiction of the courts. The important thing is that both parts of it show an intention that the owner is to be at liberty to call on the security at any time*. It is difficult to imagine a more clearly expressed intention. And so the present contract not only fails to displace, but clearly reinforces what might be called the prima facie position." (Emphasis added)

Brooking JA continued, at 236-237:

> "24. The respondent's submission was and is that, once the security is called up and cash received, the cash does not become 'the owner's money': it may be used by the owner only for a particular purpose. But it is not easy to say what the available particular purpose is according to the respondent's submission. McDonald's affidavit of 22 September asserts by implication that the owner is not entitled to 'appropriate the proceeds ... in its absolute discretion' and asserts that it may apply the proceeds only 'in accordance with the contract' but does not show what, in the respondent's submission, the contract requires or permits. Paragraph 15 of the endorsement on the writ, both before and after its amendment, implicitly asserted that the proceeds might be used only to make payments to secure performance of the respondent's obligations under the contract. The respondent's outline of argument for the purposes of the appeal maintained the submission as recorded by the judge, namely, that the owner was not entitled to apply the approved security moneys to meet any costs or liabilities arising outside the contract. This position was maintained in oral argument on appeal.
> 25. I shall not summarise the respondent's contentions in support of the view that the claims, or most of the claims, made by the appellants for amounts totalling about $143 million are not for costs or liabilities arising under the contract. They are sufficiently recorded in the written material. Nor do I find it necessary to deal with any of those contentions, beyond saying that I would, as at present advised, have difficulty in accepting those contentions in anything approaching their entirety. For the short answer to the respondent's contentions is the primary argument that is and always has been put on behalf of the appellants, namely, that the proceeds of a successful call upon the security become part of the assets of the appellants, although obligations in contract exist in consequence of the receipt of the proceeds. The judge said that whether the defendants were entitled to treat the proceeds as 'their moneys' turned on the proper construction of cl 4, and this is, with respect, plainly so. Her Honour further said that a serious question arose with regard to the construction of cl 4 and in particular para (c) of cl 4.3. The reasons for decision do not set out, even very briefly, a fairly arguable view that cl 4 or para (c) of cl 4.3 in particular, on its proper construction imposes a trust upon the proceeds or in some other way (not identified before us in argument) prevents them becoming part of the beneficially owned assets of the proprietor. The particular paragraph mentioned by the judge, para (c) of cl 4.3, is directly concerned, not with the status or application of the proceeds of a call but with the making of a call. *By far the most important part of cl 4 for present purposes is not para (c) but para (b) of cl 4.3:*
>
> > *'The owner does not hold any Approved Security or the proceeds of any Approved Security on trust for the Contractor.'*
>
> 26. *In the face of this provision it is, to say the*

very least, extremely difficult to avoid the conclusion that the proceeds of conversion do become part of the general funds of the owner. No doubt, as cl 4.1, itself records, the object of the provision of the bonds is to give the owner security in respect of the contractor's obligations under the contract, but a proprietor may be secured by augmenting its funds, there being a contractual obligation on its part to make a 'refund' — but not in specie — in certain events. It is not a necessary or even natural implication from the statement of purpose or function of the security in cl 4.1 that the proceeds of a converted security are to be impressed with a trust, and para (b) of cl 4.3 lies like a giant tree fallen athwart the path, a most formidable obstacle to the implication of a trust. The obligations cast upon the owner by cl 4 in respect of the proceeds of a call made under the security are merely contractual. The owner receives the proceeds and may apply them as it wishes. It is under a contractual obligation to pay the contractor an amount equal to 40 per cent of the proceeds within 14 days of mechanical completion of both Separable Parts: cl 4.2(a). Within 14 days after the end of the defects liability period of both Separable Parts it must make a payment calculated in accordance with cl 4.2(b). It must make further payments as required by cl 4.2(c) and (d). It must pay interest as required by cl 4.3(d). The notion that a trustee should be required to pay interest on a trust fund to a beneficiary is a strange one.

27. The respondent founded itself upon reference to the contractor's obligations under the contract in cl 4.1 and relied on things said by the High Court in *Australasian Conference Association Ltd v Mainline Constructions Pty Ltd (in liq)* (1978) 141 CLR 335 where the contract described the retention fund in lieu of which the security was to be effective as 'security that the builder shall carry out his obligations under this contract'. But that contract was in very different terms from the present, as we observed in the course of argument. It provided that a trust should arise.

28. Clause 4 of the present contract may be contrasted with provisions often found, and so to be seen in a number of reported and unreported cases, whereby a trust is expressly created of retention moneys or of the proceeds of the conversion of a security given in lieu of retention moneys. At times a standard form of contract provides for the creation of a trust in respect of retention moneys or cash. See, for example, AS 2124-1992, cl 5.9, JCC-F 1994, cl 10.23 and SWB-2, cl 10.14.3. Many standard forms are conveniently collected in Dorter and Sharkey, *Building and Construction Contracts in Australia*, 2nd ed, vol 2. A summary of a number of provisions in standard forms of contract dealing with the matter of trust in relation to retention and securities will be found in Bailey, *Construction Law in Australia*, 2nd ed, pp 239-243. The imposition of trusts on retention sums is discussed in *Hudson's Building and Engineering Contracts*, 11th ed, paragraphs 8-076 to 8-086 and 13-130. *The present contract is, as I have said, in some respects unusually simple. Under it, the proceeds of a bond which is converted into cash provide security for the performance of the contractor's obligations under the contract in a practical way, by augmenting the owner's assets. The same protection was given to proprietors in a practical way by the unsophisticated contracts of old, which provided for progress payments of a stated percentage of the value of the work done, before elaborate provision came to be made about what was to be done with retention sums. As Hudson says (para 8-076), with the early contracts, '[t]he intention simply was to provide for partial payment during the construction period, so as to confer a degree of commercial security on the owner against possible breaches or failures of the contractor*'." (Emphasis added)

The standard form contracts — dealing with the security

AS 4000-1997 (and AS 4901-1998, AS 4902-2000 and AS 4903-2000)

As noted above, cl 5 of this form of contract deals with the provision of security and the circumstances in which recourse may be had to the security. It is notable that cl 5.1 provides that all security, other than cash or retention moneys, shall be transferred in escrow. Clause 5.5 provides that, generally speaking, any portion of the security which is cash or retention moneys shall be held in

trust for the party providing it until the principal of the contract is entitled to receive them.

Clause 5.2 provides that "security shall be subject to recourse by a party who remains unpaid after the time for payments where at least 5 days have elapsed since that party notified the other party of intention to have recourse".

Applying common law principles, where the contract does not specify the time for performance, then the obligation must be performed within a resonable time (see *Hick v Raymond* [1893] AC 22, per Lord Watson at 32 and *Canning v Temby* (1905) 3 CLR 419 per Griffith CJ at 424.

The "time for payment" within the meaning of cl 5.2 is to be determined by reference to cl 37.2, which deals with certificates and provides that payments shall be made within seven days of receiving written notice of the superintendent's assessment of moneys payable to the principal or contractor respectively.

Elsewhere within AS 4000, there are various clauses providing for certification by the superintendent of costs incurred as money due from the contractor to the principal. These are to be found in cl 27 (cleaning up), cl 29.3 (defective work), cl 34.7 (liquidated damages), cl 35 (defects liability) and cl 39.6 (adjustment on completion of work taken out of the contractors hands).

Clause 37.6 also provides that the principal may elect that moneys due and owing otherwise than in connection with the subject matter of the contract also be due to the principal pursuant to the contract.

Having regard to the terms of cl 5.1 of AS 4000, it seems likely that a court would imply a negative stipulation to the effect that the beneficiary not have recourse to the security other than in accordance with the provisions of the contract referred to above. That conclusion follows from the fact that cl 5.1 expressly provides that any delivered security (other than cash or retention moneys) shall be transferred "in escrow", namely that the security has been provided on the basis that it be held until the conditions on which it was provided have been satisfied.

AS 2124-1992

In relation to this form of contract, it is notable that cl 5.5 refers to a party having recourse to retention and/or cash security or, alternatively, converting into money security that does not consist of money. Although not expressly stated in the clause, it would seem to be implied that the requirements of the clause would also apply to monetary security which has resulted from a call on a performance bond, bank guarantee etc.

For the reasons set out above in relation to calling up security, it seems likely that a court would imply a negative stipulation against a beneficiary having recourse to the proceeds of such a security unless the requirements of cl 5.5 have been satisfied.

NPWC 3

As noted above, cl 5.5 of this form of contract deals with conversion of security but not recourse to security. The issue of recourse to security is dealt with in cl 46, which requires that there be "a debt due from the Contractor to the Principal" and that moneys otherwise payable to the contractor by the principal including any retention moneys are insufficient. It seems likely that a court would imply a negative stipulation against a beneficiary having recourse to the security unless these requirements had been satisfied.

JCC-C 1994 (and JCC-D 1994, JCC-E 1994 and JCC-F 1994)

As indicated above, cl 10.25 talks about the "availability of security" in a manner which indicates that what is being referred to is the recourse to (or dealing with) the security.

Applying the reasoning of Austin J in *Reed Construction Services Pty Ltd v Kheng Seng (Australia) Pty Ltd*,[21] it seems likely that a court (at least in New South Wales) would imply a negative stipulation into the contract that the security would not be available to the proprietor unless the proprietor can establish an entitlement under the contract which is substantially more than a "bare claim to be entitled to reimbursement" under cl 5.06.03 or "a bona fide claim to unliquidated damages for breach of contract".

4. Whether rights of the beneficiary to call up and deal with a performance bond survive termination or rescission

21 (1999) 15 BCL 158.

of the contract

In *Fletcher Construction Australia Ltd v Varnsdorf Pty Ltd*,[22] Callaway JA (with whom Batt JA agreed) said, at 830 ((1999) BCL 450 at 465:

> "We are not concerned with the vexed question whether, and if so in what circumstances, a beneficiary may be prevented from calling upon a guaranteee where the underlying contract has been discharged: compare *Potton Homes Ltd v Coleman Contractors Ltd* (1984) 28 BLR 19 at 28-29."

