IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2024-404-273
[2024] NZHC 561

BETWEEN	HAWKINS LIMITED Plaintiff
AND	ELIZABETH PROPERTIES LIMITED Defendant

Hearing: 28 February 2024

Appearances: D J Cooper KC and J P Bell-Connell for the Plaintiff
J Carlyon and Y Fu for the Defendant

Judgment: 15 March 2024

JUDGMENT OF GAULT J
(Application for interim injunction)

This judgment was delivered by me on 15 March 2024 at 4:00 /pm
pursuant to r 11.5 of the High Court Rules 2016.

Registrar/Deputy Registrar

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Solicitors / Counsel:
Mr D Cooper KC, Barrister, Auckland
Ms K Van Houtte and Mr J Bell-Connell, Dentons Kensington Swan, Auckland and Wellington
Ms J Carlyon and Ms Y Fu, Meredith Connell, Auckland

[1] Hawkins Ltd (Hawkins) seeks an interim injunction to restrain Elizabeth Properties Ltd (EPL) from calling on a $3 million contractor's bond provided by ANZ Bank New Zealand Ltd (ANZ) as surety for Hawkins (the Bond[1]) pending determination of a liquidated damages (LDs) dispute due in April in a current Construction Contracts Act 2002 (CCA) adjudication.

Factual background

[2] The Elizabeth Street Development in Tauranga (the development) is a mixed commercial and residential site comprising retail, a food and beverage dining precinct, 97 apartments and 23 luxury townhouses.

[3] On 23 August 2019, EPL and Hawkins entered into a construction contract for construction of the development (the contract). The contract was based on NZS3910:2013 with special conditions added. The contract was for a fixed lump sum amount of $148,921,526.45 (plus GST, if applicable), subject to any adjustment in accordance with the contract. The contract divided the work into seven separable portions (SPs).

[4] Key components of the contract (which I address in more detail below) included:

(a) the appointment of an Engineer to the contract (the Engineer) (cl 6);

(b) for LDs to be paid if an access date or date of practical completion "is achieved later than the corresponding due date" (cl 10.5.1);

(c) the Bond (cl 3); and

(d) a disputes regime (cl 13), supplemented by the CCA adjudication regime.

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1 Date of Issue 9 October 2019, Guarantee Number GO376731166.

[5] By early 2021, the development was significantly delayed. On 25 March 2021, the parties entered into a programme reset settlement agreement (reset agreement) to give both parties a clear understanding of programme and financial positions to see the project to a successful completion.

[6] However, there were further delays. In addition, following the reset agreement a dispute arose in relation to the validity and applicability of LDs under the contract.

[7] On 15 November 2022, Hawkins issued a notice of adjudication under the CCA. The adjudication proceedings relate to the LDs applied by EPL as a deduction to payment claim 48 in October 2022. In the adjudication proceedings, Hawkins seeks the following determinations:

(a) EPL's claims for LDs fail for uncertainty following the reset agreement because the reset agreement does not address LDs, such that none of the necessary mechanisms and parameters (rates, dates, access reductions, etc) for LDs exist;

(b) alternatively, the LDs claimed by EPL would be a penalty because EPL seeks LDs in respect of a failure to meet the conditions for delayed access/or practical completion when it has been able to access the areas for store fitout for a period of months prior to public opening and has in fact done so; and

(c) alternatively, allowances for equitable proportional reductions of LDs are inadequate to address Hawkins' entitlements for EPL's early occupancy and use of the SPB and SPC portions of the work since 10 January 2022 (in respect of SPB) and various dates between 18 December 2021 and 26 May 2022 (in respect of SPC).

[8] On 21 December 2022, the adjudication was paused to enable the parties to pursue settlement discussions. LDs that had been paid up to that date were refunded to Hawkins.

[9] The settlement discussions ended in 2023 without a settlement and the adjudication was restarted in December 2023.

[10] On 21 December 2023, EPL wrote to Hawkins requesting that it pay LDs of $22,526,500.

[11] On 9 January 2024, Hawkins wrote to EPL setting out its position that EPL was not entitled to the LDs claimed in the 21 December 2023 letter.

[12] On 15 January 2024, EPL wrote to the Engineer recording the sum of LDs that it considered was due (now $22,784,000). The Engineer then made that deduction from Hawkins' payment claim 63.

[13] On 25 January 2024, EPL wrote to Hawkins giving notice that:

(a) Hawkins was in breach of the contract by failing to pay LDs due and owing under the contract;

(b) in order to remedy the breach, Hawkins was required to pay all LDs due and owing under the contract; and

(c) Hawkins must remedy the breach by making payment within 10 working days, failing which EPL would convert the Bond into cash and apply the proceeds to the LDs owed by Hawkins.

[14] The same day, EPL wrote a Bond demand letter to the Engineer. That letter included:

> Pursuant to the Bond, dated 9 October 2019 (copy attached), and in particular clause 3(e), any demand for the Bond must be accompanied by an Engineer's Certificate stating that in the Engineer's opinion the Contractor is in default under the Contract and, having been notified of the breach, has failed to remedy the breach and that the Principal is entitled to call on the Bond.
>
> EPL hereby requires that the Engineer issues such Engineer's Certificate in respect of Hawkins' failure to pay the LDs. To the extent you have any concerns that not all LD's are due and owing, I confirm that EPL does not seek a ruling (or certificate) on that at this stage. Rather, EPL simply asks for your

> certification that there has been a breach of the Contract as a result of Hawkins' failure to pay any part of the LDs.

[15] Correspondence followed between the parties' solicitors and with the Engineer. Hawkins' solicitors' letter to the Engineer dated 9 February 2024 included the following:

> If you believe that you are qualified to make a decision on the legal rights and obligations of the parties under the Contract and Reset Agreement, then at the very least, you will need to have regard to the relevant information to do so. Hawkins is willing to provide you with its papers in the adjudication so that its evidence and the detailed basis for its position is available to you. However, section 68 of the Act prohibits Hawkins from providing you with that information without EPL's consent. If EPL consents (and we are asking it to do so), we will provide Hawkins' papers in the adjudication to you. For Hawkins' part, we are instructed that it consents to EPL providing its papers in the adjudication to you. Of course, even doing so would not address the legal expertise difficulty.

