VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST **VCAT REFERENCE: BP161/2017**

CATCHWORDS

Injunction – application by builder – unconditional bank guarantees as security for builder's performance – contractual allocation of risk – construction of recourse provisions – whether the respondent, who was not the owner of the site, had a tenable claim for damages – *Domestic Building Contracts Act 1993* ss8, 9, 53(2)(bb),

Intervenor – no standing to apply for orders – VCAT Act 1998 s73(3)..

APPLICANT:	May Constructions (Residential) Pty Ltd (ACN 159 697 864)
RESPONDENT:	Creative Property Developments Pty Ltd as Trustee for the Creative Property Developments Trust
WHERE HELD:	Melbourne
BEFORE:	Senior Member A. Vassie
HEARING TYPE:	Injunction
DATE OF HEARING:	17 March 2017
DATE OF ORDER:	13 April 2017
DATE OF REASONS:	13 April 2017
CITATION:	May Constructions (Residential) Pty Ltd v Creative Property Developments Pty Ltd (Building and Property) [2017] VCAT 484

ORDERS

The application for an interlocutory injunction is dismissed.

A. Vassie
Senior Member

APPEARANCES:

For the Applicant:	Mr. M Stirling of Counsel
For the Respondent:	Mr. F. Tiernan QC and Mr. A.P. Downie of Counsel
For the Intervenor:	Mr. G. Hellyer of Counsel

REASONS FOR DECISION

1. The applicant builder has applied for an interlocutory injunction restraining the respondent developer from having recourse to two bank guarantees the builder procured to secure its performance of a building contract.

The Building Contract and the Bank Guarantees

2. By a contract dated 9 December 2013 ("the contract")[1] the respondent Creative Property Developments Pty Ltd ("Creative PD") engaged the applicant May Constructions (Residential) Pty Ltd ("May CR") to construct works at 1200 High Street, Armadale ("the works") for a contract price of $7,152,002.00. The contract was in the standard form of Australian Institute of Architects/Master Builders Australia Major Works Contract, ABIC MW-2008 H Vic. By special conditions, set out in Schedule 2A to the contract, various clauses in the standard form were deleted or amended. The works were a mixed use development of residential apartments and retail shops and other commercial premises.

3. Items 7 and 10 of Schedule 1 to the contract, in combination with clauses C1 and C3 of the contract, required May CR to provide security to Creative PD by way of two unconditional guarantees, each being for 2.5% of the contract price. In compliance with that requirement, May CR procured two unconditional bank guarantees from Commonwealth Bank of Australia, each of which was an unconditional undertaking to pay on written demand any sum which might from time to time be demanded by Creative PD to a maximum aggregate sum of $162,545.50: a total security of $325,091.00.[2]

4. Creative PD alleges that under the terms of the contract May CR is liable to pay to it sums totalling $942,436.12 and so Creative PD is entitled to have recourse to the bank guarantees. That sum is made up as follows:

Cost of rectification of defects	$431,000.00
Liquidated damages	$180,400.00
Reimbursement for overpayment of a progress claim	$331,036.12
	$942,436.12

May CR disputes its liability to pay any of those sums.

---

[1] The contract is exhibit AA-5 to the affidavit of Andreas Angelatos dated 24 February 2017 in opposition to the application. An incomplete copy of the contract is exhibit PM-1 to the affidavit of Peter May dated 7 February 2017 in support of the application.

[2] The bank guarantees are exhibit MLC-1 to the affidavit of Megan Lisbeth Calder in support of the application.

5. There is a dispute about the date on which practical completion of the works was achieved. The architect nominated in the contract – Bruce Henderson Architects Pty Ltd – gave to May CR two notices of practical completion. There is no dispute that on 23 December 2015 May CR, Creative PD and the architect agreed to divide the works into two separable portions. Separable part 1 comprised the basement, ground floor and that part of the first floor which was a commercial area. Separable part 2 was all other areas. On the same day, 23 December 2015, the architect gave to May CR a notice of practical completion of separable part 1. On 5 February 2016 the architect gave to May CR a notice of practical completion of separable part 2.

Highdale

6. Although Creative PD is described in the contract as the "owner" (May CR being described in it as "the contractor"), at no material time has Creative PD owned the land on which the works were constructed. Highdale Pty Ltd ("Highdale"), a company related to Creative PD, was the owner of the land at the time of entry into the contract. Andreas Angelatos is the director of both Highdale and Creative PD. By a Development Services Deed dated 28 June 2012 Highdale had engaged Creative PD to develop the land.[3]

7. On or about 17 June 2015 Highdale registered at the Land Titles Office a plan of subdivision of the land. The plan delineated the individual lots and common property. Owners Corporations 1 and 3, Plan No. PS714650D, came into being upon the registration of the plan.

8. Highdale has sold some of the residential apartments. Donna Maria Gannon has purchased lot 301 on the plan. She alleges that there are defects in the apartment built on lot 301 and in works done on the common property. I gave Ms Gannon leave to intervene in the proceeding[4] when, on 17 March 2017, I heard the application for an interlocutory injunction. She had made the application for leave to intervene under s73(3) of the *Victorian Civil and Administrative Tribunal Act 1998*.

The Applicant's Primary Contentions

9. While acknowledging that it is unusual for a builder who has provided security to an owner by way of bank guarantee to be granted an injunction to prevent the owner from having recourse to the guarantee, May CR has contended that there are two features of the present case which point to there being a lower risk of the injustice being done by granting an injunction then there would be by refusing the injunction and permitting the recourse.

---

[3] The Development Services Deed is exhibit AA-3 to the affidavit of Andreas Angelatos dated 24 February 2017.

[4] The title to the proceeding in an order dated 17 March 2017 names Ms Gannon as an "intervening party". I did not make any order joining her as a party and she did not make any application to be joined. She is not a party.