In recent times, there have been two instances in which appellate courts in Australia have considered the issue of whether or not any contractual right which a beneficiary may have to call up and deal with the security may be exercised after termination or rescission of the contract.[23]

In *Geraldton Building Co Pty Ltd v Christmas Island Resort Pty Ltd*,[24] the contract between the parties was apparently not one of the standard forms of contract referred to above (or any predecessor thereof). Clause 14 of the contract provided as follows:

> "Within one week of the date of execution of this agreement or upon the first progress payment made by the proprietor to the construction manager, whichever is the earlier, the constrcution manager shall deliver to the proprietor security for its due performance of this agreement in the form of a bank guarantee from a reputable Australian bank approved by the proprietor in the sum of Aus$1,000,000 'the performance guarantee')."

The contractor terminated the contract before practical completion because of the proprietor's failure to pay certain progress payments. It was conceded, for the purposes of the proceedings, that the principal was nevertheless entitled to an award of unliquidated damages for breaches of the contract by the contractor before its termination.

The Full Court of the Supreme Court of Western Australia held that the contract and the form of the bank guarantee revealed a common intention of the parties that the right to call on the bank guarantee survived the termination of the contract. The court further held that, on termination, a secondary obligation to pay damages for non-performance was substituted by operation of law for the obligation to perform and that therefore the obligation to pay damages was secured by the bank guarantee.

In his judgment, Franklyn J (with whom Kennedy and Murray JJ agreed) said, at 72-74:

> "In my opinion the wording of cl 14 is consistent with recognition of the possibility of termination for breach followed by a claim for unliquidated damages, and the common intention that the bond be then available to the extent of its value to secure such damages as might be awarded and is not inconsistent with any other provision of the agreement or with the agreement as a whole.
>
> The appellant also submits that, under the terms of the bond, no money becomes payable from the bank to the proprietor and there is no right to any payment unless and until a written demand or request for payment has been made, it being suggested, as I understand the submission, that this is a condition precedent to payment and that the delays necessary to determine the amount payable in respect of an unliquidated claim necessarily lead to the inference that any such demand or request must be for a liquidated amount. I do not accept the validity of that submission. What is clear is that the parties accepted the bond in its present form as the agreed-upon 'bank guarantee' delivered as security for 'the due performance of' the contract. Its terms declare that the sum of $1 million held by the bank is so held at the proprietor's 'disposal' but will be held at the bank until it is notified by the proprietor in writing either that the money is not required or of the amount of payment required by the proprietor either in part or in parts. The proprietor's right of access to it is thereby confirmed and is not dependent upon any demand or request. It will be so held at its disposal until the events there mentioned. The right to payment pursuant to the bond is not a 'conditional right', as I understand

22 [1998] 3 VR 812; (1999) 15 BCL 450.

23 Up to 19 September 2001, neither of these cases appears to have been the subject of subsequent judicial consideration.

24 (1996) 12 BCL 64.

the appellant's counsel to maintain, the condition being the requirement to give written notice. *On its proper interpretation and having regard to its express terms there is an unconditional right to payment in respect of non-performance from the funds held by the bank at the proprietor's disposal, that right to be exercised by notice in writing. The notification is clearly not a condition of the existence of the right*. In terms of cl 14 the form of the guarantee could have been in any one of a number of different forms. Pursuant to cl 14 its form had to be approved by the respondent. It was approved by it in its present form which does not in any way suggest that it is to be limited to liquidated claims. No such limitation is found within the terms of the agreement itself. The bond contains no limitation as to the purposes or nature of the claims for which the payment might be required. Had it been intended that it be limited to claims for liquidated amounts, one would expect some such restriction to appear in the body of the bond itself, particularly as the payment out was to be effected by a third party, the bank. In the absence of limitation in the agreement or bond and of fraud, the proprietor is entitled to the benefit of the bond by way of security for due performance. See *Wood Hall Ltd v Pipeline Authority* (1979) 141 CLR 443 at 451, 457 and 459. *R D Harbottle Mercantile Ltd v National Westminster Bank Ltd* [1978] 1 QB 146 at 155; *Hortico (Australia) Pty Ltd v Energy Equipment Co (Australia) Pty Ltd* (1985) 1 NSWLR 545.

It is then said that, the agreement having been terminated in the manner in which it was, cl 14 did not survive to enable the respondent to claim on the bond. In reliance on *Bloemen Pty Ltd v Gold Coast City* [1973] AC 115, it was submitted that the obligation of the appellant to maintain the bond so as to enable the proprietor to call on it pursuant to cl 14 was a 'substantial obligation' of the agreement which did not survive its termination (*Bloemen* at 126-127). The decision in *Hyundai Heavy Industries Co Ltd v Papadopoulis* [1980] 1 WLR 1129 is said to be distinguishable in that it was concerned with rights accrued prior to cancellation of the contract. In the present case, it is said, there is no accrued 'right' to call for payment as the agreement was terminated before any written demand or request for payment was made. Clause 14, so the argument goes, has no post termination relevance because by its terms it relates to practical completion and the defects liability period, which assume the continuance of the agreement to completion.

Bloemen (above), in my opinion has no relevance to the facts of this case. *The existence of a right to call on the bond subsequent to termination depends upon the proper construction of cl 14 and the bond. Unlike Bloemen, the present case is not concerned with a 'substantial obligation' of the contract in the sense there used. The obligation imposed on the construction manager by cl 14 was fully performed by the provision of the bond. It was provided as security for the due performance of the agreement. It was available to meet damages for which it became liable for non-performance. The bond is not by its terms limited to the life of the contract and there is nothing in cl 14 or otherwise in the agreement to suggest that the parties intended any such limitation. The proprietor has the right under cl 20 of the agreement to terminate the contract for non-performance after giving notice and the construction manager's failure to remedy as required by such notice. It would seem contrary to the whole purpose of cl 14 that the guarantee given to secure to the proprietor damages for non-performance should be lost only because the proprietor exercised his remedy of termination for that non-performance. It is no answer to say that it could have demanded payment of the moneys from the bank prior to termination and hold the proceeds until its measure of damages was quantified. There is no condition in the agreement or bond to that effect and in my view it would be unreasonable to suggest that such should, in either case, be implied. Such an implication is not necessary to give business efficacy to the provision*. The only relevance of cl 14 after termination is that it identifies the purpose of the bond and the use to which the moneys thereby secured may be put. The obligations it creates have been fulfilled, the bond exists and is available as security for damages for non-performance independently of the clause. The proprietor's right to damages for

the managing contractor's failure to perform is not terminated by termination of the agreement, whether that right be for liquidated or unliquidated damages. The right to such damages and so to call on the security, whether for liquidated or unliquidated damages arises on breach and consequently the bond in my opinion, has post-termination effect.

The appellant terminated the contract. It is an agreed fact that at the time of termination it was in breach of its obligations under the agreement in respect of which the respondent is entitled to an award of unliquidated damages. Upon termination the position is that the parties are:

> 'discharged from further performance of the contract, but rights are not divested or discharged which have already been unconditionally acquired. Rights and obligations which arise from the partial execution of the contract and causes of action which accrued from its breach alike continue … But when a contract, which is not void or voidable at law, or liable to be set aside in equity, is dissolved at the election of one party because the other has not observed an essential condition or has committed a breach going to its root, the contract is determined so far as it is executory only and the party in default is liable for damages for its breach.' *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457, Dixon J at 477.

In *Lep Air Services Ltd v Rolloswin Investments Ltd* (also referred to as *Moschi v Lep Air Services Ltd*) [1973] AC 331 Lord Diplock said at 350:

> 'It is no doubt convenient to speak of a contract as being terminated or coming to an end when the party who is not in default exercises his right to treat it as rescinded. But the law is concerned with the effect of that election upon those obligations of the parties of which the contract was the source, and this depends upon the nature of the particular obligation and upon which party promised to perform it.
>
> Generally speaking, the rescission of the contract puts an end to the primary obligations of the party not in default to perform any of its contractual promises which he has not already performed by the time of the rescission. It deprives him of any right as against the other party to continue to perform them. It does not give rise to any secondary obligation in substitution for a primary obligation which has come to an end. The primary obligations of the party in default to perform any of the promises made by him and remaining unperformed likewise come to an end as does his right to continue to perform them. *But for his primary obligations there is substituted by operation of law a secondary obligation to pay to the other party a sum of money to compensate him for the loss he has sustained as a result of the failure to perform the primary obligations. This secondary obligation is just as much an obligation arising from the contract as are the primary obligations that it replaces*: see *R V Ward Ltd v Bignall* [1967] 1 QB 534, 548.'

In my opinion the provisions of cl 14, considered with the contract as a whole and the terms of the bond, reveal that it was the common intention of the parties that the right to call on the security for due performance should continue after termination of the agreement." (Emphasis added)

In *Queensland Investment Corporation v Kern Corporation Pty Ltd (in liq)*,[25] the contract between the parties was also apparently not one of the standard forms of contract referred to above (or any predecessor thereof).

Under cl 11.1 of the contract, the developer (the first plaintiff) was obliged under the terms of the contract to provide security and a guarantee to the proprietor (Queensland Treasury Corporation and the defendant) "for the purpose of ensuring the Developer's due and proper performance of this Deed and of satisfying the Developer's obligations under this Deed".

Both the security and the guarantee took the form of unconditional undertakings to pay sums up to specified amounts on written demand by the proprietor.

Receivers and managers were appointed in respect of both the developer and the builder. Subsequently the proprietor gave notices to them both, terminating the deed, and demanded payment of the sums which the bank had promised to pay to

25 (2001) 17 BCL 123.

it. Those sums were paid the same day.

Clause 11.4 of the contract provided:

> "In the event of any material default by the Developer under this Deed, the Proprietor may at any time convert into money such part, if any, of the security and/or the guarantee that does not consist of money. The Proprietor shall not be liable for any loss occasioned by such a conversion."