[16] On 12 February 2024, Hawkins commenced this proceeding and applied for an interim injunction.

[17] On 14 February 2024, van Bohemen J made an order by consent that, pending resolution of the application:

(a) EPL is restrained from calling on, or otherwise requesting payment under, the Bond; and

(b) Hawkins and/or ANZ will not be entitled to release the Bond until further order of the Court, except as provided in cl 8 of the Bond.

[18] On 19 February 2024, the Engineer issued a certificate stating "for the purpose of clause 3(e) of the Bond that Hawkins' failure to pay LDs to EPL is a default of its obligations under the Contract". It also stated that "[t]his certificate is provided following fair and impartial consideration."

The wider dispute

[19] Hawkins says that the contract is a build only construction contract, that Hawkins is not responsible for design, and the delays result from design defects and a

failure by EPL (through its consultants) to address those design defects. Hawkins says there have also been delays caused by EPL's delays and poor procurement of construction materials which it undertook to procure. Hawkins says the magnitude of these issues is apparent from the thousands of requests for information that Hawkins has issued to try to clarify the design. Hawkins acknowledges these matters cannot be resolved in this proceeding. Some of them (concerning the LDs regime) are the subject of the CCA adjudication. Others (concerning the causes of delay and the costs and losses resulting from delay) will be resolved by arbitration under the contract if they cannot be agreed between the parties.

[20] EPL says that Hawkins has by some margin failed to achieve the agreed due dates for completion. It says EPL has sought to recover some of the losses caused by this delay by seeking payment of the LDs agreed in the contract, but Hawkins has resisted payment. EPL says it is owed over $22.5 million in LDs and in light of Hawkins' ongoing refusal to pay these, EPL has sought to call upon the $3 million Bond. It accepts that the final position in respect of whether LDs are payable may well turn on the CCA adjudication but says that is irrelevant to the provisions dealing with a call on the Bond.

Statement of claim

[21] The key paragraphs of Hawkins' statement of claim are as follows:

> 43 EPL has breached clause 6.1.1 of the Contract by purportedly issuing a notice under clause 3.1.6 and requiring the Engineer to issue an Engineer's Certificate when:
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> a Hawkins is not in default of any obligation to pay the claimed liquidated damages;
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> b the validity and applicability of the liquidated damages regime under the Contract is disputed and is the subject of extant Adjudication Proceedings; and/or
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> c EPL has the obligation under clause 6.1.1 of the Contract to ensure that the Engineer fulfils all aspects of the role and functions reasonably and in good faith and the Engineer is not in a position to independently, fairly and impartially consider all the relevant facts or to reach a reasonable opinion regarding the alleged default.

> 44 The notice purportedly issued by the respondent under clause 3.1.6 of the Contract and its request that the Engineer issued an Engineer's Certificate is, therefore, invalid and the respondent is not entitled to call the Contractor's Bond.
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> …
>
> 47 An Engineer's Certificate issued in response to EPL's purported notice under 3.1.6 would be invalid, for the following reasons:
>
> a Hawkins is not in default of its obligations under the Contract; and
>
> b the validity and applicability of the liquidated damages regime under the Contract is disputed and is the subject of extant Adjudication Proceedings;
>
> and/or
>
> c EPL has the obligation under clause 6.1.1 of the Contract to ensure that the Engineer fulfils all aspects of the role and functions reasonably and in good faith and the Engineer is not in a position to independently, fairly and impartially consider all the relevant facts or to reach a reasonable opinion regarding the alleged default and/or the extant adjudication proceedings.

[22] Although para 47 of the statement of claim was drafted in anticipation of the Engineer's certificate and requires updating to address the certificate actually issued after the proceeding commenced, the argument proceeded on that basis.

[23] The prayer for relief in the statement of claim seeks an injunction until further order of the Court. Mr Cooper KC, for Hawkins, acknowledged that the substantive claim and the application for interim relief are not intended to injunct a call on the Bond beyond the April adjudication determination (except for a 48-hour window to enable Hawkins to pay any LDs required by the determination).

Principles governing the grant of interim injunctions

[24] The general principles governing applications for interim injunctions are well established. They were summarised by the Court of Appeal in *Commerce Commission v Viagogo AG*:[2]

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2 *Commerce Commission v Viagogo AG* [2019] NZCA 472, [2019] 3 NZLR 559 at [30].

> The principles that govern the grant of interim injunctions under r 7.53 and the court's inherent jurisdiction are well settled. The court will usually adopt a two-stage approach.[3] The first inquiry is whether there is a serious question to be tried. If that threshold is met, the court moves on to consider whether the balance of convenience favours granting or refusing relief. But as this Court observed in *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd*, considerations are marshalled under these (non-exhaustive) heads as "an aid to determining, as regards the grant or refusal of an interim injunction, where overall justice lies. In every case the Judge has finally to stand back and ask himself that question."[4]

[25] However, Ms Carlyon, for EPL, submitted that in cases where the injunction seeks to restrain payment under a bond, a more stringent standard than a "serious question to be tried" applies, namely the higher threshold of a "strong case", citing three decisions of this Court in bond cases: *McVeigh v Chief Executive of the Department of Corrections; Arrow International (NZ) Ltd v NZ Project 29 Ltd;* and *Quay Park Arena Management Ltd v Great Lakes Reinsurance (UK) Plc*.[5] This necessitated a more detailed review of these and several other authorities and makes this judgment considerably longer.

[26] *McVeigh* involved a call on a contractor's bond relying on the liquidation of the contractor as an insolvency event. Ellis J said there was no dispute as to the general principles governing applications for interim injunction.[6] However, she continued:

> [31] But these general principles are qualified in a case where the injunction seeks to restrain payment under a Bond. That is because their purpose is to provide a security that is readily and promptly available, and assuredly realisable, when a specified triggering event occurs. In a construction context, Contractor's Bonds are used to shift the financial risk of a dispute from the principal to the contractor, to the extent of the Bond. The courts are reluctant to enjoin a call on a Bond because to do so would undermine the commercial effectiveness of Bonds and inject legal and factual complexity into what should be a straightforward commercial undertaking. As the learned authors of Law of Guarantees state:[7]

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3 See *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 (HL).