10. The first feature, May CR contends, is this. A proper construction of clause C7.1 of the contract, it argues, is that Creative PD's entitlement to security is reduced by 50% within 28 days after the architect has issued a notice of practical completion. More than 28 days have elapsed since the architect issued the second notice of practical completion. So, May CR contends, Creative PD is obliged to return one of the bank guarantees and ought to be enjoined from having recourse to at least one of the guarantees.

11. Creative PD disputes that construction of clause C7.1. Below I shall set out the whole of clause C7 and of clause C9, to put clause 7.1 into its proper context, and explain why I consider that May CR's construction of it is incorrect.

12. The second feature, which is not in dispute, is that it has been Highdale, not Creative PD, which has entered into contracts of sale of residential apartments and that it is Highdale, not Creative PD, which owns any lots that remain unsold. Accordingly, contends May CR, irrespective of any defects that there may be in the works or of any delay that there may have been in completing the works, Creative PD could not have suffered any loss under the contract that would entitle it to have any recourse to the bank guarantees and it is untenable for Creative PD to claim that it had suffered any loss. Creative PD disputes that contention, which is one of law. For reasons I shall give below I do not accept the contention that such a claim is untenable.

The Recourse Provisions

13. Clause C5 of the contract is headed "Owner's right to draw on security provided to it". By special condition 5 in Schedule 2A of the contract, the whole of the standard form clause C5 was deleted and was replaced by a clause numbered C5.1, in the following terms:

    C5.1 The owner may draw on the security provided by the contractor under **clause C1** to pay for any costs, expenses or damages which the owner claims that it has incurred or reasonably considers it might in the future incur pursuant to any right of the owner under or relating to this contract or as a consequence of any act or omission of the contract which the principal asserts constitutes a breach of this contract.

    The security provided by May CR under clause C1 was the two bank guarantees.

14. Clause N5 of the contract is headed "Progress claims – procedure for architect". Beneath the heading are sub-clauses numbered 1 to 5 which set out how the architect must assess a claim for a progress payment under the contract and then issue to the contractor a certificate setting out any payment due to either the owner or the contractor. By special condition 31 in Schedule 2A of the contract, three new sub-clauses, numbered 6, 7 and 8, were inserted to clause N5. What thus became clause N5.6 was as follows:

6 The owner may, without limiting any other right which it may have under the contract or at law, but only to the extent permitted by law, deduct from any amount owing to the contractor or from any retention monies or any security, any amount which:

a. the owner may have paid on behalf of the contractor, whether or not expressly authorised by this agreement;

b. is a bona fide claim to a debt or a bona fide claim to money which the owner may have against the contractor; or

c. is otherwise due and owing to the owner by the contractor in connection with the works.

Any amount remaining owing to the owner after such deduction may be recovered by the owner as a debt due and owing.

15. May CR has submitted that only clause C5.1 provides for Creative PD to have recourse to the bank guarantees. Creative PD has submitted that clause N5.6 is the primary basis for a recourse, but clause C5.1 would entitle it to have recourse if clause N5.6 does not. Clause N5.6 creates a lower threshold for it to cross, according to Creative PD's submission, because that clause requires it only to have a bona fide claim to a debt or to money before it may call upon a security.

16. I doubt whether in this case it makes much difference which of those two submissions is correct. I proceed on the footing that May CR's submission is correct and that clause C5.1 is the applicable recourse provision. I do so because to "draw on the security provided", as clause C5.1 expresses the power to have recourse, seems an apt expression when the security is a bank guarantee, whereas to "deduct from…any security", as clause N5.6 expresses the power, seems apt when the security is a cash retention sum but less apt when it is a guarantee.

Allocation of Risk

17. In an application for an interlocutory injunction restraining recourse to a performance bond or guarantee, it is first necessary to decide whether a contractual provision governing the availability of recourse does no more than provide a security for performance or does more than that by allocating the risk as to which of the parties to the contract shall be out of pocket pending resolution of this dispute.[5] If the provision allocates the risk, it has the following consequences:

[5] *Fletcher Construction Australia Limited v Varnsdorf Pty Ltd* [1998] 3 VR 812 at 821; *Sugar Australia Pty Ltd v Lend Lease Services Pty Ltd* [2015] VSCA 98 at [19] – [25] and at [123].

> Such a contractual provision fundamentally alters the context in which the Court must exercise its discretion by changing the complexion of the status quo and raising the prospect of substantial injustice if the purpose of the provision is defeated. That is, the status quo in such circumstances becomes what the parties have agreed as to which of them should bear the financial risk pending final determination, not the continuation of where that risk would natural fall in the absence of a performance bond to call upon.[6]

18. In *Fletcher Construction Australia Ltd v Varnsdorf Pty Ltd ("Fletcher")*[7] a construction contract required the builder to provide security in the form of an "unconditional undertaking" to pay a specified sum in favour of the owner. The builder fulfilled the requirement by obtaining standby letters of credit. The contract provided for the appointment of a contract administrator, who was to certify when the works had reached "Handover": a term defined in such a way as to be tantamount to a stage of practical completion. The builder failed to complete by specified "Handover" dates. The owner, claiming to be entitled to "Time Damages" under the contract because of delay in performance, sought to draw upon the letters of credit. The Court of Appeal dismissed on appeal from an order refusing the builder's application for an interlocutory injunction.

19. In the course of his judgment in *Fletcher*, Charles JA pointed to three features of the contractual provisions which showed an intention of the parties to allocate commercial risk to the builder. First, the security was required to be "unconditional". Secondly, there was simple procedure by which an independent party, the contract administrator, was to certify whether he was satisfied that "Handover" stage had been reached. Thirdly, the provision which obliged the builder to pay "Time Damages" for failure to complete by a date for "Handover", entitled the owner to "deduct Time Damages from any money due to [the builder] under the contract", and if that was insufficient, obliged the builder to pay the balance of the "Time Damages"; then, if the builder failed to pay the balance within ten days, the owner could have recourse to the security to obtain the balance.