Under cl 37.2 of the contract, if the developer failed to show cause to the proprietor's satisfaction why the powers contained therein should not be exercised, the proprietor might:

> "without prejudice to any other rights it may direct under this Deed or at law:
>
> (a) take over the whole or any part of the Work under this Deed remaining to be completed and for that purpose and in so far as it may be necessary, exclude from the Site the Developer, the Builder and any other person concerned in the execution of the Works, or
>
> (b) terminate this Deed and in that case exercise any of the powers of exclusion conferred by para (a) of this clause."

Clause 37.8 of the Deed, which dealt with termination, provided (in part):

> "In the event that the Developer is stated to owe money to the Proprietor [the costs of completion having been assessed by a quantity surveyor] then the Proprietor shall be entitled to apply in whole or in partial satisfaction thereof the proceeds of the security provided under this Deed."

The plaintiff's case was that the proprietor was not entitled to those moneys, because the demand for them was made too late, namely after the Deed was terminated.

In a joint judgment, Pincus & Davis JJA and Thomas J held that the proprietor's right to call up the guarantee was not brought to an end by the termination of the contract. They said, at 125-127:

> "The right to convert which, according to the proprietor's argument, continued to subsist under cl 11.4 after termination, is not one the exercise of which depends on or requires the fulfilment of any obligation on the part of the developer or the builder; it is a right against the bank, which is not party to the Deed. But as between the parties to the Deed, the question whether the proprietor's act of conversion, subsequent to termination, was a breach of contract depends (so far as the demurrer point is concerned) simply on whether termination of the Deed brought the right of conversion to an end.
>
> When a contract is rescinded for breach, rights which have been unconditionally acquired before rescission are not in general lost: *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457 at 476 and 477 per Dixon J (as his Honour then was). The passage to which we refer has become familiar and was approved of in *Bank of Boston Connecticut v European Grain and Shipping Ltd* [1989] AC 1056 at 1098-1099. See also *Westralian Farmers Ltd v Commonwealth Agricultural Service Engineers Ltd* (1936) 54 CLR 361 at 379, a decision referred to further below. No doubt the same rule, preserving vested causes of action, governs when there is termination of a contract other than for breach. *The Westralian Farmers case is authority for the proposition that generally where an executory agreement is terminated, rights establishment of which results from further execution of the contract — that is, execution after the date of termination – cannot be sued on, but "if all the facts have occurred which entitle one party to such a right as a debt" an action for that debt may be brought after termination*: at 380.
>
> It was argued for the plaintiffs that cl 11.5 might imply that the words 'at any time' in cl 11.4 should be read down — at least with respect to the guarantee, as opposed to the security. Clause 11.5 says, as to the guarantee, that the proprietor shall return it upon issue of a certain certificate of practical completion; the argument was that one should infer that the parties meant to put an end to the proprietor's rights under the guarantee once it became clear that there was never going to be a certificate of practical completion. That became clear, in the present case, when the Deed was terminated. We

find that inference less than compelling. The Deed says in cl 11.1 that the security and guarantee are provided 'for the purpose of ensuring the Developer's due and proper performance of this Deed and of satisfying the Developer's obligations under this Deed'. We can see no reason why one should imply that if, for example because the builder has become insolvent, practical completion is never reached, the proprietor's right of access to the guarantee, given the purpose we have stated, should be brought to an end.

The Deed nowhere expressly says whether or not the right of conversion under cl 11.4 survives termination, but such indications as the Deed contains tend to make one doubt whether the parties could have intended the right to convert to cease on termination. Under cl 37.2, if the proprietor terminates for breach as contemplated by cl 37.1, that is done 'without prejudice to any other rights [the proprietor] may have under this Deed or at law'. Here the termination under cl 37.9 was done, as we have said, in pursuance of the proprietor's right to 'exercise the power conferred on it by paragraphs (a) or (b) of clause 37.2 as it may elect'. This incorporates the relevant part of cl 37.2 and it appears to us probable that it was intended to include the reference in cl 37.2 to the effect of termination on other rights; we would read the incorporation of the right to exercise the power conferred by paras (a) or (b) of cl 37.2 as including the right to do so on the basis indicated in that clause. That does not, however, solve all problems as to the effect of the termination, for there is room for argument as to the scope of the expression 'any other rights' in cl 37.2; they plainly would not include, for example, the proprietor's right to have the work done by the builder. There is no need finally to determine the expression's scope; it is enough for the proprietor's purposes to conclude that the language of cl 37.2 argues against reading the Deed as putting an end to a right of the proprietor under it, in the event of termination.

Next, it should be noted that cl 37.7, which deals with amounts owing after practical completion, begins: 'If this Deed is terminated under this clause'. Clause 37.7 does not itself give any right of termination and the reference must be to cl 37, which includes 37.9. It follows that if there is a termination under cl 37.9 and the work is completed then the mechanism of 37.7 is available; a quantity surveyor is to estimate the cost of completing the work and certify that cost and then an adjustment is to be made between the parties depending on whether (and if so by how much) the amount of the certificate exceeds the agreed price or vice versa. Under cl 37.8, if the developer owes money to the proprietor as a result of the certificate 'the Proprietor shall be entitled to apply in whole or in partial satisfaction thereof the proceeds of the security provided under this Deed.'

That clearly implies that the rights of the proprietor under the security survive termination under cl 37.9 and there is no sensible reason to exclude from those rights that of conversion, under cl 11.4. The parties are, as we have mentioned, in dispute as to the meaning in cl 37.8 of the word 'security'. It is not easy to see why the proprietor's right to be paid the excess cost of completion should be confined to its right under what the Deed in other clauses refers to as the 'security', excluding its right under the guarantee. Possibly the use in cl 37.8 of the word 'security' was a mere slip in drafting but there is no need to determine whether it should be so treated. Even if the reference was intended to be to security in the sense used elsewhere in the Deed, the provisions of cl 37.8 make it impossible sensibly to argue that the right to convert the money covered by the security (as opposed to that covered by the guarantee) given by cl 11.4, should be treated as coming to an end on termination under cl 37.9. Then one asks: for what reason might the parties have agreed to make termination bring to an end one right to convert under cl 11.4 but not another? No satisfactory answer has been suggested

To summarise, provisions of the Deed dealing with this sort of termination make one doubt whether the proper construction of cl 11.4 of the Deed is that after termination there can be no conversion with respect to the guarantee; they also make it clear that termination does not put an end to the right to convert under the security.

Apart from that, *applying the general law, even without reference to the specific provisions of the Deed, it is our view that the plaintiff's*

argument on this point has to be rejected. Looking at the matter broadly, it rather strains credulity to assert that the proper construction of this commercial contract is one which treats the parties as having agreed to make unavailable provisions giving the proprietor security for due performance where the developer and builder have gone into receivership and the Deed has been put an end to for that reason. This would be to read the Deed as destroying the proprietor's security because of the occurrence of the situation which makes access to the security necessary. Compare *Hyundai Heavy Industries Ltd v Papadopoulos* [1980] 1 WLR 1129 at 1134. *Whether or not one is influenced by that practical consideration, application of the ordinary rule that vested causes of action are not put to an end by termination of a contract, brings the proprietor success*.

It was argued that the proprietor had no right, at the date of termination of the Deed, to convert the security or the guarantee into money under cl 11.4 of the Deed because there had been at that date no 'election' on the part of the proprietor. The argument was that the proprietor had no immediate right to payment at the date of termination, not having made the demand required by the terms of the bank's promise, which were as follows:

> '[the bank] hereby undertakes unconditionally to pay on demand any sum or sums which may from time to time be demanded by [the proprietor] to a maximum sum of.'

It is true, as argued for the plaintiffs, that the bank's obligation to pay was expressed to arise on demand and that no demand had been made before termination. Nevertheless, the proprietor had at the date of termination a good cause of action for the sums which the bank had promised to pay. There is authority going back at least as far as *Dockery v Tanning* [1610] Cro Jac 242; 79 ER 209, that if there is a promise to pay on demand, suing is demand enough. There are exceptions to that rule some of which are set out in the judgment of McPherson J (as his Honour then was) in *Australia and New Zealand Banking Group Ltd v Douglas Morris Investments Pty Ltd* [1992] 1 Qd R 478 at 484. One mentioned by his Honour is that of debts 'not present but to accrue'; a second is the case of a 'collateral promise', such as one by a surety to pay on demand if the principal does not; and a third is the case of a debt due on a running account between a banker and customer. The debt payable on demand in the present case falls into none of these categories but is caught by the general rule; *there was vested in the proprietor at the date of termination a cause of action against the bank on the bank's promise to pay, although no demand had at that date been served. The inclusion of the words 'at any time' in cl 1.4 has, at least, the effect of continuing the right to convert, despite termination of the Deed under cl 37.9*." (Emphasis added)

The standard form contracts

AS 4000-1997 (and AS 4901-1998, AS 4902-2000 and AS 4903-2000)

Clause 5.4 of this form of contract contemplates reduction and release of the security at practical completion. That does not assist in construing whether or not the right to call up and deal with the security survives termination of the contract.

Similarly, little assistance can be derived from cl 37.6, which provides that the principal may elect that moneys due and owing otherwise than in connection with the subject matter of the contract also be due to the principal pursuant to the contract.

Clause 39.4 founds the principal's rights to take performance of the works out of the contractor's hands or alternatively, to terminate the contract. Clause 39.6 provides for an adjustment on completion of the work taken out of the contractor's hands but does not deal with the situation where the contract is terminated. Clause 39.10 provides that if the contract is terminated, the parties' remedies, rights and liabilities shall be the same as they would have been under the common law in the case of repudiation and rescission of the contract. Applying the reasoning in *Queensland Investment Corporation*, at 127, a court may well hold that the right to have recourse to the security survives the termination of the contract, notwithstanding that cl 5.2 of the contract would seem to require a further executory act by the principal before it could have recourse to the security. As was stated by the Queensland Court of Appeal in *Queensland Investment Corporation*, if the security provided

was in the form of an unconditional bank undertaking, the right to call up the security does not depend on or require the fulfilment of any obligation on the part of the grantor but arises as a right against the surety because of the terms of the bank guarantee itself.