4 *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA) at 142.

5 *McVeigh v Chief Executive of the Department of Corrections* [2020] NZHC 1018; *Arrow International (NZ) Ltd v NZ Project 29 Ltd* [2019] NZHC 1326; and *Quay Park Arena Management Ltd v Great Lakes Reinsurance (UK) Plc* [2014] NZHC 2204.

6 *McVeigh v Chief Executive of the Department of Corrections* [2020] NZHC 1018 at [30].

7 *Andrews & Millett, Law of Guarantees* (7th ed, Sweet & Maxwell) at 16-027.

> "It has been repeatedly stated that Contractor's Bonds and irrevocable letters of credit are 'the lifeblood of international commerce' and that consequently the court will not intervene and disturb the mercantile practice of treating the rights of the beneficiary as the equivalent of cash in hand."

[32] For these reasons, an applicant who seeks to injunct a call or payment on a Bond must meet a higher threshold than a "serious issue to be tried".

[33] Traditionally, it has been the case that an applicant is required to show that the impugned call was fraudulent – more specifically that:[8]

(a) the only realistic inference available on the facts was that the beneficiary could not honestly have believed in the validity of its call on the Bond; *and*

(b) the financial institution with which the Bond was held knew of that fact.

[34] It seems that in more recent times, however, this strict rule has been slightly relaxed—at least in the case of conditional (as opposed to on-demand) Bonds. So, in New Zealand:

(a) in *Clark Road Developments v Rohits Civil & Infrastructure Ltd*, Muir J recognised an exception where a plaintiff can positively establish that in its terms the relevant Bond does not respond to the call;[9] and

(b) in *Arrow International (NZ) Ltd v NZ Project 29 Ltd* Cooke J recognised an exception where an applicant can demonstrate that the relevant contractual provisions are not being given effect: "which will principally depend on whether the conditions of the Contract and the Bond are being performed".[10]

[35] In *Simon Carves Ltd v Ensus UK Ltd*, where an injunction was granted to restrain a call on a performance bond on the grounds of a breach of the terms of the underlying contract, the Judge summarised the principles extrapolated from the relevant authorities (including and in particular in the Court of Appeal's decision in *Sirius International Insurance Co v FAI General Insurance Ltd*[11]) as follows:[12]

> "(a) Unless material fraud is established at a final trial or there is clear evidence of fraud at the without notice or interim injunction stage, the court will not act to prevent a bank from

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8 *Alternative Power Solutions v Central Electricity Board* [2014] UKPC 31, [2014] 4 All ER 882 at [55], citing *United Trading Corporation SA v Allied Arab Bank Ltd* [1985] 2 Lloyd's Rep 554 at 561.

9 *Clark Road Developments v Rohits Civil & Infrastructure Ltd* [2017] NZHC 844 at [33].

10 *Arrow International (NZ) Ltd v NZ Project 29 Ltd* [2019] NZHC 1326 at [22].

11 *Sirius International Insurance Co v FAI General Insurance Ltd* [2003] 1 WLR 2214. In that case it was accepted by the England and Wales Court of Appeal that an injunction could be granted where it was "positively established" that the draw down on a letter of credit was contrary to an express condition contained in a separate contract (which in that case was not the contract the letter of credit was intended to support).

12 *Simon Carves Ltd v Ensus UK Ltd* [2011] EWHC 657 (TCC); [2011] BLR 340 at [33].

> paying out on an on demand bond provided that the conditions of the bond itself have been complied with (such as formal notice in writing). However, fraud is not the only ground upon which a call on the bond can be restrained by injunction.
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> (b) The same applies in relation to a beneficiary seeking payment under the bond.
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> (c) There is no legal authority which permits the beneficiary to make a call on the bond when it is expressly disentitled from doing so.
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> (d) In principle, if the underlying contract, in relation to which the bond has been provided by way of security, clearly and expressly prevents the beneficiary party to the contract from making a demand on the bond, it can be restrained by the court from making a demand under the bond.
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> (e) The court when considering the case at a final trial will be able to determine finally what the underlying contract provides by way of restriction on the beneficiary party in calling on the bond. The position is necessarily different at the without notice or interim injunction stage because the court can only very rarely form a final view as to what the contract means. However given the importance of bonds and letters of credit in the commercial world, it would be necessary at this early stage for the court to be satisfied on the arguments and evidence put before it that the party seeking an injunction against the beneficiary had a strong case. It cannot be expected that the court at that stage will make what is in effect a final ruling."

[27] *Arrow International (NZ) Ltd*, referenced in *McVeigh* above, also involved a call on a construction bond in the context of an insolvency event. The contract included special conditions that following an insolvency event the Principal may "resume possession of the site" and, where it does, may:[13]

> require the Engineer, once the Principal has made a provisional election of its remedies, to certify that there has been a breach by the Contractor and make a provisional assessment of all amounts that may become owing to the Principal by the Contractor as a result of the Contractor being removed based on the Principal's provisionally elected remedies, and that amount will be a sum immediately due and payable from the Contractor to the Principal and the Principal may immediately recover such amount from the Contractor and/or by making a call on the bond…

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[13] *Arrow International (NZ) Ltd v NZ Project 29 Ltd* [2019] NZHC 1326 at [9] and [11] (emphasis removed).

[28] Cooke J saw the case as raising considerations that may not normally arise with applications for an interim injunction because the parties had addressed the question of what should happen when there has been contractual default in their contract, including what was to happen on an interim basis.[14] He accepted the submission that it was not appropriate to impose injunctive relief on the basis that the plaintiffs have an arguable case in accordance with the first of the three factors usually considered in an application for injunctive relief (serious question to be tried). Accordingly, he considered it was not sufficient for the plaintiffs to show they have an arguable case. To obtain the continued protection of an interim injunction, they would need to demonstrate that the contractual provisions are not being given effect to – which will principally depend on whether the conditions of the contract and the bond are being performed.[15]

[29] Having analysed the contract, Cooke J considered that, while it was at least arguable that the engineer's certificate contemplated by the bond was one provided in accordance with the terms and conditions of the contract,[16] the special condition operated as a cashflow determination, much like the procedure envisaged in the CCA, prior to the final assessment.[17] It was not the role of the Court to alter the balance of risks that the parties expressly negotiated, including in the clauses that regulated what would happen in the event of precisely the circumstances the parties now faced.