20. In my opinion the contract in the present case has the same three features. May CR bound itself contractually to provide security by way of two "unconditional" bank guarantees. There was a stipulated procedure by which a third party, the architect, could assess a claim for a progress payment and issue a certificate setting out any payment due to either the owner or the contractor. Clause M12, headed "Liquidated damages may be payable", obliged May CR to pay or allow liquidated damages, at a rate of $2,000.00 per calendar day plus GST, if the works, or a separable part of the works, had not reached practical completion by the required date; then clause M13 empowered the architect to "deduct" liquidated damages from the next and subsequent progress certificates.

---

6 *Sugar Australia Pty Ltd v Lend Lease Services Pty Ltd* [2015] VSCA 98 at [31].
7 [1998] 3 VR 812.

21. Accordingly, in my opinion, the contract in the present case has shown an intention of the parties to allocate to May CR the risk of being out of pocket pending the resolution of disputes between it and Creative PD. The application for an interlocutory injunction has to be viewed in the light of that allocation of risk.

Principles of Construction

22. There is no controversy about the general principles by which an application for an interlocutory injunction should be determined. First, the applicant must show that there is a serious question to be tried as to the applicant's entitlement to relief upon a final hearing of the proceeding: a sufficient likelihood of success at the final hearing to justify the preservation of the status quo pending the final hearing. Secondly, the applicant must show that damages would not be an adequate remedy for any loss suffered if the interlocutory injunction is not granted. Thirdly, the applicant must show that the balance of convenience favours the grant of an injunction[8], in the sense that there would be a lower risk of injustice being done by granting the injunction than by refusing it.[9]

23. When the application is for an interlocutory injunction restraining a party from having resort to a security for performance of a contract under which risk has been allocated to the applicant, the principles are more particular. For the purpose of determining whether there is a serious question to be tried the court or tribunal is required to construe the contractual provisions which enable recourse to the security or any contractual provisions which purport to qualify or limit the ability to have recourse to the security. In *Sugar Australia Pty Ltd v Lend Lease Services Pty Ltd* ("*Sugar*")[10] Kaye JA set out the principles of construction as follows:

    (1) Subject to three principal exceptions, a court will not enjoin a party from recourse to a performance guarantee. Those exceptions are:

        (a) The court will enjoin a party in whose favour the guarantee has been given from acting fraudulently.

        (b) The court will enjoin such a party from acting unconscionably in contravention of the *Competition and Consumer Act 2010* (Cth).

        (c) The court will restrain such a party from acting in breach of a contractual promise made by it not to call on the guarantee in particular circumstances.

---

8 *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 at 68.
9 *Bradto Pty Ltd v State of Victoria* (2006) 15 VR 65 at 72.
10 [2015] VSCA 98.

(2) A recourse provision should be construed in light of all the other relevant provisions of the contract, including the terms of the security which formed part of the contract.

(3) In construing any contractual limitation on the exercise by a party to have recourse to its rights to the security, the court should take into account the commercial purposes served by security clauses in construction contracts, and to which I have referred.

(4) In particular, the commercial background for the contract informs the construction of a security clause, so that the court should not too readily favour a construction, which is inconsistent with an agreed allocation of risk as to who is to be out of pocket pending resolution of the dispute about breach.

(5) Accordingly, clear words are required to support a construction that inhibits a beneficiary of a security clause from calling on a performance guarantee where a breach is alleged in good faith (that is, non-fraudulently).[11]

(a) Clause 5.1

24. For convenience of reference I again set out clause C5.1, which I am regarding as the applicable recourse clause available to Creative PD. I must construe it in accordance with the principles set out in the passage from *Sugar* cited in the previous paragraph:

> C5.1 The owner may draw on the security provided by the contractor under **clause** C1 to pay for any costs, expenses or damages which the owner claims that it has incurred or reasonably consider it might in the future incur pursuant to any right of the owner under or relating to this contract or as a consequence of any act or omission of the contractor which the principal asserts constitutes a breach of this contract.

There is no allegation that any of Creative PD's conduct has been fraudulent or unconscionable. May CR's allegations are that Creative PD's claims that it has incurred or will incur costs, expenses or damages are mistaken on a factual level, or wrong as a matter of law, or both. Nor is there, strictly speaking, a contractual promise by Creative PD not to call on the bank guarantees in particular circumstances. Rather there is a contractual promise, in clause C7.1, expressed in positive terms: that Creative PD's entitlement to security will be reduced by

[11] At [138].

50% in particular circumstances. I think that it is legitimate for May CR to submit, as it has, that a failure to act in accordance with clause C7.1, by not conceding that the security has been reduced, would bring the case within the exception numbered (1)(c) in Kaye JA's enumeration of principles. There can have been no such failure to act unless May CR's submission about the construction of clause C7.1 is correct. For reasons I shall be giving below I consider that it is not correct.

25. The costs, expenses or damages for the payment of which Creative PD may draw upon the security, in accordance with clause C5.1, are of two kinds. One is costs, expenses or damages which "it claims that it has incurred" under the contract or as a consequence of a breach of contract. In that category are the claims for liquidated damages and for restitution of a sum which it claims to have overpaid to May CR. In accordance with Kaye JA's enumeration of principles, the only qualification upon Creative PD's entitlement to draw upon the bank guarantees for payment of those claims is that the claims, and the assertion that there have been breaches of the contract that give rise to those claims, are made in good faith. The other kind is costs, expenses, or damages that Creative PD "reasonably considers that it might in the future incur" under the contract or as a consequence of any act or omission which it asserts is a breach of contract. In that category is the claim for damages for rectification of defects. The qualification of reasonableness in relation to that category requires that Creative PD has acted reasonably in making the claim based upon facts or circumstances which it knew, or ought to have known, concerning the validity of the claim.[12]

(b) Clause C7.1

26. In the standard printed form of contract, clause C7 had appeared as follows:

> **C7 Owner's release of security on *practical completion***
>
> 1. When the architect issues the notice of *practical completion*, the contractor is entitled to the release of 50% of the amount of the security then held.
>
> 2. If the security is cash retention:
>
>   a. the architect must give to the contractor a certificate equal to 50% of the amount of the security then held at the same time that the notice of *practical completion* is issued;
>
>   b. the contractor, on receiving the certificate, must prepare a *tax invoice* in accordance with **clause N6** and give both documents to the owner for payment;

[12] *Sugar,* [2015] VSCA 98 at [142] – [144].

c. the amount stated in the certificate must be paid in accordance with **clause N7**.