AS 2124-1992

A similar result would follow under the AS 2124-1992 form of contract. It is notable that the form of words in cl 5.1 of this form of contract are not dissimilar from those considered in the *Geraldton Building Co* and *Queensland Investment Corporation* cases.

NPWC 3

A similar result would follow under the NPWC 3 form of contract. In fact, the position is even stronger because cl 44.6 provides expressly that, on cancellation of the contract, "the whole or part of any security, including cash lodged or retained for the due and proper performance of the Contract … may be declared by the Prncipal to be forfeited and all sums and the whole or part of the security that are so declared to be forfeited shall be forfeited and shall be retained by or become payable to or vested in the Principal".

JCC-C 1994 (and JCC-D 1994, JCC-E 1994 and JCC-F 1994

Having regard to the principles referred to above, the same result would appear to follow where the contract is determined under cll 12.01, 12.03 or 12.04 of this form of contract.

If there was a common law rescission of the contract, applying the reasoning in *Queensland Investment Corporation*, any security in the form of an unconditional bank undertaking would also be available to the proprietor, as the right to call up the security does not depend on or require the fulfilment of any obligation on the part of the grantor (the builder), but arises as a right against the surety because of the terms of the bank guarantee itself.

5. Differing considerations where interim injunctive relief sought pending determination of the substantial contractual dispute between the grantor and the beneficiary

The exercise which a court performs in considering whether or not to exercise its discretion to grant injunctive relief will vary according to whether the relief sought is interim or final.

Where interim relief is sought, the issues the court is concerned with are:

- whether there is a serious question to be tried (in respect of the beneficiary's entitlement to call up the security);
- whether damages are an adequate remedy; and
- where the balance of convenience lies.

In hearing the interlocutory application, the court should decide any "pure" question of law. As Rolfe J said, in *Barclay Mowlem Construction Ltd v Simon Engineering (Australia) Pty Ltd*:[26]

> "The issues raised by the present case are essentially issues of law. Thus, my decision, whilst the matter has been argued on an interlocutory basis, will have the effect of determining the substantial issue between the parties. As I understand it, it is clearly established that on an application for an interlocutory injunction where a pure question of law arises or a question of law arises on facts not in contest, it is the duty of the court to decide such question of law: *Hortico*[27] (at 549) and *MCP Musselbrook Pty Ltd v Deutsche Bank (Asia) AG* [1988] 12 NSWLR 16. Further, in cases where the decision to refuse or grant an interlocutory injunction will to all intents and purposes determine the proceedings, it has been established that it is desirable for the court to evaluate the strength of the plaintiff's case for final relief to see where the balance of convenience lies: *Kolback Securities Ltd v Epoch Mining NL* [1987] 8 NSWLR 533 at 536."

The cases demonstrate that "balance of convenience" issues play a significant role in determining when the courts will restrain the calling

26 [1991] 23 NSWLR 451 at 456.
27 *Hortico (Australia) Pty Ltd v Energy Equipment (Australia) Pty Ltd* [1985] 1 NSWLR 545.

up an dealing with performance bonds, bank guarantees etc.

In *C S Phillips Pty Ltd v Baulderstone Hornibrook Pty Ltd*,[28] Giles J (as he then was) provided a valuable analysis of the principles to be applied by the court in considering whether or not to grant interim injunctive relief, whether or not the relief sought is mandatory. In that case, the plaintiffs sought interlocutory orders requiring the defendant to restore to the second plaintiff a sum of $315,965 (the amount called for and received under bank guarantees provided by the plaintiffs) and alternative orders for payment of that amount into the second plaintiff's account (or some other account) on such conditions as the court thought fit to impose including the provision of fresh bank guarantees by the plaintiffs.

His Honour said, at pp 8-13 of his judgment:

> "THE APPROACH TO MANDATORY INTERLOCUTORY RELIEF
>
> The interlocutory relief sought by the plaintiffs was mandatory: in substance, the repayment of the money obtained by Baulderstone under the bank guarantees upon reinstatement of those guarantees. The plaintiffs submitted that it was not necessary for them to achieve a higher standard of persuasion in favour of that relief than was required for a prohibitory injunction, referring to *Fletcher Challenge Ltd v Fletcher Challenge Pty Ltd* (1981) 1 NSWLR 196 at 207 and *Businessworld Computers Pty Ltd v Australian Telecommunications Commission* (1988) 82 ALR 499 at 502-4 and 507.
>
> Baulderstone submitted that a higher degree of persuasion was necessary, referring to *Shepherd Homes Ltd v Sandham* (1971) Ch 340 at 351 and *Queensland v Australian Telecommunications Commission* (1985) 59 ALJR 562 at 563.
>
> In *Shepherd Homes Ltd v Sandham*, Megarry J said that 'on motion, as contrasted with the trial, the court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case the court must, inter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction.'

This passage was cited and acted upon by Gibbs CJ, sitting as a single judge, in *Queensland v Australian Telecommunications Commission*. His Honour took also a passage from *Halsbury's Laws of England*, vol 24, para 948 to the effect that a mandatory interlocutory injunction would not normally be granted in the absence of special circumstances, but —

> 'if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can easily be remedied, or if the defendant attempts to steal a march on the plaintiff, such as where, on receipt of notice that an injunction is about to be applied for, the defendant hurries on the work in respect of which complaint is made so that when he receives notice of an interim injunction it is completed, a mandatory injunction will be granted on an interlocutory application.'

In that case Gibbs CJ declined relief, saying that notwithstanding there was a serious question to be tried he lacked a high degree of assurance that the plaintiff would necessarily succeed.

Both Megarry J and Gibbs CJ confined what they said to a 'normal case'. It may be thought that reference to a higher degree of assurance where a mandatory interlocutory injunction is sought is more a question of semantics than of substance.

When an interlocutory injunction is sought, the existence of the plaintiff's rights and/or the fact of their violation are necessarily uncertain. The fundamental approach must be to weigh the need to protect the plaintiff against injury by violation of its rights for which it would not be adequately compensated in damages should the uncertainty be resolved in its favour, on the one hand, against the need to protect the defendant against injury by violation of its rights for which it would not be adequately compensated by the plaintiffs undertaking as to damages if the uncertainty be resolved in its favour, on the other hand (see American Cyanamid Co v Ethicon Ltd (1975) AC 396 at 406 per Lord Diplock; Appleton Papers Inc v Tomasetti Paper

28 (unreported, NSW Sup Ct, No 55040/1994, 26 October 1994).

Pty Ltd (1983) 3 NSWLR 208 at 216-219). The plaintiff's rights may include restoration of its property or to a position, the defendant's rights may include the retention of property or maintenance of a position. The court must seek to achieve the balance in a manner best calculated to achieve justice between the parties in the circumstances of the particular case, and the conventional references to whether there is a serious question to be tried, to the balance of convenience, and to other particular matters found in the authorities, are but guidance in that purpose. To hold that a case is not a normal case, but a case in which the circumstances warrant mandatory interlocutory relief, is only to say that in the circumstances of the particular case, which circumstances include how mandatory relief will affect the parties, justice between the parties calls for the relief. And to speak of a special degree of assurance where a mandatory interlocutory injunction is in question is only to draw attention to the possibly serious impact on the defendant if its rights are violated and the plaintiff's undertaking as to damages may not provide adequate compensation.

These sentiments are, I think, found in what was said by Hoffmann J in *Films Rover International Ltd v Cannon Film Sales Ltd* (1986) 3 All ER 772 at 780-781:

> 'I think it is important in this area to distinguish between fundamental principles and what is sometimes described as "guidelines", ie useful generalisations about the way to deal with the normal run of cases falling within a particular category. *The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the court may make the "wrong" decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong" in the sense I have described. The guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle.*

The passage quoted from Megarry J in *Shepherd Homes Ltd v Sandham* [1971] Ch 340 at 351 qualified as it was by the words "in a normal case", was plainly intended as a guideline rather than an independent principle. It is another way of saying that the features which justify describing an injunction as "mandatory" will usually also have the consequence of creating a greater risk of injustice if it is granted rather than withheld at the interlocutory stage unless the court feels a "high degree of assurance" that the plaintiff would be able to establish his right at a trial. I have taken the liberty of reformulating the proposition in this way in order to bring out two points.

The first is to show that semantic arguments over whether the injunction as formulated can properly be classified as mandatory or prohibitory are barren.

The question of substance is whether the granting of the injunction would carry that higher risk of injustice which is normally associated with the grant of a mandatory injunction. The second-point is that in cases in which there can be no dispute about the use of the term "mandatory" to describe the injunction, the same question of substance will determine whether the case is "normal" and therefore within the guideline or "exceptional" and therefore requiring special treatment. If it appears to the court that, exceptionally, the case is one in which withholding a mandatory interlocutory injunction would in fact carry a greater risk of injustice than granting it even though the court does not feel a "high degree of assurance" about the plaintiff's chances of establishing his right, there cannot be any rational basis for withholding the injunction.

In *Shepherd Homes Ltd v Sandham*, Megarry J spelled out some of the reasons why mandatory injunctions generally carry a higher risk of injustice if granted at the interlocutory stage:

- they usually go further than the preservation of the status quo by requiring a party to take some new

positive step or undo what he has done in the past; an order requiring a party to take positive steps usually causes more waste of time and money if it turns out to have been wrongly granted than an order which merely causes delay by restraining him from doing something which it appears at the trial he was entitled to do;

- a mandatory order usually gives a party the whole of the relief which he claims in the writ and makes it unlikely that there will be a trial.

One could add other reasons, such as that mandatory injunctions (whether interlocutory or final) are often difficult to formulate with sufficient precision to be enforceable. In addition to all these practical considerations, there is also what might be loosely called a "due process" question. An order requiring someone to do something is usually perceived as a more intrusive exercise of the coercive power of the state that an order requiring him temporarily to refrain from action. The court is therefore more reluctant to make such an order against a party who has not had the protection of a full hearing at trial.