[30] *Quay Park Arena Management Ltd* concerned a summary judgment application rather than an interim injunction. In that case, Associate Judge Doogue addressed the circumstances in which the Court will restrict enforcement of a performance bond.[18] Having analysed the terms of the performance bond in that case, the Judge said:[19]

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14 *Arrow International (NZ) Ltd v NZ Project 29 Ltd* [2019] NZHC 1326 at [20]-[21].
15 *A*t [22].
16 At [35].
17 At [38].
18 *Quay Park Arena Management Ltd v Great Lakes Reinsurance (UK) Plc* [2014] NZHC 2204 at [38]-[48].
19 At [67].

> … the parties have agreed that all that needs to be demonstrated is that the engineer to the contract considers that a default under the contract has occurred which the contractor has not remedied following reasonable notice to do so and that the sum demanded "is in the sole opinion of the engineer reasonable" and that the engineer certifies accordingly.

[31] The Judge further said:[20]

> A statement in a certificate is of its nature intended to have the effect of at least provisionally establishing a factual matter for the purposes of the contract. If there was an unrestricted right for a party to a contract to apply to the Court to decide whether a certifier, such as the engineer here, had proper grounds for certifying the matters that are to be provisionally certified to, then there would be little point to the whole certification process.

[32] However, the Judge then referred to limits on the exercise of a discretion of this kind, including the right to question an engineer's certificate on the ground of the absence of good faith and a mistake of a kind which shows that the certificate is not in accordance with the contract, by reference to the principles relating to judicial review of certificates, adopting the approach in *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* in relation to a valuation.[21]

[33] The Judge considered that if the engineer included in the certificate items which were never any part of the contractual obligations of the contractor, then the mistake was one which would vitiate the certificate.[22] The Judge concluded there was an arguable defence and dismissed the application for summary judgment.[23]

[34] Mr Cooper addressed these three decisions of this Court and submitted that caution is needed before applying them in a case where a disputed breach is the trigger rather than an insolvency event. Moreover, he relied on Australian and Singaporean cases and submitted:

(a) there is no higher threshold when seeking an interim injunction to restrain the call on a performance bond;

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20 *Quay Park Arena Management Ltd v Great Lakes Reinsurance (UK) Plc* [2014] NZHC 2204 at [127].

21 *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314 (NSWCA).

22 *Quay Park Arena Management Ltd v Great Lakes Reinsurance (UK) Plc* [2014] NZHC 2204 at [162].

23 At [173].

(b) there is no presumption of an unfettered right to call on a bond — the position depends on the terms of the contract; and

(c) the unconditional nature of a surety's obligation is of limited relevance when considering the primary contractual obligations as between the contractor and principal.

[35] The Singaporean case of *JBE Properties Pte Ltd v Gammon Pte Ltd* involved an unsuccessful appeal against a decision to grant an interim injunction restraining JBE from receiving money under a performance bond on the ground that its call on the bond was unconscionable.[24] Mr Cooper referred to it given the statement approved in *McVeigh* that contractors' bonds and irrevocable letters of credit are the "lifeblood of international commerce", and relied on the Singapore Court of Appeal's observations (albeit this case does not raise unconscionability as a separate ground). The Court said:

> 10 The Singapore courts' rationale in applying unconscionability as a separate and independent ground for restraining a call on a performance bond (especially one given by the contractor-obligor in a building contract) is that a performance bond serves a different function from a letter of credit. The latter performs the role of payment by the obligor for goods shipped to it by the beneficiary (typically via sea or air from another country), and "has been the life blood of commerce in international trade for hundreds of years" (see *Chartered Electronics* at [36]). Interfering with payment under a letter of credit is tantamount to interfering with the primary obligation of the obligor to make payment under its contract with the beneficiary. Hence, payment under a letter of credit should not be disrupted or restrained by the court in the absence of fraud. In contrast, a performance bond is merely security for the secondary obligation of the obligor to pay damages if it breaches its primary contractual obligations to the beneficiary. A performance bond is not the lifeblood of commerce, whether generally or in the context of the construction industry specifically. Thus, a less stringent standard (as compared to the standard applicable vis-à-vis letters of credit) can justifiably be adopted for determining whether a call on a performance bond should be restrained. We should also add that where the wording of a performance bond is ambiguous, the court would be entitled to interpret the performance bond as being conditioned upon facts rather than upon documents or upon a mere demand, contrary to the *dictum* of Staughton LJ in *IE Contractors Ltd v Lloyds Bank Plc* and *Rafidain Bank* [1990] 2 Lloyd's Rep 496 at 500.

[36] Next, Mr Cooper referred to *Universal Publishers Pty Ltd v Australian Executor Trustees Ltd*, a decision of the Supreme Court of New South Wales involving

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[24] *JBE Properties Pte Ltd v Gammon Pte Ltd* [2010] SGCA 46, [2011] 2 SLR 47.

a contractor seeking an injunction to restrain a call upon a banker's undertaking.[25] White J said:[26]

> A party may also be restrained from calling on a performance bond such as the banker's undertaking in this case if calling on the performance bond is in breach of an express or implied negative stipulation in the contract. Where the clause for the provision of such a bond is intended not only to provide security for the performance of the other party's obligations but also to allocate the risk as to who should be out-of-pocket pending resolution of a dispute as to whether the other party is in breach of contract, the party may be restrained from calling on the bond if it is clear beyond serious argument that the party calling on the performance bond has no right to the amount claimed (see *Fletcher Construction Australia Ltd v Varnsdorf Pty Ltd* (1998) 3 VR 812 at 821 and 826; *Clough Engineering Limited v Oil & Natural Gas Corporation Limited* [2008] FCAFC 136; (2008) 249 ALR 458; *Reed Construction Services Pty Ltd v Kheng Seng (Aust) Pty Ltd* (Austin J, New South Wales Supreme Court, 20 November 1998, unreported BC9806316 at [12]); *FMT Aircraft Gate Support Systems v Sydney Ports Corporation* [2010] NSWSC 1108 at [7]-[11]).