3. If the security is by *unconditional guarantees*, the owners must return one of the guarantees to the contractor with the period shown in item 12 of **schedule 1**.

The period shown in item 11 of scheduled 1 was 14 calendar days.

27. Once, by virtue of special condition 7 of Schedule 2A, the printed clause C7.1 was deleted and replaced by another clause numbered C7.1 clause C7 became:

C7 Owner's release of security on *practical completion*

1. The owner's entitlement to security will be reduced by 50 % of the amount of security then held within 28 days after each of the following has occurred:

(a) the architect issues the notice of *practical* completion; and

(b) the rectification and completion of all defects or incomplete items notified to the contractor at or prior to *practical completion*.

2. If the security is cash retention:

a. the architect must give to the contractor a certificate equal to 50% of the amount of the security then held at the same time that the notice of *practical completion* is issued;

b. the contractor, on receiving the certificate, must prepare a *tax invoice* in accordance with **clause N6** and give both documents to the owner for payment;

c. the amount stated in the certificate must be paid in accordance with **clause N7**.

3. If the security is by *unconditional guarantees*, the owner must return one of the guarantees to the contractor within the period shown in item 11 of **schedule 1**.

28. May CR submits that the proper construction of clause 7.1 is that the entitlement to security is reduced by 50% of its amount after the architect has issued the notice of practical completion and 28 days have elapsed, and that the amount of security will be reduced again by 50% (to 25%)[13] upon the rectification and completion of all defects or incomplete items notified to May CR at or prior to practical completion and the elapse of 28 days from rectification and completion. On that construction, Creative PD is obliged under clause 7.3 to return one of the two bank guarantees, because 28 days have elapsed since the issuing on 5 February 2016 of the second of the two notices of practical completion.

29. Creative PD submits that the proper construction of clause 7.1 is that a reduction by 50% does not occur until both of the circumstances described in sub-paragraphs (a) and (b) have occurred; although circumstance (a) has occurred, circumstance (b) has not, it says.

30. In its submission May CR has emphasised the use of the word "each" in clause 7.1, not "both" which is the word one would expect the draftsman of the clause to have used to achieve a meaning that the reduction by 50% would occur only if both of circumstances (a) and (b) had occurred. There are two other possible points in favour of the construction that May CR has contended for. One is the very division of clause 7.1 into two paragraphs. A meaning that the reduction of 50% would occur only once all notified defects had been notified, all notified incomplete works had been completed and a notice of practical completion had been issued could have been achieved by saying so in one continuous provision, unbroken by sub-paragraphs. The other possible point is that May CR's construction achieves consistency of clause 7.1 with clause 7.2(a), which states clearly enough that where the security is cash retention the issue of a notice of practical completion, plus the giving of the contractor's invoice, will achieve a 50% reduction of the amount of security.

31. In my opinion the error in May CR's submission is that it focuses upon clause 7.1 in isolation, whereas the proper construction of that clause emerges from consideration of it in the context of the contract as a whole, and particularly in the context of the "security" clauses numbered C1 to C17, and more particularly still from the need for clauses C7 and C9 to have a sensible operation together.

32. Clause C9 is as follows:

> **C9 Owner's release of security on final certificate**
>
> 1. When the architect issues a final certificate for a separable part or the whole of the *works* under **clause N12**, or a certificate under **clause Q9** or **Q17**, as the case may be, the owner must release to the contractor any remaining security for the whole, or the separable part, as applicable, less any amount owing to the owner under the certificate.

[13] In his written submission in reply dated 21 March 2017 Mr Stirling indicated, correctly in my opinion, that the submission produced that arithmetical outcome.

2. If the security is cash retention, the architect must take into account any remaining security when preparing the final certificate.

3. If the security is by *unconditional guarantee* and:

    a. the certificate is in favour of the contractor, the owner must give to the contractor the remaining *unconditional guarantee* within the period shown in item 11 of **schedule 1**;

    b. the certificate is in favour of the owner, the certificate is evidence of the basis and amount of the owner's entitlement, and the owner may draw on the security under **clause C6** before returning the remaining *unconditional guarantee* to the contract within the period shown in item 11 of **schedule 1**.

Clause N12 sets out a procedure for the architect's assessment of the contractor, final claim and issue of the final certificate. Clauses Q9 and Q17 apply only when there has been a termination of the contractor's engagement so they do not apply in this case. The reference in clause C9.3(b) to clause 6 is awkward because by virtue of special condition 7 in Schedule 2A of the contract the printed clauses C5.1 and C6 were deleted and replaced by a single new clause numbered C5.1; the reference to clause C6 in clause C9.3(b) must be regarded as a reference to the new clause C5.1.

33. In my opinion the structure of clause C7 is significant. The obligation of the owner to return one of the guarantees comes at the end, in clause 7.3. That structure suggests that clause C7.3 operates only if both of the circumstances described in clause 7.1 have occurred: issuing of the notice of practical completion, and also rectification and completion. Then, and only then, does the obligation to return one of the guarantees arise. If the intention of the parties was to impose an obligation to return one of the guarantees in the first of the circumstances – the issuing of the notice of practical completion – one would have expected the obligation to return one of the guarantees to have been expressed immediately after clause C7.1(a), and for the clause to have expressed after clause C7.1(b) an obligation to return the remaining guarantee.