Megarry J recognised, however, that none of these was a necessary concomitant of a mandatory injunction.'

Gummow J in *Businessworld Computers Pty Ltd v Australian Telecommunications Commission* accepted all that Hoffman J said, preferring the approach there set out as adopted in *Fletcher Challenge Ltd v Fletcher Challenge Pty Ltd* and by Sheppard J in *Holiday Inns (Pacific) Inc v Leisure Development (Qld) Pty Ltd* (7 October 1987, unreported) to an approach based on *Shepherd Homes Ltd v Sandham* and until then adopted by single judges of the Federal Court. His Honour observed that while the decision of Gibbs CJ was deserving of the closest and most respectful consideration it was not binding on him, referring to *Bone v Commissioner of Stamp Duties* (1972) 2 NSWLR 651 at 654 and 664. I also adopt what Hoffmann LJ said and prefer that approach, and while I give the most careful consideration to the decision of Gibbs CJ, I believe I am not bound by that decision to do otherwise (see *Bone v Commissioner of Stamp Duties* and *Appleton Papers Inc v Tomasetti Pty Ltd* at 218)." (Emphasis added)

In *Barclay Mowlem*,[29] Rolfe J referred to the damage which could be caused to the reputation of a contractor if a performance bond was called up, for which damages would not be an adequate remedy. He said, at 461-462:

"Once the evidence is admitted I am satisfied that it demonstrates how inadequate a remedy damages would be. *The matter, so far as the plaintiff is concerned, which is detrimentally affected upon the performance bond being called-up, is the perceived ability of the plaintiff to properly perform its obligations under the contract. If the plaintiff's ability in this regard is called in question, even improperly, it is not difficult to infer that its competitors would be quick to utilise such information in competing with the plaintiff. Finally, particularly as matters presently stand in the commercial world,* questions maybe raised as to the financial viability of the plaintiff if it is unable to perform contracts properly. This would be underlined if, as the uncontradicted evidence shows, there has not previously been any call upon a performance bond. In other words, people may be tempted to ask whether the plaintiff's business was 'going downhill'. I find it difficult to see how a court could ever assess the damage occasioned to the plaintiff in these circumstances. I am of course not overlooking the fact that the court must do its best to assess damages, but it is only necessary to state the type of problems which may confront the plaintiff to demonstrate the difficulty, if not impossibility, which it would face in proving quantum thereof." (Emphasis added)

The reasoning of Rolfe J in *Barclay Mowlem* was followed by Austin J in *Reed Construction Services Pty Ltd v Kheng Seng (Australia) Pty Ltd*.[30] His Honour said, at 167:

"As to the balance of convenience, I am content to adopt almost everything that Rolfe J said in the *Barclay Mowlem* case at pp 461-463. The

29 (1991) 23 NSWLR 451.
30 (1999) 15 BCL 158.

> only qualification to my adoption of his remarks is that, in contrast with that case, there is no evidence before me that the builder has not previously suffered from the calling up of a performance bond or bank guarantee. However, as Rolfe J remarked, even in the absence of that evidence, *it can be inferred from the circumstances that the calling up of a performance or maintenance bond is a very serious matter for the builder, having an effect on the builder's reputation in the industry which competitors could quickly take advantage of.* There is also some evidence tendered by the plaintiff concerning the financial position of the defendant. Suffice it to say that if it is not established, having regard to that evidence, that it would be risk-free to allow the performance bond to be paid out to the defendant pending the outcome of the case." (Emphasis added)

Balance of convenience issues also provide some explanation for the decisions in *Fletcher Construction Australia Ltd v Varnsdorf Pty Ltd*[31] and *Bachmann Pty Ltd v BHP Power New Zealand Ltd*.[32] In both cases, the security took the form of letters of credit and the court was mindful of the implications to the commercial community if it restrained those letters of credit being converted into cash. Provision of letters of credit as security for payment have a long history in the international sale of goods, where there is an understandable apprehension about the prospects of a seller recovering payment from a foreign purchaser. The balance of convenience in *Bachmann* was further affected by the fact that the letter of credit would be rendered useless if resort to it was restrained, because it was due to expire long before the substantive dispute was likely to be heard and determined.

One final issue worthy of mention is whether a "no injunction" clause in a contract would be enforced by a court. As noted above,[33] this was an issue which was not dealt with by the Victorian Court of Appeal in *Anaconda Operations Pty Ltd v Fluor Daniel Pty Ltd*,[34] although the court referred to the clause as indicating an intention by the parties that the owner would be at liberty to call up the security at any time.

In *Bateman Project Engineering Pty Ltd v Resolute Pty Ltd*,[35] the contract contained a provision that "the (defendants) shall be entitled to proceed with the conversion of the security for the amount claimed and the (plaintiffs) shall not hinder, obstruct, restrain or injunct the Principal from so doing".

Owen J held that this prohibition was void and unenforceable, as being contrary to public policy and was severable from the remainder of the contract. He said:

> "22. In *Bond v Larobi Pty Ltd* (1992) 6 WAR 489 at 496-500 I made some general comments on these topics which, I think, are applicable here but which I will not repeat. I should also refer to the comments of Heenan J in *Baulderstone Hornibrook Engineering Pty Ltd v Kayah Holdings Pty Ltd* (1998) 14 BCL 277 at 280. It is important to bear in mind the distinction between a clause which qualifies the existence of a right and one which purports to affect the enforcement of the right: *Anderson v G H Mitchell & Sons* (1941) 65 CLR 543 at 549-50.
>
> 23. In my view, the prohibition in cl 6.2(b)(iii) against seeking an injunction is an ouster of the jurisdiction of the court and is void as being against public policy. It goes clearly and permanently to the enforcement of a right that arises under the contract. It is not to the point that the final determination of the rights, liabilities and obligations of each party under the Contract generally fall to be determined (at a later time) in a way that is unaffected by the prohibition. The parties are, and continue to be, in dispute over a myriad of matters, including whether the plaintiffs are entitled to an extension of the date for practical completion, what is the true Definitive Cost Estimate and Target Capital Cost, what is encompassed within approved and other variations, whether there are overruns or underruns and so on. All of these matters survive to be argued on another day. The provision

31 [1998] 3 VR 812; (1999) 15 BCL 450.
32 (1999) 1 VR 420; (2000) 16 BCL 26.
33 Op cit n 20.
34 (2000) 16 BCL 230.
35 [2000] WASC 284.

affects one aspect of the contractual rights arising under the Contract, namely the entitlement of the defendants to call on the Guarantee and the right of the plaintiffs to have the Guarantee called on only in strict accord with the relevant terms of the Contract.

24. The next step is to consider the clause in the context of the whole Contract and the overall relationships between the parties. This is an explicit acknowledgment that this case 'depends on its own circumstances' and this Contract 'needs to be separately considered'. I think the clear inference is that the provision relating to the Guarantee was an important facet of the contractual relationship. It was no mere makeweight. The prohibition therefore places a 'substantial fetter' on the contractual rights of the parties, or one of them. This case is quite different to *Bond v Larobi Pty Ltd*. There, the impugned clause modified the legal and equitable rights of the parties by delaying, but not defeating, access to the courts to have those rights adjudicated upon. Here, while the right to have the overall dispute between the parties adjudicated in the courts survives, so far as concerns the Guarantee, it is defeated. What cl 6.2(b)(iii) does is 'take from a party to whom a right actually accrues … his power of invoking the jurisdiction of the courts to enforce it': *Dobbs v National Bank of Australasia Ltd* (1935) 55 CLR 643 at 652.

25. In my view the prohibition in cl 6.2(b)(iii) is invalid and unenforceable. I note in passing that the prospect of a conclusion of this nature was alluded to (although, contrary to what is said in the headnote, without a decision on the point) in *Anaconda Operations Pty Ltd v Fluor Daniel Pty Ltd* (1999) 16 BCL 230 at [15]. I will have more to say about that case later.

26. However, the finding that the prohibition offends public policy does not mean that the entire clause falls away. The principles relating to severance are well known: see *Hurst v Vestcorp Ltd* (1988) 12 NSWLR 394 per McHugh J at 443-444. The prohibition against resort to the courts to preserve the right to have the Guarantee called only in strict accord with the relevant terms of the Contract is a discrete part of cl 6 and, indeed, of cl 6.2(b)(iii). The illegal provision is not, in substance, so connected with the other parts of the clause that to remove it would alter the nature of what remains. It is therefore severable."

It remains to be seen whether the decision in *Bateman Project Engineering Pty Ltd* will be followed in jurisdictions other than Western Australia.[36] It is worthy of note that a similar approach by Heenan J in *Baulderstone Hornibrook Engineering Pty Ltd v Kayah Holdings Pty Ltd*.[37] in relation to an expert determination clause being void as an ouster of jurisdiction of the courts, has not been followed in New South Wales and Victoria (see *Fletcher Construction Australia Ltd v MPN Group Pty Ltd*[38] and *Badgin Nominees Pty Ltd v Oneida Ltd*[39]).

Conclusion

The case law demonstrates a difference in emphasis between two lines of authority in relation to the circumstances in which courts will restrain a beneficiary from calling up and/or dealing with security in the form of unconditional bank guarantees and the like.

On the one hand, there is the line of authority commencing with *Pearson Bridge (NSW) Pty Ltd v State Rail Authority of New South Wales*,[40] which have generally taken the view that, as between the parties to the underlying contract, one party may be restrained from calling on a security in circumstances where the underlying contract imposes conditions on the right to do this, even though the security itself is unconditional, and where there is an arguable case that the condition giving rise to the entitlement has not been satisfied.[41]

36 In Dorter & Sharkey, *Building & Construction Contracts in Australia* (Lawbook Co. Looseleaf Service), para [10.390], the authors express the view that "the West Australian Court perhaps went too far".

37 (1998) 14 BCL 277.

38 (unreported, NSW Sup Ct, 14 July 1997).

39 [1998] VSC 188.

40 (1982) 1 ACLR 81.