[37] Mr Cooper submitted the reference to a "negative stipulation" in the Bond means simply that it will not be called upon where the pre-conditions are not satisfied.

[38] The Judge in *Universal* also said:[27]

> Whether the purpose of the provision of the performance bond in the form of the banker's undertaking is only to provide security for the performance of the lessee's contractual obligations, or whether the purpose is also to allocate the risk as to who should be out-of-pocket pending resolution of a dispute, is a conclusion to be drawn from the construction of the lease.
>
> The latter purpose of such a provision can readily be drawn if the contract provides that the performance bond may be called on if the party claims to be entitled to be owed money, or claims that the opposite party is in breach of the contract.

[39] Later in the decision, the Judge said:[28]

> In my view, the decision in *Lucas Stuart Pty Limited v Hemmes Hermitage Pty Limited* is inconsistent with the suggestion that *Clough Engineering* lays down principles applicable to all contracts that where an unconditional performance bond, or a like instrument, is provided as security for a party's obligations, express words will be needed to preclude a beneficiary of such security from calling on it if a breach is alleged in good faith.

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25 *Universal Publishers Pty Ltd v Australian Executor Trustees Ltd* [2013] NSWSC 2021.
26 At [14].
27 At [16]-[17].
28 At [58]-[59].

> There need be no dichotomy between, on the one hand, a party's being entitled to claim on an unconditional performance bond because it claims in good faith that the other party is in default and, on the other hand, a party's entitlement to call on a security being indisputable or capable of being established objectively when the demand is made. There is a middle ground; that the claim of default may be raised in good faith but may be disputed. Whether the raising of a dispute as to the existence of a breach provides an answer to a claim being made on the performance bond will depend on the proper construction of the contract, including any evidence as to commercial practice that may be admissible or about which judicial notice can be taken.

[40] The Judge concluded there was a serious question to be tried.[29]

[41] *Walton Construction Pty Ltd v Pines Living Pty Ltd* was a decision in the Supreme Court of the Australian Capital Territory on an application for an interlocutory injunction to restrain calling upon bank guarantees.[30] The Judge emphasised that the entitlement to call upon the guarantees was determined by the terms of the guarantees.[31] After reviewing the authorities as to the constructional principles relating to performance guarantees, the Judge said the different results in the cases indicates that whether or not there is a power to call upon security when the entitlement is disputed will depend on the subtleties of the particular contractual provisions.[32] The Judge considered that, when dealing with an application for an injunction directed to the beneficiary of the guarantee (as opposed to the financial institution providing it) the starting point must be the terms of the contract between those parties that permit recourse to be had to the security. It is the terms of that contract which will define the scope of the entitlement to call upon the security and any constraints upon that entitlement.[33]

[42] In that case, the contract did not expressly deal with the circumstances in which the guarantee may be called upon and the Judge said the outcome turned upon whether it was possible to imply into the contract a term which covered both the security and risk allocation purposes identified in the authorities. The Judge concluded that the contract did not permit recourse to the bank guarantee in circumstances where,

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29 *Universal Publishers Pty Ltd v Australian Executor Trustees Ltd* [2013] NSWSC 2021 at [71].
30 *Walton Construction Pty Ltd v Pines Living Pty Ltd* [2013] ACTSC 237.
31 At [38].
32 At [55].
33 At [62].

although a claim by the owner was made bona fide, that claim was subject to a genuine dispute.[34] Again, the interim injunction was continued.

[43] In *Lucas Stuart Pty Ltd v Hemmes Hermitage Pty Ltd*,[35] the New South Wales Court of Appeal dealt with an appeal against a first instance decision declining to grant an interlocutory injunction restraining call upon performance bonds. The applicant argued there was a serious question to be tried as to whether a pre-condition that the applicant had "not materially complied with its obligations" had been satisfied.[36] The first instance Judge had held the applicant had not established that there was any serious question to be tried.

[44] On appeal, Macfarlan JA (with whom the other Judges relevantly agreed) addressed the two principal goals that parties may seek to achieve by requiring that performance bonds be provided by a contractor to a principal in circumstances such as the present while commenting on *Clough Engineering Ltd v Oil & Natural Gas Corporation Ltd*.[37] Macfarlan JA said one goal is to provide security in the event of the insolvency of the contractor. The other is to enable the principal to obtain prompt payment of amounts it claims, notwithstanding disputes raised by the contractor. Not every contract seeks to achieve both goals. So far as the second goal is concerned, Macfarlan JA drew a distinction between a clause that only entitles the respondent to call upon the bonds if, as a matter of objective fact, the applicant "has not materially complied with its obligations" where it is open, as had occurred in that case, for the applicant to seek to restrain the respondent from calling upon the bonds upon the basis that the pre-condition has, at least arguably, not been satisfied, and a clause where the respondent's entitlement to call upon the bonds is dependent on the respondent's satisfaction or even simply upon the respondent's assertion that the applicant was in breach of the contract. The Judge said the position would have been different if the relevant clause had made the respondent's entitlement to call upon the bonds dependent on the respondent's satisfaction or even simply upon the respondent's

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34 *Walton Construction Pty Ltd v Pines Living Pty Ltd* [2013] ACTSC 237 at [63].
35 *Lucas Stuart Pty Ltd v Hemmes Hermitage Pty Ltd* [2010] NSWCA 283.
36 At [22].
37 *Clough Engineering Ltd v Oil & Natural Gas Corporation Ltd* [2008] FCAFC 136, (2008) 249 ALR 458.

assertion that the applicant was in breach of the contract. Provisions of this type would have gone a long way to achieving the second of the goals.[38]

[45] On the availability of injunctive relief, Macfarlan JA said:

> 47 For reasons I have given, the applicant has shown there is a serious question to be tried that the respondent's Notice of 19 July 2010 requiring defects to be remedied within a specified time is invalid. It is common ground between the parties that the respondent wishes to use non-compliance with the Notice as a ground for calling upon the performance bonds under Clause 16.3. As it is clearly implicit in the Contract that the respondent will only call upon the performance bonds in the circumstances identified in the Contract, the applicant has demonstrated an arguable case that the respondent is threatening to breach an implied negative stipulation in the Contract. Authorities dealing with performance bonds confirm that injunctive relief may be given in such circumstances (see for instance *Reed Construction Services Pty Ltd v Kheng Seng (Australia) Pty Ltd*).