34. Clause C9 must be given a sensible operation. A construction of clause 7.1 which gives clause C9 no operation, or a limited operation, is unlikely to be correct. Consider the case of the contractor having received the notice of practical completion and having rectified all defects and completed all incomplete works of which the contractor had been notified. On May CR's construction of clause 7, the owner would have become obliged to return both guarantees; there would be no "remaining security" or "remaining unconditional

guarantee” with which clause C9 could deal once the architect had issued the final certificate even though, on the same construction, the amount of security held would have been reduced to 25%, not to zero. On Creative PD’s construction of clause 7 the owner’s entitlement to security would have been reduced to 50% only, and there would be a “remaining security” or “remaining unconditional guarantee” to be dealt with under clause 9; clause 9 would have a sensible operation.

35. Mr Tiernan QC and Mr Downie of Counsel for Creative PD made a written submission on 24 March 2017 in response to written submissions of Mr Stirling of Counsel for May CR. Their written submission included an argument based on a comparison between clause C7.1 (which they called “special condition 7”) and clause C9:

> Fourth, May’s submission ignores clause C9 of the general conditions, which provides for the return of any remaining security upon the issuing of the final certificate. May’s construction would cause great difficulty with the operation of an important part of the Building Contract, because:
>
> a. if outstanding defects are not remedied as at the date of the final certificate, clause C9 requires the balance of the security to be returned, but special condition 7 prohibits it; and
>
> b. if outstanding defects are already remedied as at the date of the final certificate, then special condition 7 would render inutile the provision for the return of the security in clause C9, since special condition 7 would already have required the return of the security before the final certificate was issued.

I have taken the argument to be making much the same point as I was endeavouring to make in the previous paragraph. If the argument is something more or something else, I am afraid that I have not understood it.

36. In that written submission Mr Tiernan QC and Mr Downie put other arguments. One was that the word “and” after sub-paragraph (a) and before sub-paragraph (b) in clause C7.1 supported the construction that there were two cumulative circumstances, not two each, which brought about a reduction by 50% of the amount of security. That argument is certainly open but to my mind is not determinative of the question of construction. Another was that it would be impossible for Creative PD to return half of a guarantee, as would be its obligation if May CR’s construction were correct. I do not accept that argument. Reduction of a security by 50% obliges Creative PD to return one of the two guarantees: an entirely feasible task.

37. In my opinion there is another reason why the construction of clause C7.1 contended for by Creative PD is correct. The clause is what Kaye JA in *Sugar* described as a "bespoke clause".[14] The parties deleted the printed clause C7.1 in the standard form contract and replaced it with one of their own devising, or, at any rate, of the devising of one of them. Had the printed clause C7.1 remained in place, it would have had the effect which May CR has been arguing that the replacement clause C7.1 has: a reduction of, and obligation to release, 50% of the security held once the architect had issued the notices of practical completion. The replacement clause was in a different language. A construction of the replacement clause C71 which exposes May CR to a greater risk of a recourse to both guarantees, even after the issuing of notices of practical completion, is consistent with the other contractual provisions that have allocated to May CR the risk of being out of pocket pending resolution of the disputes between the parties.

(c) A presently irrelevant dispute

38. In an affidavit in opposition to the application for an interlocutory injunction the architect's employee Daniel Fasciani has given evidence that in the course of a conversation between him and Peter May of May CR on 23 December 2015 Mr May agreed that Creative PD could retain the two bank guarantees until all defects had been rectified.[15] In an affidavit in reply Mr May has denied that he and Mr Fasciani made any such agreement.[16] The resolution of that conflict of evidence must await the final hearing of the proceeding when cross-examination may test the evidence of each deponent. It is irrelevant to the issue of the proper construction of provisions of the contract.

(d) Construction of clause 7.1: Conclusion

39. For the above reasons I consider that on a proper construction of clause 7.1 there is no serious issue to be tried as to whether Creative PD is obliged to return one of the two bank guarantees because the architect has issued notices of practical completion. As a matter of construction of the clause, Creative PD is not obliged to do that.

Whether Breach by May CR leads to a loss for Creative PD

40. The second of May CR's primary contentions is that, as a matter of law, a claim by Creative PD that it has suffered or will suffer loss by reason of any breach by May CR is untenable. It therefore cannot establish a recourse to the bank guarantees under clause C5.1 "to pay for any costs, expenses or damages" that it has incurred, or reasonably considers that it might in future incur, as a result of any such breach.

---

[14] *Sugar*, [2015] VSCA 98 at [124].
[15] Affidavit of Daniel Fasciani dated 24 February 217, paragraph 35.
[16] Affidavit of Peter May dated 10 March 2017, paragraph 8.5.

41. The steps in the argument are:

  (a) Highdale, not Creative PD, was the owner of the site before any sale of a lot in the subdivision to a purchaser.

  (b) As a matter of law, a party to a contract cannot recover, for the other party's breach of contract, the amount of a loss that has been or will be incurred by a person that is not a party to the contract. If a purchaser from Highdale, or Highdale itself, suffers a loss as a result of any breach by May CR of its contract, that loss is not a loss which Creative PD has suffered or will suffer.

  (c) Creative PD does not have any contractual relationship with any owner of a lot. The owner has no cause of action against Creative PD for compensation for any defects. The owner's cause of action is a statutory one[17] against May CR and a contractual one against Highdale. Having no liability to an owner for the cost of rectifying defects, Creative PD does not suffer any loss in that regard.

  (d) As to liquidated damages, because for the reasons given in (a), (b) and (c) Creative PD cannot suffer any loss or damage at all as a consequence of any breach of contract by May CR, and so the liquidated damages clause, M12, must be a penal provision and unenforceable.

42. In answer to the contention that it is untenable to claim that Creative PD has suffered or ought to suffer loss as a result of any breach of contract by May CR, Creative PD relies upon statements of principle in two House of Lords decisions. The first of them was described in the second as the *St Martins* case[18], decided in 1993. The second is *Alfred McAlpine Construction Ltd v Panatown Ltd* ("*Panatown*"),[19] decided in 2000.