41 Other cases which followed this approach include *Selvas Pty Ltd v Hansen & Yuncken (SA) Pty Ltd* (1987) 6 ACLR 36; *Barclay Mowlem Construction Ltd v Simon Engineering (Australia) Pty Ltd* (1991) 23 NSWLR 451; *J H Evans (NT) Pty Ltd v Diano Nominees Pty Ltd* [1989] NTSC 4; and *Reed Construction Services Pty Ltd v Kheng Seng (Australia) Pty Ltd*

On the other hand, there is a conflicting line of decisions,[42] which primarily focus on the unconditional nature of the bank guarantee or other security, as expressly contemplated by the underlying contract between the parties, and the undesirability of restraining the beneficiary of an unconditional security from exercising its rights according to its terms, on the basis that to do so would deprive this type of security of the unconditional quality which gives them much of their commercial currency. This line of decisions has held that the beneficiary of an unconditional security should not be restrained from exercising it, at least where the beneficiary has a bona fide claim to be entitled to do so.

Attempts to resolve the difference of emphasis and approach in these two lines of authority are complicated by the differences in the terms of the underlying contracts in the various cases. As Parker J of the Western Australian Supreme Court said, in *Kvaerner Process Systems Pty Ltd v Australian Gasflelds Ltd*, after referring to the two lines of authority:[43]

> "These and other cases serve to emphasise, however, the materiality of the precise terms of the underlying contract which inevitably differ, often significantly, from decision to decision, except where standard form contracts are being considered. The present case involves anything but a standard form contract."

(1999) 15 BCL 158.

42 This line of cases includes the decisions of the Victorian Court of Appeal in *Fletcher Construction Australia Ltd v Varnsdorf Pty Ltd* [1998] 3 VR 812, (1999) 15 BCL 450; *Bachmann Pty Ltd v BHP Power New Zealand Ltd* [1999] 1 VR 420, (2000) 16 BCL 26 and *Anaconda Operations Pty Ltd v Fluor Daniel Pty Ltd* (1999) 16 BCL 230.

43 (2001) 17 BCL 343.

Appendix 1

Relevant Terms of AS 4000-1997 (and AS 4901-1998, AS 4902-2000 and AS 4903-2000)

"**3.** …

'**Security'** means:

(a) cash;

(b) retention moneys;

(c) bonds or inscribed stock or their equivalent issued by a national, state or territory government;

(d) interest bearing deposit in a bank carrying on business at the place stated in *Item* 9(c);

(e) an approved unconditional undertaking (the form in Annexure Part C is approved) or an approved performance undertaking given by an approved financial institution or insurance company; or

(f) other form approved by the party having the benefit of the security;

…

5. Security

5.1 Provision

Security shall be provided in accordance with *Item* 13 or 14. All delivered *security*, other than cash or retained moneys, shall be transferred in escrow.

5.2 Recourse

Security shall be subject to recourse by a party who remains unpaid after the time for payment where at least 5 days have elapsed since that party notified the other party of intention to have recourse.

5.3 Change of security

At any time a party providing retention moneys or cash *security* may substitute another form of *security*. To the extent that another form of *security* is provided, the other party shall not deduct, and shall promptly release and return, retention moneys and cash *security*.

5.4 Reduction and release

Upon the issue of the *certificate of practical completion* a party's entitlement to *security* (other than in *Item* 13(e)) shall be reduced by the percentage or amount in *Item* 13(f) or 14(d) as applicable, and the reduction shall be released and returned within 14 days to the other party.

The *Principal's* entitlement to *security* in *Item* 13(e) shall cease 14 days after incorporation into *the Works* of the plant and materials for which that *security* was provided.

A party's entitlement otherwise to *security* shall cease 14 days after *final certificate*.

Upon a party's entitlement to *security* ceasing, that party shall release and return forthwith the *security* to the other party.

5.5 Trusts and interest

Except where held by a government department or agency or a municipal, public or statutory authority, any portions of *security* (and interest earned thereon) which is cash or retention moneys, shall be held in trust for the party providing them until the *Principal* or the *Contractor* is entitled to receive them.

Interest earned on *security* not required to be held in trust shall belong to the party holding that *security*.

…

37.2 Certificates

The *Superintendent* shall, within 14 days after receiving such a progress claim, issue to the *Principal* and the *Contractor*:

(a) *progress certificate* evidencing the *Superintendent's* opinion of the moneys due from the *Principal* to the *Contractor* pursuant to the progress claim and reasons for any difference ('*progress certificate'*); and

(b) a certificate evidencing the *Superintendent's* assessment of retention moneys and moneys due from the *Contractor* to the *Principal* pursuant to the *Contract*.

If the *Contractor* does not make a progress claim in accordance with *Item* 28, the *Superintendent* may issue the *progress certificate* with details of the calculation and shall issue the certificate in para (b).

…

The *Principal* shall within 7 days after receiving both certificates, or within 21 days after the *Superintendent* receives the progress claim, pay to the *Contractor* the balance of the *progress certificate* after deducting retention moneys and setting off such of the certificate in paragraph (b) as the *Principal* elects to set off. If that setting off produces a negative balance, the *Contractor* shall pay that balance to the *Principal* within 7 days of receiving written notice thereof.

…

37.6 Other moneys due

The *Principal* may elect that the moneys due and owing otherwise than in connection with the subject matter of the *Contract* also be due to the *Principal* pursuant to the *Contract*.

…

39.4 Principal's rights

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

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

(b) terminate the *Contract*.

…

39.6 Adjustment on completion of work taken out

When *work* taken out of the *Contractor's* hands has been completed, the *Superintendent* shall assess the cost thereby incurred and shall certify as moneys due and payable accordingly the difference between that cost (showing the calculations therefor) and the amount which would otherwise have been paid to the *Contractor* if the *work* had been completed by the *Contractor*.

If the *Contractor* is indebted to the *Principal*, the *Principal* may retain *construction plant* or other things taken under subclause 39.5 until the debt is satisfied. If after reasonable notice, the *Contractor* fails to pay the debt, the *Principal* may sell the *construction plant* or other things and apply the proceeds to the satisfaction of the debt and the costs of sale. Any excess shall be paid to the *Contractor*.

…

39.10 Termination

If the *Contract* is terminated pursuant to subclause 39.4(b) or 39.9, the parties' remedies, rights and liabilities shall be the same as they would have been under the law governing the *Contract* had the defaulting party repudiated the *Contract* and the other party elected to treat the *Contract* as at an end and recover damages."

Appendix 2

Relevant Terms of AS 2124-1992

"**5 SECURITY, RETENTION MONEYS AND PERFORMANCE UNDERTAKINGS**

5.1 Purpose

Security, retention moneys and performance undertakings are for the purpose of ensuring the due and proper performance of the Contract.

5.2 Provision of Security

If it is provided in the Annexure that a party shall provide a security then the party shall provide security in the amount stated in the Annexure and in accordance with this Clause.

5.3 Form of Security

The security shall be in the form of cash, bonds or inscribed stock issued by the Australian Government or the Government of a State or Territory of Australia, interest bearing deposit in a trading bank carrying on business in Australia, an approved unconditional undertaking given by an approved financial institution or insurance company, or other form approved by the party having the benefit of the security.

The party having the benefit of the security shall have a discretion to approve or disapprove the form of an unconditional undertaking and the financial institution or insurance company giving it or other form of security offered. The form of unconditional undertaking attached to these General Conditions is approved.

If the security is not transferable by delivery, it shall be accompanied by an executed transfer or such other documentation as is necessary to effect a transfer of the security. The costs (including all stamp duty or other taxes) of and incidental to the transfer and retransfer, shall be borne by the party providing the security.

5.4 Time for Lodgement of Security

Security shall be lodged within 28 days of the Date of Acceptance of Tender.

5.5 Recourse to Retention Moneys and Conversion of Security

A party may have recourse to retention moneys and/or cash security and/or may convert into money security that does not consist of money where —

(a) the party has become entitled to exercise a right under the Contract in respect of the retention moneys and/or security; and

(b) the party has given the other party notice in writing for the period stated in the Annexure, or if no period is stated, five days of the party's intention to have recourse to the retention moneys and/or cash security and/or to convert the security; and

(c) the period stated in the Annexure or if no period is stated, five days has or have elapsed since the notice was given.

5.6 Substitution of Security for Retention Moneys

The Contractor shall be at liberty at any time to provide in lieu of retention moneys, security in any of the forms permitted in Clause 5.3. To the extent that such security is provided, the Principal shall not deduct retention moneys and shall forthwith release retention moneys.

5.7 Reduction of Security and Retention Moneys

Upon issue of the Certificate of Practical Completion, the Principal's entitlement to security and retention moneys shall be reduced to the percentage thereof stated in the Annexure or, if no percentage is stated, to 50 per cent thereof.

Subject to the first paragraph of Clause 5.7, if in the opinion of the Superintendent it is reasonable to further reduce the Principal's entitlement to security and retention moneys, that entitlement shall be reduced to the amount which the Superintendent determines to be reasonable.

The Principal shall, within 14 days of

the Superintendent making such a determination, release security and retention moneys in excess of the entitlement.

5.8 Release of Security

If the Contractor has provided additional security pursuant to Clause 42.4, the Principal shall release that additional security within 14 days of the incorporation into the Works of the unfixed plant or materials in respect of which the additional security was furnished.

If the Principal has provided security, then when the Contactor has been paid all moneys finally due to the Contractor under the Contract or a Separable Portion, the Contractor shall release the security lodged by the Principal in respect of the Contract of the Separable Portion, as the case may be.

If the Contractor has provided security, then the Principal shall release it when required by Clause 42.8.