[46] I acknowledge the importance of performance bonds in commerce. The pre-conditions for their call are an important component of the risk allocation between the parties – with both goals identified above potentially in mind. Such pre-conditions are to be determined by reference to the terms of the contract. As Mr Cooper submitted, the unconditional nature of a surety's obligation is of limited relevance when considering the primary contractual obligations as between the contractor and principal.[39] It may well be that the parties have expressly circumscribed the pre-conditions so that the bond may be called upon despite a genuine dispute as an interim risk allocation measure. *Arrow* is such a case.

[47] Having considered these authorities, I prefer not to make an exception to the well-established threshold of a serious question to be tried for an interim injunction case involving a performance bond. Rather, in the ordinary way on an application for an interim injunction, I consider that the dispute as to the meaning of the contract is to be assessed against the orthodox threshold of serious question to be tried, of course recognising that the meaning of the contract is determined in its commercial context

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38 *Clough Engineering Ltd v Oil & Natural Gas Corporation Ltd* [2008] FCAFC 136, (2008) 249 ALR 458 at [41]-[43].

39 *RCR O'Donnell Griffin Pty Ltd v Forge Group Power Pty Ltd (Receivers and Managers Appointed) (in liq)* [2016] QCA 214 at [94], referring to *Lucas Stuart Pty Ltd v Hemmes Hermitage Pty Ltd* [2010] NSWCA 283; *CPB Contractors Pty Ltd v JKC Australia LNG Pty Ltd (No 2)* [2017] WASCA 132 at [87]; and *JBE Properties Pte Ltd v Gammon Pte Ltd* [2010] SGCA 46, [2011] 2 SLR 47 at [10], quoted above at [35].

including the nature of the performance bond. In the ordinary way, if the serious question to be tried threshold is met, the strength of the case — where it can be ascertained at the interim stage — may be a relevant factor in the balance of convenience.

[48] That is not to suggest that the serious question step is to be brushed over lightly – as Eichelbaum J put it in *Ansell v NZ Insurance Finance Ltd*,[40] it is not sufficient for the plaintiffs just to say that there is a tenable cause of action from a legal point of view, and a conflict of evidence on the facts. However, that is to be balanced against the well-established point, dating at least from *American Cyanamid Co v Ethicon Ltd*,[41] and repeated recently in this Court,[42] that:

> At this stage of the proceeding, it is not the Court's function to attempt to resolve any conflicts of evidence on which the claims of the parties rely, nor is it for the Court to determine any difficult questions of law which may require more detailed consideration.[43]

[49] In some cases, the proper interpretation of a contract may amount to such a difficult question. It is not the Court's function on an interim injunction application – or always feasible under urgency – to determine such a question of interpretation in what may be in effect a final ruling.

Serious question to be tried threshold

Key contract terms

[50] In relation to the Bond, the special conditions in the contract relevantly provide:

> 3.1.6 If the Principal intends to call upon the Contractor's Bond, the Principal must give prior written notice to the Contractor stating each of the following:
>
> (a) the Contractor's breach or breaches;

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40 *Ansell v NZ Insurance Finance Ltd* HC Wellington A434/83, 30 November 1983.

41 *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 (HL) at 407.

42 *The Christian Church Community Trust v Bank of New Zealand* [2023] NZHC 2523, [2023] 3 NZLR 190 at [17]; and *Three Hills Group Ltd v New Zealand Post Ltd* [2023] NZHC 3156 at [51].

43 *Mad Butcher Holdings Ltd v Standard 730 Ltd* [2019] NZHC 589 at [15] following *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 (HL) at 407; *Villa Maria Wines Ltd v Montana Wines Ltd* [1984] NZLR 422 (CA) at 425; and *Health Club Brands Ltd v Colven* [2013] NZHC 428 at [9].

(b) the action required by the Contractor to remedy the breach or breaches; and

(c) a specific time within which the Contractor must remedy such breach (provided that such timeframe may be no shorter than 10 Working Days).

3.1.7 If the Principal considers that the Contractor is in breach of the Contract or an Insolvency Event has occurred in respect of the Contractor, the Principal may convert the Contractor's Bond into cash and may apply the proceeds to:

(a) the Cost of remedying the Contractor's breach, or Costs arising from the Insolvency Event; and/or

(b) compensation for the damages suffered or incurred, or for which the Principal becomes liable for as a result of the Contractor's breach or the Insolvency Event.

[51] The Bond is also part of the contract. The terms of the Bond include:

1. The Surety is held and bound to the Principal in the sum of NZD 3,000,000.00 (Three Million New Zealand Dollars) (the "Bond Sum") and binds itself, its successors and assigns for the payment of that sum to the Principal.

2. THE Surety irrevocably and unconditionally undertakes to the Principal to pay any sum or sums which may, from time to time, be demanded in writing by the Principal (subject to clause 3) up to an aggregate amount not exceeding the sum stated in clause 1 above. The Surety shall make payment forthwith upon demand by the Principal (subject to clause 3) without enquiry as to, and without having regard to, the position between the Contractor and the Principal, or whether or not the Contractor is in default under the Contract. Payment will be made without reference to, and notwithstanding any instruction from the Contractor to the Surety to the contrary.

3. Any demand made by the Principal must:

(a) be in writing;

(b) be addressed to the Surety (at the address stated for service);

(c) state the amount required to be paid;

(d) state the bank account to which the amount demanded is to be paid; and

(e) be accompanied by an Engineer's Certificate, stating that, in the Engineer's reasonable opinion (acting independently and impartially), the Contractor has suffered an Insolvency Event, or is in default of its obligations under the Contract and having been notified by the Principal to remediate, the Contractor has

> failed to remediate within a reasonable time having regard to the extent and nature of the default and remediation action to be taken and that the Principal is entitled to call on this bond pursuant to the Contract.