43. In *St Martins* there were two companies in the St Martins group of companies: company C and company I. The group was engaged in property development. Company C reached an agreement with a local authority, which owned a site, that upon company C's completion of a development on the site company C would be granted a 150 year lease: a proprietary interest in the site. Company C also entered into a building contract with a builder, the McAlpine Company. It was a term of the building contract that company C could not assign its interest in it without the builder's consent. Nevertheless, company C did assign its interest to company I, without the builder's consent.

---

17 *Domestic Building Contracts Act 1995*, s8 and s9.

18 *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd, St Martins Property Corp Ltd* [1994] 1 AC 85.

19 [2001] 1 AC 518 [2000] 4 A11 ER 97.

44. There were defects in the buildings on the completed development site. The effect of the assignment without consent was that company C had transferred its proprietary interest in the site to company I but, because the assignment had occurred without the builder's consent, company I had no cause of action against the builder for the cost of rectifying the defects. Instead, company C commenced proceedings to recover that cost. It was met with the defence that, having transferred its interest company I, it had not and could not suffer any loss under the building contract.

45. Lord Browne-Wilkinson, with whose judgment three of the other four members of the House of Lords agreed, acknowledged that there was a general rule that a plaintiff can recover damages only for his own loss, not for the loss of a third party, but stated that there were exceptions to that rule and that company C's case was one of them. His Lordship decided that there were two features of the case that entitled company C to recover substantial damages for the cost of rectifying the defects. The first feature was that both company C and the builder knew, when the building contract was created, that after the development the site was going to be occupied, and possibly purchased, by third parties and not by company C. The second feature was that by the building contract company C and the builder had specifically agreed that the rights of action under the building contract could not, without the builder's consent, be transferred to third parties who became owners or occupiers and might suffer loss. So it was proper to decide that company C was entitled to enforce its contractual rights against the builder for the benefit of those who suffered from defective performance but who had no right to sue the builder.[20] That is what, in the second case, was called the narrow ground upon which the *St Martins* case was decided.

46. The fifth member of the House of Lords in the *St Martins* case, Lord Griffiths, agreed that company C was entitled to substantial damages, but did so on a much broader ground. Lord Griffiths decided that company C was entitled, as a matter of law, to claim that it had suffered loss itself even though it would not be liable to owners or occupiers for the cost of rectifying defects: it had suffered loss because it had not received from the builder the performance of the bargain it had contracted for, and the measure of damages for that loss was the cost of rectification of the defects. The other members of the House of Lords stated that they were attracted by the broader ground put forward by Lord Griffiths but were not prepared to go so far as adopting it.

47. The second case, *Panatown*[21], had similarities to the present case but had one important difference. As in the present case, there was a building contract between a builder and a property developer (Panatown) which did not own the land on which the development was built; another company, UIP, in the same

---

[20] [1994] 1 AC 85 at 114-115.
[21] [2001] 1 AC 916.

group of companies as Panatown was the owner of the land at the time that the building contract was entered into. There were defects in the developed site as built and Panatown sued for damages. Again it was met with the defence that any loss from defects was UIP's loss, not Panatown's, and so Panatown could not recover any substantial damages, only nominal damages.

48. The important difference between *Panatown* and the present case is that, as well as the building contract, there was also a "duty of care deed" between the builder and UIP which gave UIP a right to claim against the builder for any loss that arose out of its failure to exercise reasonable care and skill in the performing the building contract.

49. Three of the five members of the House of Lords in *Panatown* judged that Panatown was entitled to no more than nominal damages and that the general rule, that a plaintiff can recover damages only for his own loss, not for the loss of a third party, applied. They recognised that there were exceptions to the rule, including the exception expressed in the narrow ground on which the *St Martins* case was decided, but decided that none of those exceptions was available to Panatown. In the *St Martins* case the persons who suffered from defective performance of the building contract had no contractual right themselves against the builder, but in the case before them (said the majority in *Panatown)* the parties had intended that UIP, the person who did suffer loss from defective performance, should have a direct cause of action against the builder, and had entered into the "duty of care deed" accordingly. In those circumstances there was no justification for allowing to Panatown an additional remedy against the builder. One of the three, Lord Jauncey, gave an additional reason for deciding against Panatown: it did not intend to spend any money to remedy the defects and so had not and would not suffer any loss from the breach of the building contract.

50. Lord Goff dissented. In a very comprehensive judgment his Lordship set out why he considered that the broader ground expressed by Lord Griffiths in the *St Martins* case was correct in legal principle and should be adopted so that a developer like Panatown (and like Creative PD in the present case) is not left without an effective remedy against the builder. Lord Millett also dissented, for much the same reason, and for the additional reason that the "duty of care deed" should not affect the conclusion that Panatown had suffered loss; the "duty of care deed" meant only that the law should not permit double recovery for both companies against the builder.

51. The views of Lord Griffiths and Lord Goff have been influential. Mr Tiernan referred me to the 13th edition of *Hudson*[22] where the learned authors argue that those views are correct in principle and that the reasons of the majority in *Panatown* are unpersuasive. Mr Tiernan has also referred me to other decisions which I am about to mention. As for a claim based upon the views of Lord Griffiths and Lord Goff, "the legal basis for such a claim in Australia is

[22] Hudson's Building and Engineering Contracts, 13th edition, paras 7-028 and 7-029.

uncertain".[23] A judge at first instance in Queensland[24] has held that they did not assist the plaintiff in the case before him but did not say whether those views do or should represent the law in Australia. A judge at first instance in Victoria[25] has referred to those views but without comment on their correctness or applicability in Australia. In the law of insurance the law has moved towards allowing an action by a third party to a contract whenever there is a contractual intention to benefit the third party.[26]

52. It is not untenable, therefore, for Creative PD to maintain a claim for damages against May CR by way of enforcing its expectation or performance interest under the contract. The broader ground relied upon by Lord Griffiths and Lord Goff may be followed. On the other hand the very existence in Victoria of a statutory remedy[27] against the builder for persons who do suffer loss because of defects but who have no contractual remedy against the builder may be a reason why the present case should fall to be decided as the majority did in *Panatown*. There is a serious question of law to be tried as to whether Creative PD has suffered any loss or damage at all, or, if it has, whether the damage is no more than nominal, in which case it would have been unjust to refuse an injunction against enforcement of the bank guarantees. But the claim that it has suffered loss and damage is tenable.