…

42 CERTIFICATES AND PAYMENTS

42.1 Payment Claims, Certificates, Calculations and Time for Payment

…

Within 14 days after receipt of a claim for payment, the Superintendent shall issue to the Principal and to the Contractor a payment certificate stating the amount of the payment which, in the opinion of the Superintendent, is to be made by the Principal to the Contractor or by the Contractor to the Principal. The Superintendent shall set out in the certificate the calculations employed to arrive at the amount and, if the amount is more or less than the amount claimed by the Contractor, the reasons for the difference. The Superintendent shall allow in any payment certificate issued pursuant to this Clause 42.1 or any Final Certificate issued pursuant to Clause 42.8 or a Certificate issued pursuant to Clause 44.6, amounts paid under the Contract and amounts, otherwise due from the Principal to the Contractor and/or due from the Contractor to the Principal arising out of or in connection with the Contract including but not limited to any amount due or to be credited under any provision of the Contract.

If the Contractor fails to make a claim for payment under Clause 42.1, the Superintendent may nevertheless issue a payment certificate.

Subject to the provisions of the Contract, within 28 days after receipt by the Superintendent of a claim for payment or within 14 days of issue by the Superintendent of the Superintendent's payment certificate, whichever is the earlier, the Principal shall pay to the Contractor or the Contractor shall pay to the Principal, as the case may be, an amount not less than the amount shown in the Certificate as due to the Contractor or to the Principal as the case may be …

…

42.8 Final Certificate

Within 14 days after receipt of the Contractor's Final Payment Claim or, where the Contractor fails to lodge such claim, the expiration of the period specified in Clause 42.7 for the lodgement of the Final Payment Claim by the Contractor, the Superintendent shall issue to the Contractor and to the Principal a final payment certificate endorsed 'Final Certificate'. In the certificate the Superintendent shall certify the amount which in the Superintendent's opinion is finally due from the Principal to the Contractor or from the Contractor to the Principal under or arising out of the Contract or any alleged breach thereof.

…

Within 14 days after the issue of a Final Certificate which certifies a balance owing by the Principal to the Contractor, the Principal shall release to the Contractor any retention moneys or security then held by the Principal.

…

42.10 Set Offs by the Principal

The Principal may deduct from the moneys due to the Contractor any money due from

the Contractor to the Principal otherwise than under the Contract and if those moneys are insufficient, the Principal may, subject to Clause 5.5, have recourse to retention moneys and, if they are insufficient, then to security under the Contract.

42.11 Recourse for Unpaid Moneys

Where, within the time provided by the Contract, a party fails to pay the other party an amount due and payable under the Contract, the other party may, subject to Clause 5.5, have recourse to retention moneys, if any, and, if those moneys are insufficient, then to security under the Contract and any deficiency remaining may be recovered by the other party as a debt due and payable.

…

44 DEFAULT OR INSOLVENCY

44.1 Preservation of Other Rights

If a party breaches or repudiates the Contract, nothing in Clause 44 shall prejudice the right of the other party to recover damages or exercise any other right.

44.2 Default by the Contractor

If the Contractor commits a substantial breach of contract and the Principal considers that damages may not be an adequate remedy, the Principal may give the Contractor a written notice to show cause.

…

44.4 Rights of the Principal

If by the time specified in a notice under Clause 44.2 the Contractor fails to show reasonable cause why the Principal should not exercise a right referred to in Clause 44.4, the Principal may by notice in writing to the Contractor —

(a) take out of the hands of the Contractor the whole or part of the work remaining to be completed; or

(b) terminate the contract.

…

If the Principal exercises the right under Clause 44.4(a), the Contractor shall not be entitled to any further payment in respect of the work taken out of the hands of the Contractor unless a payment becomes due to the Contractor under Clause 44.6

…

44.6 Adjustment on Completion of the Work Taken Out of the Hands of the Contractor

When work taken out of the hands of the Contractor under Clause 44.4(a) is completed the Superintendent shall ascertain the cost incurred by the Principal in completing the work and shall issue a certificate to the Principal and the Contractor certifying the amount of that cost.

If the cost incurred by the Principal is greater than the amount which would have been paid to the Contractor if the work had been completed by the Contractor, the difference shall be a debt due from the Contractor to the Principal. If the cost incurred by the Principal is less than the amount that would have been paid to the Contractor if the work had been completed by the Contractor, the difference shall be a debt due to the Contractor from the Principal. The Principal shall keep records of the cost in a similar manner to that prescribed in Clause 41.

If the Contractor is indebted to the Principal, the Principal may retain the Constructional Plant or other things taken under Clause 44.5 until the debt is satisfied. If after reasonable notice, the Contractor fails to pay the debt, the Principal may sell the Constructional Plant or other things and apply the proceeds to the satisfaction of the debt and the costs of sale. Any excess shall be paid to the Contractor.

…

44.10 Rights of the Parties on Termination

If the Contract is terminated under Clause 44.4(b) or Clause 44.9 the rights and liabilities of the parties shall be the same as they would have been at common law had the defaulting party repudiated the Contract and the other party elected to treat the Contract as at an end and recover damages."

Appendix 3

Relevant Terms of NPWC 3

"5 SECURITY, RETENTION MONEYS AND PERFORMANCE UNDERTAKINGS

5.1 Purpose

Security, retention moneys and performance undertakings shall, when the same or any of them are required, be provided and given for the purpose of ensuring the due and proper performance of the Contract and of satisfying the obligations of the Contractor under the Contract.

5.2 Provision of Security

If security is required the contractor shall provide it in accordance with this clause in the amount set out in the Annexure hereto.

5.3 Form of Security

The security shall be in the form of cash, Government Bonds or Inscribed Stock, or an unconditional undertaking or certificate in a form approved in writing by the Principal and given by a bank approved in writing by the Principal.

If the security is not transferable by delivery it shall be accompanied by an executed transfer thereof to the Principal and costs and expenses (including all stamp and other duties) of and incidental to the said transfer shall be borne and paid by the Contractor.

…

5.5 Conversion of Security

If the Principal becomes entitled to exercise all or any of his rights under the Contract in respect of the security the Principal may convert into money the security that does not consist of money. The Principal shall not be liable for any loss occasioned by such a conversion.

…

5.7 Reduction of Security and Retention Moneys

The Principal may, at any time after the Superintendent has issued a Certificate of Practical Completion under sub-clause 42.2 in respect of the Works or a separable part of the Works, make or allow a reduction of the amount of the security or the retention moneys by an amount which, in his opinion, is just and equitable PROVIDED HOWEVER that the reduction shall not reduce the amount of the security and retention moneys below fifty per centum of the security and retention moneys held by the Principal at the time the reduction is made or allowed by him.

Any reduction under this sub-clause shall not operate so as to waive, prejudice, release or discharge any of the conditions of the Contract or any of the obligations imposed on the Contractor by the Contract.

5.8 Release of Security and Retention Moneys

The Principal shall account to the Contractor for the security and any retention moneys as provided in sub-clause 42.7, subject to the rights of the Principal under the Contract.

…

42. CERTIFICATES AND PAYMENTS

42.1 Progress Certificates and Progress Payments

Unless otherwise provided in the Contract, the Contractor shall submit to the Superintendent a detailed statement in a form satisfactory to the Superintendent, every month showing the contract value of the work carried out in performance of the Contract and incorporated in the Works. Within twenty-one days after receipt by the Superintendent of such a statement or, if the Contractor fails to submit any such statement, at such time as the Superintendent thinks fit, the Superintendent shall determine the value of the work so carried out and incorporated and issue a progress certificate.

Payment of moneys due under a progress certificate shall be made by the Principal within fourteen days after the issue of that progress certificate. The amount of the progress payment will be the

total gross value shown in the certificate less —

(a) any retention moneys as provided in the Annexure hereto; and

(b) any progress payment already made in respect of work covered by that progress certificate; and

(c) any other amount that the Principal may be entitled to deduct from the moneys due under that progress certificate.

…

42.7 Final Certificate and Return of Security

When all work under the Contract has been finally and satisfactorily executed and the Contractor has fulfilled all his other obligations under the Contract, the Superintendent shall issue to the Contractor a Final Certificate.

Within twenty-eight days after the Final Certificate has been issued and the Contractor, if so directed by the Superintendent, has furnished the Superintendent with a release of all claims against the Principal, whether arising under or by virtue of the Contract or otherwise, the Principal shall pay to the Contractor all amounts then payable, including any retention moneys then held by the Principal, and shall return to the Contractor the security or such part of it as the Principal is then holding.

…

44 DEFAULT OR BANKRUPTCY OF CONTRACTOR

44.1 Procedure on Default of Contractor

If the Contractor defaults in the performance or any observance of any covenant, condition or stipulation in the Contract or refuses or neglects to comply with any direction as defined in clause 23 but being one which either the Principal or the Superintendent is empowered to give, make, issue or serve under the Contract and which is issued or given to or served or made upon the Contractor by the Principal in writing or by the Superintendent in accordance with clause 23, the Principal may suspend payment under the Contract and may call upon the Contractor, by notice in writing, to show cause within a period specified in the notice why the powers hereinafter contained in this clause should not be exercised.

The notice in writing shall state that it is a notice under the provisions of this clause and shall specify the default, refusal or neglect on the part of the Contractor on which it is based.

If the Contractor fails within the period specified in the notice in writing to show cause to the satisfaction of the Principal why the powers hereinafter contained should not be exercised the Principal, without prejudice to any other rights that he may have under the Contract against the Contractor, may —

(a) take over the whole or any part of the work remaining to be completed and for that purpose and in so far as it may be necessary exclude from the site the Contractor and any other person concerned in the performance of the work under the Contract; or

(b) cancel the Contract, and in that case exercise any of the powers of exclusion conferred by sub-paragraph (a) of this paragraph.

…

44.4 Adjustment of Costs on Completion of the Works

On completion of the work in accordance with the Contract the Superintendent will ascertain the cost of the Works to the Principal, comprising payments to the Contractor and all costs, charges and expenses incurred by the Principal in carrying out the whole or any part of the Works completed by him pursuant to sub-clause 44.3 and any sum or sums payable or due to the Principal as liquidated damages under the Contract and he will certify such amount to the Principal. A certificate signed by the Superintendent stating the cost of the Works to the Principal shall be prima facie evidence of the matters stated in that certificate.