[52] In relation to the Engineer's powers and responsibilities, the contract relevantly provides:

> 6.1.1 The Principal shall ensure that at all times there is an Engineer, and that the Engineer fulfils all aspects of the role and functions reasonably and in good faith.
>
> …
>
> 6.2.1 The dual role of the Engineer in the administration of the Contract is:
>
> (a) As expert adviser to and representative of the Principal, giving directions to the Contractor on behalf of the Principal, and acting as agent of the Principal in receiving payment claims and providing Payment Schedules on behalf of the Principal; and
>
> (b) Independently of either contracting party, to fairly and impartially make the decisions entrusted to him or her under the Contract, to value the work, and to issue certificates.

Discussion

[53] It is not the function of the Court on this application to attempt to resolve the conflict of affidavit evidence as to responsibility for the developments' delay. The threshold issue is limited to whether there is a serious question to be tried that EPL is not entitled to call upon the Bond.

[54] It is not disputed that EPL has given prior written notice to Hawkins of its intention to call upon the Bond as required by cl 3.1.6 of the contract, that EPL considers Hawkins is in breach as required by cl 3.1.7, nor that there is now an Engineer's certificate which on its face complies with cl 3(e) of the Bond.

[55] Nevertheless, Hawkins says that there is plainly a serious question to be tried as to whether EPL's call on the Bond, and its request (expressed as a 'requirement') that the Engineer issue a certificate of default, is a breach of EPL's obligations under cls 6.1.1 and 6.2.1(b) of the contract (the first cause of action) because:

(a) Hawkins is not in default under the contract by declining to pay LDs that are not due and owing, so that there is no default as required by both the Bond and contract for a call on the Bond.

(b) Absent a default, a call on the Bond cannot be made and the Engineer cannot (acting reasonably, in good faith, independently of either party, impartially, and fairly) form a reasonable opinion there has been a default.

(c) EPL's purported call on the Bond and request that the Engineer issue a certificate of default is therefore a breach of the contract.

[56] Hawkins also says there is a serious question to be tried that EPL's requirement that the Engineer issue a certificate of default is a breach of the Bond (the second cause of action) because the Engineer is not able to provide the necessary certificate:

(a) The Bond itself requires that the Engineer, acting independently and impartially, must provide a certificate containing his reasonable opinion that the Contractor is in default.

(b) However, the dispute involves complex contract interpretation issues of mixed law and fact. As a matter of expertise, the Engineer is not qualified to resolve issues of law, interpret the relevant legal authorities, and apply them to the facts to determine whether or not there is any valid claim to LDs. These matters are properly before the CCA adjudicator.

(c) Even if he had the necessary expertise, the Engineer's obligations to act independently and impartially (and his overlaid contractual obligations to act reasonably and fairly) would require him to properly consider the parties' respective positions regarding LDs.

(d) The Engineer does not possess the relevant information, i.e., the very extensive information both parties have provided to the adjudicator.

> Hawkins has offered to provide the Engineer with its information, subject to EPL's consent (as required by section 68 of the CCA). EPL has ignored that request with the consequence that the Engineer remains in the dark as to the information provided in the CCA adjudication process.

[57] In oral submissions, Mr Cooper articulated the case in a more nuanced way. First, he submitted that reading the contract as a whole, it does not give EPL an unfettered discretion to call on the Bond whenever it "considers" that the Contractor is in breach. He submitted that reading the key terms together (particularly cl 3(e) of the Bond and cls 6.1.1 and 6.2.1 of the contract), this Bond is not one that is simply payable on demand. It also incorporates obligations of reasonableness and a reasonable judgement by the Engineer. Secondly, he submitted that the Engineer proceeded to issue a certificate without the information relating to the issues in the pending adjudication identified in the 9 February 2024 letter, as EPL had wrongly told him he was required to do.

[58] Ms Carlyon submitted that Hawkins' application invites this Court to disrupt the allocation of risk negotiated and agreed between two commercial, sophisticated parties. She submitted the Bond exists to provide a security that is readily and promptly available. It reflects an agreement that EPL was not to be left out of pocket pending resolution of a dispute about breach. Hawkins' claim seeks to avoid that clear purpose and is unsupported by the plain terms of the contract. She submitted that Hawkins' position:

(a) effectively prevents a call on the Bond whenever Hawkins asserts a dispute – no matter how spurious that dispute is;

(b) invites the Principal to superimpose its views of any given dispute over that of the Engineer – the very person appointed to be an impartial referee in these situations; and

(c) by a side wind, challenges the Engineer's capability and partiality.

[59] Rather than seeking a determination of the interpretation question underpinning the reset agreement LDs issue, Ms Carlyon focused on the phrase "[i]f the Principal considers that the Contractor is in breach" in cl 3.1.7 in relation to EPL's right to give notice calling on the Bond. She submitted the parties then agreed that the decision as to whether there has been a breach supporting a call on the Bond rests with the Engineer.

[60] As to the role of the Engineer in the proceeding, Ms Carlyon submitted that the claim was a back door challenge to the certificate impugning the Engineer without him being present as a party to answer those assertions. She submitted his partiality and independence should not be challenged indirectly by way of a claim that EPL has acted in breach of the contract by failing to exercise better oversight of the Engineer.

[61] Dealing with this last point first, as Mr Cooper submitted, the Engineer need not be a party to a proceeding claiming that a pre-condition to calling upon the Bond has not been satisfied. The Engineer was not a party in the cases referred to earlier. His good faith is not in issue. Ms Carlyon said from the Bar that the Engineer was unwilling to give evidence in this proceeding given his independent role. Even so, the question is whether, on the evidence before the Court, there is a serious question that EPL is not entitled to call upon the Bond given the pending adjudication dispute and the way in which the Engineer's certificate was sought and given.

[62] I accept that the contract is between sophisticated commercial parties and that the pre-condition in special condition cl 3.1.7 that "the Principal considers that the Contractor is in breach" indicates a deliberate subjective requirement. That would seem to address the second of the goals referred to earlier, enabling the Principal to obtain prompt payment of amounts it claims notwithstanding disputes raised by the Contractor. Given that, as Ms Carlyon submitted, it does not seem right that a dispute, of itself, precludes calling upon the Bond. That would give Hawkins an effective veto. Indeed, Hawkins does not maintain that an established default is necessary to call upon the Bond. I also accept that the Bond provides for the Engineer to state that, in the Engineer's reasonable opinion (acting independently and impartially), the Contractor is in default. The Engineer is empowered to make that assessment.