Operation of the Recourse Provision

53. I have said above that I proceed on the footing that clause C5.1 is the recourse provision that is applicable in this case. For convenience of reference I set out clause C5.1 again.

> C5.1 The owner may draw on the security provided by the contractor under clause C1 to pay for any costs, expenses or damages which the owner claims that it has incurred or reasonable considers it might in the future incur pursuant to any right of the owner under or relating to this contract or as a consequence of any act or omission of the contractor which the principal asserts constitutes a breach of this contract.

54. I have also said above, in paragraph 25, that the kinds of "costs, expenses or damages" for the payment of which Creative PD may draw on the security are:

    (a) those which Creative PD "claims that it has incurred" under the contract or as a consequence of a breach of contract; that is to say, such claims made in good faith; and

[23] *Nicholson v Hilldove Pty Ltd* [2014] VSCA 158 at [77].
[24] *VI International Pty Ltd v Interworks Architects Pty Ltd & ors* [2007] QSC 096.
[25] *Ronan Catholic Trusts Corporation v Van Driel Ltd* [2001] VSC 310 at [108], [109].
[26] *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR107.
[27] *Domestic Building Contracts Act* 1995, s8 and s9.

(b) those which Creative PD "reasonably considers it might in the future incur" under the contract or in consequence of any act or omission which it asserts is a breach of contract; that is to say, that its consideration is reasonable based on facts or circumstances which it knew, or ought to have known, concerning the validity of the claim it was asserting.

(d) "Claims" in good faith "that it has incurred"

55. Mr Angelatos has deposed to a belief that Creative PD is entitled to liquidated damages of $180,400.00 from May CR and to the recovery of $331,036.12 which Creative PD has overpaid to May CR under a progress payment claim.[28]

56. The belief about entitlement to liquidated damages of $180,400.00 is based upon a calculation by Mr Fasciani. The calculation was of $110,000.00 between 30 October 2015 and 23 December 2015, when the architect certified practical completion of separable part 1, at the rate of $2,000.00 per day, and $70,400.00 between 24 December 2015 to 5 February 2016, when the architect certified practical completion of separable part 2, at the rate of $1,600.00 per day, the rate agreed upon between him and Mr May on 23 December 2015.[29]

57. The calculation begins on 30 October 2015, which was the date upon which May CR gave a notice under the contract of its intention to suspend works, which it claimed to have been entitled to do.[30] That is one reason why there is a genuine dispute about the liquidated damages claimed. Another is that May CR claims, with considerable force in my view, that in any event time for the calculation of liquidated damages did not begin to run until 16 December 2015, which in the architect's instruction no. 76 dated 4 December 2015 was the date to which the date for practical completion was extended.[31] There is a serious question to be tried as to the quantum of the liquidated damages and it may turn out to be considerably less than Creative PD has claimed. That is not to say, however, that its claim has not been made in good faith. As it was made in reliance upon the architect's calculation, Creative PD has shown enough to establish that it has been made in good faith.

58. According to Mr Angelatos, Creative PD paid to May CR $331,036.12 more than May CR was entitled to receive under progress payment claim no. 19. He has deposed that Creative PD made that payment, "with a reservation of rights", because May CR had given on 30 October 2015 a notice of intention to suspend the works and that he want to avoid the possibility of any further delay from a

---

[28] Affidavit of Andreas Angelatos dated 24 February 2017, paragraph 25.

[29] Affidavit of Daniel Fasciani dated 24 February 2017, paragraph 72. There are some obvious typographical errors in that paragraph, which I have corrected in my paraphrase of it.

[30] Affidavit of Peter May dated 10 March 2017, paragraph 7.

[31] Exhibit PM-14 to the affidavit of Peter May dated 10 March 2017, and paragraph 13.3 of that affidavit.

suspension of the works because of a dispute about what ought to have been made under that claim for progress payment.[32] The claim had been for a progress payment of $585,363.61 but the architect had certified for payment of $254,327.49 only.[33] In my view that evidence is enough to establish that the claim for recovery of $331,036.12 is made in good faith.

59. There may be a difficulty about that claim as a justification for drawing on the security. It is not claim for damages for breach of contract. It is a restitutionary claim. Whether a right to restitution is a "right of the owner under or relating to this contract", in the words of clause C5.1, is debatable. This point was not argued so I say no more about it.

(e) "Reasonably considers it might in the future incur"

60. Mr Angelatos has also deposed to a belief that Creative PD is entitled to damages of $431,000.00 for the cost of rectifying defects in the works.[34] That figure comes from a calculation by Charter Keck Cramer, quantity surveyors, based upon information supplied by the architect.[35]

61. May CR has made a vigorous attack upon this claim for damages for defects. It argues:

    (a) Some of the alleged defects are not construction defects but are design defects for which the architect, not the builder, is responsible. For that argument it has the support of an expert, a Dr Baigen.[36]

    (b) Neither the residential apartment owners, nor the owners corporations, have any cause of action against Creative PD for the cost of rectifying defects, so it is unlikely that Creative PD will be called upon to spend any money on rectification. The greater likelihood is that claims for the cost of rectification will be made directly against the builder, May CR.

    (c) The terms of the contract of sale between Highdale and each purchaser seem to exclude any cause of action by the purchaser against Highdale for the cost of rectification of defects. Whether or not that is so, a claim against Highdale does not translate into a liability for Creative PD.

    (d) The terms of the Development Services Deed[37] between Highdale and Creative PD do not oblige Creative PD to undertake any rectification works if any are required.