Should the amount so certified be

greater than the amount which would have been paid to the Contractor if the whole of the Works had been completed by him, the difference between the two amounts shall be a debt due from the Contractor to the Principal which may be deducted or recovered by the Principal pursuant to clause 46.

44.5 Preservation of Rights of Principal

No action taken by the Principal under sub-clause 44.2 or sub-clause 44.3 shall invalidate the Contract or prejudice any rights, powers and remedies of the Principal, whether under the provisions of the Contract or otherwise.

44.6 Cancellation of Contract

If the Contract is cancelled under sub-clause 44.1 or under any other provision of the Contract it shall be deemed cancelled as from the date when notice of cancellation in writing under the hand of the Principal is served upon the Contractor, or upon any Official Receiver, Trustee in Bankruptcy, Liquidator, Official or Provisional Liquidator, Official Manager, or Receiver or Receiver and Manager of the Contractor or of the business of the Contractor.

On such cancellation of the Contract all or any sums of money which may be in the hands of the Principal in respect of the Contract and are then not payable to the Contractor under or pursuant to any provision of the Contract, and the whole or part of any security, including cash lodged or retained for the due and proper performance of the Contract and all or any sums of money named in the Contract as liquidated damages which have accrued due to the Principal may be declared by the Principal to be forfeited and all sums and the whole or part of any security that are so declared to be forfeited shall be forfeited and shall be retained by or become payable to or vested in the Principal.

On such cancellation of the Contract all moneys which have previously been paid together with all moneys then payable under or pursuant to any provision of the Contract to the Contractor shall be deemed to be in full satisfaction of all claims of the Contractor of any kind or description whatsoever under or in respect of the Contract.

…

46. RIGHT OF PRINCIPAL TO RECOVER MONEYS

Without limiting the Principal's rights under any other provision in the Contract, any debt due from the Contractor to the Principal under or by virtue of any provision of the Contract may be deducted by the Principal from any moneys which may be or thereafter become payable to the Contractor by the Principal, including any retention moneys then held by the Principal, and, if such moneys are insufficient for this purpose, then from the Contractor's security under the Contract. Nothing in this clause shall affect the right of the Principal to recover from the Contractor the whole of the debt or any balance that remains owing after deduction."

Appendix 4

Relevant Terms of JCC-C 1994 (and JCC-D 1994, JCC-E 1994 and JCC-F 1994)

"**10.02 PROGRESS CERTIFICATES**

The Architect shall within the period stated in Item K.2 of the Appendix or otherwise within ten (10) days of receipt of a progress claim made in accordance with Clause 10.01:

10.02.01 Assess:

.01 The contract value of the work executed, including Variations completed or partly completed;

.02 the contract value of unfixed materials and/or goods intended for and delivered on or adjacent to the Works or to which paragraph 10.04.02 applies;

.03 costs arising from Site conditions as referred to in Clause 10.29;

.04 expenses of complying with Architect's instructions as to the postponement of work as referred to in Clause 10.32;

.05 additional costs by reason of changes in requirements of adjoining owners as referred to in paragraph 3.08.03; and

.06 costs in respect of Separate Contractors' work as referred to in paragraph 7.02.05; and

10.02.02 determine the amounts of any other adjustments to the Contract Sum in terms of this Agreement; and

10.02.03 issue a progress certificate to the Builder showing

.01 The Architect's assessment in accordance with paragraph 10.02.01;

.02 the amounts of any other adjustments to the Contract Sum as referred to in paragraph 10.02.02;

.03 the amount which the Proprietor may be entitled to retain at that time pursuant to Clause 10.23;

.04 any amount which the Proprietor has paid to nominated sub-contractors pursuant to paragraph 4.09.03;

.05 the total amount previously certified pursuant to this Clause 10.02; and

.06 the amount certified as then being due for payment to the Builder by the Proprietor.

With each progress payment certificate the Architect shall furnish to the Builder particulars of any amount which the Proprietor is entitled to deduct pursuant to Clause 10.15.

10.20 SECURITY TO BE PROVIDED BY BUILDER

The Builder shall provide security to the amount or percentage of the Contract Sum stated in Item S of the Appendix as the amount of security for the due performance of his obligations under this Agreement.

10.21 FORM OF SECURITY

Such security shall be in the form of either one or other or a combination of:

10.21.01 An unconditional undertaking or certificate in a form approved by the Proprietor and given by a Bank licensed under the provisions of the *Banking Act* 1959 (as amended) or other financial institution approved of by the Proprietor (hereinafter called a 'Bank Guarantee'); and

10.21.02 an amount to be retained progressively by the Proprietor in accordance with the provisions of

paragraph 10.23.01 and paid by him to the credit of an account in the joint names of the Proprietor and the Builder in accordance with paragraph 10.23.02 (hereinafter called 'a Retention Fund held by the Proprietor and the Builder on joint account').

10.22 BANK GUARANTEE

Where the security or any part thereof provided by the Builder is in the form of a Bank Guarantee the following provisions shall apply:

10.22.01 The Builder may provide one or more Bank Guarantees aggregating the amount of security required under the terms of this Agreement.

10.22.02 Such Bank Guarantee or Bank Guarantees shall be maintained effective until the issue by the Architect of the notice of Practical Completion pursuant to Clause 9.09 or until the date the Works are deemed to have reached Practical Completion pursuant to either of paragraphs 9.09.04 and 9.10.04.

10.22.03 Upon the first to happen of either of the events referred to in paragraph 10.22.02:

.01 The Proprietor shall authorise the reduction of the amount of the Bank Guarantee or Bank Guarantees to half of the amount or percentage of the Contract Sum stated in Item S of the Appendix, as applicable; or

.01 upon the Builder providing a further Bank Guarantee on like terms and conditions to that or those originally provided by him but equal to one half of the amount or percentage of the Contract Sum stated in Item S of the Appendix, as applicable, the proprietor shall release the Bank Guarantee or Bank Guarantees so originally provided.

10.23 RETENTION HELD ON JOINT ACCOUNT

Where the security or any part thereof provided by the Builder is in the form of a Retention Fund held by the Proprietor and the Builder on joint account the following provisions shall apply:

…

10.23.03 The amount to be held in that joint account shall be held upon trust for the Proprietor subject to the provisions of Clauses 10.20, 10.24, 10.25, and 11.10, except that in the event of the Builder determining his employment under this Agreement pursuant to Clause 12.06 the rights and interests of the Proprietor in respect of such amounts shall be and are hereby transferred to and for the benefit of the Builder.

10.25 AVAILABILITY OF SECURITY

Any security provided by the Builder in terms of this Agreement shall be available to the Proprietor whenever the Proprietor shall be entitled to the payment of moneys by the Builder under or in consequence of this Agreement or whenever the Proprietor shall be entitled to reimbursement of any moneys paid to others under this Agreement, in all such cases as if the security were a sum of money due to or to become due to the Builder by the Proprietor, provided that if the employment of the Builder under this Agreement is determined by the Builder pursuant to Clause 12.01 and the Proprietor holds any security provided by the Builder the Proprietor shall not be entitled to have recourse to that security unless and until an enabling award is made or an enabling judgment is given (whether

pursuant to Section 13 or otherwise) or the Builder agrees in writing that the Proprietor is so entitled.

12.02 PROPRIETOR'S NOTICE OF BUILDER'S DEFAULT

If the Builder shall make default in any one or more of the following respects:

12.02.01 If he, without reasonable cause, wholly suspends the carrying out of the Works before Practical Completion thereof;

12.02.02 if he fails to proceed with the Works regularly and diligently;

12.02.03 if he fails to proceed with the Works in a competent manner;

12.02.04 if he refuses or persistently neglects to comply with written notice from the Architect requiring him to remove defective work or improper materials or goods;

12.02.05 if otherwise he is guilty of a substantial breach of this Agreement

then in any such case the Architect may deliver by hand to the Builder or send by certified mail addressed to the Builder a written notice stating the intention of the Proprietor to determine the employment of the Builder under this Agreement. That notice shall specify the default and, except for a default as referred to in paragraph 12.02.01, provide details of the default.

12.03 DETERMINATION BY PROPRIETOR FOR BUILDER'S DEFAULT

If the Builder fails to remedy in terms consistent with this Agreement a default of which he has been given notice under Clause 12.02 within ten (10) days of receipt of such a notice then the Proprietor, without prejudice to any other rights or remedies, may within a further period of ten (10) days, by written notice delivered by hand to the Builder or sent by certified mail addressed to the Builder, determine the employment of the Builder under this Agreement.

12.05 CONSEQUENCES OF DETERMINATION BY PROPRIETOR

Where the Builder's employment has been determined by the Proprietor pursuant to any of Clauses 12.01, 12.03 and 12.04 the respective rights and liabilities of the Proprietor and the Builder shall be:

12.05.01 The Proprietor may employ and pay other persons whether in the employment of the Builder or not to carry out and complete the Works and the Proprietor or any such other persons may enter upon the Works and use all temporary buildings, equipment and plant, tools, materials and goods intended for, delivered to and placed on or adjacent to the Works and may purchase all materials and goods and do all other acts and things necessary for the carrying out and completion of the Works in accordance with this Agreement.

12.05.04 Until the completion of the Works pursuant to paragraph 12.05.01 the Proprietor shall not be bound by any provision of this Agreement or otherwise to make any further payment to the Builder but as soon as is reasonable thereafter, having regard to the rights of the Proprietor under Paragraph 12.05.01, the Architect shall ascertain the amount of costs properly incurred by the Proprietor pursuant to that paragraph and the amount of any loss and/or damage caused to the Proprietor by the determination and any other liability of the Builder to the Proprietor under this Agreement and shall certify all of the same and if such aforesaid amounts when added to the moneys paid to the Builder before the date of determination result in a total amount in excess of that which

would have been otherwise payable under this Agreement the difference shall be a debt due and payable to the Proprietor by the Builder. If the said amounts when added to the said moneys result in a lesser total than that which the Proprietor would otherwise have been required to pay under this Agreement then the difference shall be a debt due and payable by the Proprietor to the Builder."