[32] Affidavit of Andreas Angelatos dated 24 February 2017, paragraphs 20.
[33] Affidavit of Daniel Fasciani dated 24 February 2017, paragraphs 14 to 16.
[34] Affidavit of Andreas Angelatos dated 24 February 2017, paragraph 25.
[35] Affidavit of Daniel Fasciani dated 24 February 2017, paragraph 62.
[36] Affidavit of Peter May dated 10 March 2017, paragraph 14.4.
[37] Exhibit AA-3 to the affidavit of Andreas Angelatos dated 24 February 2017.

(e) Creative PD has not made any promise, or expressed any intention, to lay out money to pay for rectification of defects or the use the proceeds of the recourse to the bank guarantees to pay for rectification of defects.

62. To a greater or lesser degree, there is merit in all those arguments. On the other hand:

(i) Arguably clause 6.2 of the Development Services Deed, which requires Creative PD to indemnify Highdale against all liability incurred “in connection with any Sale Contract”, would oblige Creative PD to indemnify Highdale against any claim by a purchaser against Highdale for the cost of rectification of defects. If such a claim were to be successful, Creative PD might be obliged to indemnify Highdale in relation it and would then suffer a loss.

(ii) Mr Angelatos has deposed that Creative PD has undertaken repairs to some of the defects.[38]

63. Although it may ultimately be determined that Creative PD has not suffered and will not suffer any loss which arises out of the presence of defects in the works, because of the matters I set out in paragraphs 60 and 62 I consider that Creative PD has shown enough to establish that, in light of all the fact which it knows, or it ought to have known, it has reasonably considered that it might in future incur the liability to pay $431,000.00 for the cost of rectifying defects in the works.

(f) Conclusion about the recourse clause

64. The requirements of clause C5.1 have been satisfied. It operates to entitle Creative PD to draw upon the two unconditional bank guarantees which May CR has provided as security for its performance of the contract.

Balance of Convenience

65. In support of its submission that damages would not be an adequate remedy if the injunction was refused but it were successful in the proceeding, May CR pointed to the fact that Creative PD and Highdale each has a paid-up capital of $4.00 only. It is likely, the argument went, that the proceeds of the call upon the guarantees would be dissipated and there would be no assets from which a judgement could be satisfied. Mr Angelatos, however, has deposed that for the purpose of Creative PD’s proposed development of the site its bank, the Commonwealth Bank, had increased its lending facilities from $6 million to $7.78 million.[39] That evidence suggests that the Commonwealth Bank regarded Creative PD as having considerable financial substance. May CR has not made out its contention.

---

[38] Affidavit of Andreas Angelatos dated 16 March 2017, paragraph 7(c).
[39] Affidavit of Andreas Angelatos dated 24 February 2017, paragraph 9.

66. For what it is worth, which I doubt is very much, Mr Angelatos on behalf of Highdale has signed a written undertaking dated 24 March 2017 which Mr Tiernan and Mr Downie attached to that written submission of the same day. The undertaking is:

> Highdale Pty Ltd undertakes to the Tribunal, in the event that the Tribunal does not enjoin the respondent's recourse to the bank guarantees and the Tribunal subsequently makes a finding that the respondent's recourse to the performance guarantees was not permitted by the contract between the applicant and the respondent, to reimburse to the applicant such sum as is ordered by the Tribunal.

67. May CR has asserted that if Creative PD has recourse to the bank guarantees May CR will suffer irreparable and lasting harm to its reputation and business that could not be compensated for by an order for damages. The assertion has been made in an affidavit by May CR's solicitor, based upon her instructions[40]; Mr May himself has not deposed to it. Because the application for the interlocutory injunction had to be made in haste it is not surprising that part of the initial supporting material was a solicitor's affidavit based upon instructions, but it is a little surprising that Mr May in his subsequent affidavit dated 10 March 2017 did not confirm those instructions. It stands to reason, nevertheless, that recourse to the bank guarantees may well affect May CR's reputation and business adversely. The risk that those consequences would follow a recourse to the bank guarantees is, it seems to me, itself a consequence of the allocation of risk to May CR that was made when the parties entered into the contract.

68. Because the status quo in the proceeding is the contract and that allocation of risk to May CR[41], to grant an injunction as sought would create a greater risk of injustice than to refuse it.

69. Through her Counsel Mr Hellyer the intervenor Ms Gannon asked me, in the event of my refusal to grant the injunction, to make an order under s53(2)(bb) of the *Domestic Building Contracts Act 1995* that Creative PD pay into the Domestic Builders Fund an amount equivalent to the proceeds of recourse to the bank guarantees, or at least so much of those proceeds as corresponds to the amount claimed for the cost of rectification of defects. Mr Tierney and Mr Downie submitted, correctly, that Ms Gannon has no standing to request the Tribunal to make any such order. But the making of the request emboldened Mr Stirling to ask me to make such an order in the event that the application for an interlocutory injunction was unsuccessful.

[40] Affidavit of Megan Lisbeth Calder dated 7 February 2017, paragraphs 3 and 4.
[41] See paragraph 17, and footnote 6, above.

70. In my opinion the Tribunal should not make such an order under s53(2)(bb) in a case in which an unsuccessful application is made for an interlocutory injunction to restrain recourse to unconditional security. To make such an order would enable the applicant for the injunction to achieve indirectly what the Tribunal has not permitted the applicant to achieve directly. The authority to which Mr Hellyer referred in a written submission[42], a case in which an order was made under the section, did not involve a contractual recourse to an unconditional bank guarantee or any similar unconditional security.

Conclusion

71. For the above reasons the application for an interlocutory injunction is dismissed.

72. The affidavit material filed in support of and against the application, and the exhibits to the affidavits, are voluminous and the factual disputes that emerge from them are many. I have referred only to those parts of the material which have formed a basis for these reasons.

A. Vassie
Senior Member

13 April 2017

[42] *Rescom Constructions Pty Ltd v Woodcrest Investments Pty Ltd* [2006] VCAT 446.