[63] However, I consider that the combination of the contract terms identified, and the actions of EPL and the Engineer in this case, give rise to a serious question to be tried that EPL is not lawfully entitled to call upon the Bond. I make three points. First, without purporting to determine the proper construction of the contract on this interlocutory application, the contract terms indicate an objective overlay given the need for the Engineer's "reasonable" opinion and for the Principal to ensure that the Engineer fulfils all aspects of the role and functions "reasonably". The terms of the contract materially differ from what was explicit in *Arrow*, entitling the Principal to "require" the Engineer to certify a breach and "make a provisional assessment of all amounts that may become owing to the Principal … and that amount will be a sum immediately due and payable".[44]

[64] Secondly, this is not a case where the dispute relates only to whether the Contractor is responsible for delays, where the Principal's view in good faith and the impartial certification of the Engineer should suffice on the terms of the contract. Here, the dispute extends to whether LDs are payable at all as a question of the proper construction of the contract and the reset agreement.

[65] Thirdly, without putting it any higher than necessary, the actions of EPL and the Engineer give rise to a serious question that the Engineer did not form a reasonable opinion and that EPL did not ensure that the Engineer acted reasonably.

(a) In relation to the Engineer, as indicated, his good faith is not in issue. The certificate confirms that he appreciated his independent and impartial role. On its own, EPL's notice stating it "*requires* that the Engineer issues such Engineer's Certificate in respect of Hawkins' failure to pay the LDs" (my emphasis) rather than *requests* would likely add little. However, there is a serious question as to the reasonableness of the certificate given the combination of the following: EPL's notice to the Engineer stating what it "requires"; EPL's lack of consent to provide the Engineer with Hawkins' papers in the adjudication; the Engineer's provision of a certificate knowing EPL had declined that

[44] *Arrow International (NZ) Ltd v NZ Project 29 Ltd* [2019] NZHC 1326 at [11].

consent; and the lack of any evidence as to the Engineer's basis for issuing the certificate in those circumstances – knowing that the adjudication determination relating to entitlement to LDs was pending — beyond the certificate itself (which is silent as to those matters). The Engineer's certificate set out cl 10.5.1 of the contract, confirmed that Hawkins has failed to achieve practical completion of separable portions of the works by the due dates, and confirmed that cl 10.5.1 states that the contractor agrees to pay LDs in this event and has not done so. On the face of the certificate, that is the extent of the consideration even though the Engineer had earlier indicated that he was in a position to consider fairly all relevant facts and form a reasonable opinion regarding EPL's claim that there has been a default. There is no reference to the interpretation question underpinning the reset agreement LDs issue or to Hawkins' position in the adjudication more generally. The position would likely be different if the Engineer had addressed the questions of interpretation raised (going beyond cl 10.5.1) and confirmed his impartial view that LDs were payable.

(b) In relation to EPL, there is a serious question as to whether it ensured that the Engineer fulfilled all aspects of his role and functions reasonably. Without suggesting that EPL has to second guess the Engineer's impartial view, the serious question arises given EPL's notice to the Engineer knowing the adjudication determination relating to entitlement to LDs was pending, EPL's lack of consent to provide the Engineer with Hawkins' papers in the adjudication and allowing the Engineer to proceed regardless.

[66] For these reasons, I consider there is a serious question to be tried.

Balance of convenience

[67] In assessing whether the balance of convenience favours granting or refusing interim relief, I start with the adequacy of damages. This is essentially a money dispute — about the time value of money pending determination of the substantive

dispute about the entitlement to LDs. Thus, at least in the absence of a solvency issue, damages would ordinarily be an adequate remedy for the plaintiff which would weigh heavily against interim relief restraining EPL's call upon the Bond even though it can be said that damages would also be an adequate remedy for EPL.[45]

[68] Here, however, Hawkins says that calling on the Bond will cause it irreparable harm to its reputation with clients, future tenderers, subcontractors and banks. As Mr Cooper submitted, Hawkins' evidence in summary is that:

(a) Hawkins (and its shareholder) have invested heavily in rebuilding its reputation and stake in the New Zealand market after purchasing the business in 2017 from its previous owners.

(b) Since 2017, Hawkins has had no calls on any bonds. Hawkins is now viewed as a trustworthy market player and has successfully tendered for large scale central government and council, as well as private sector, projects.

(c) The small nature of the New Zealand market means that a call on the Bond would become quickly and widely known throughout the industry, including because tendering processes for new work often require disclosure of whether the tenderer has been subject to previous performance bond calls.

(d) A call on the Bond in circumstances where the obligation to pay LDs is genuinely and actively disputed would therefore be detrimental to Hawkins' reputation with existing clients and with potential clients (future tenders). This would unfairly wind back the significant work Hawkins has done to rebuild its reputation since 2017.

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[45] EPL did not pursue its written submission that the form of Hawkins' undertaking as to damages provides little comfort. The undertaking was in orthodox form enabling the Court to make an order for payment of damages caused by an interim injunction.

(e) Hawkins has provided direct evidence of its own experience of reputational harm resulting from a bond call on a project in Victoria, Australia.

(f) In addition, Hawkins works with, and is dependent on, more than 500 subcontractors with often about 3,000 staff working on projects throughout the country. A call on the Bond could create subcontractor concern about Hawkins' liquidity, because it risks creating a perception that Hawkins is unable to pay the LDs claimed. There is heightened sensitivity to such issues in current market conditions where subcontractors have had a difficult time due to COVID-19, supply chain issues, and high inflation.

(g) The bond market in New Zealand is small, with only a handful of banks and sureties issuing bonds. The fact of a bond call would quickly be common knowledge. Potential issuers focus on how many bond calls an organisation has had as part of their risk calculation. Hawkins would need to disclose this call (if permitted to proceed) when requesting future bond facilities.

[69] Mr Cooper also referred to *Lucas Stuart Pty Ltd*,[46] where Macfarlan JA said:

> 44 There is no evidence that inability of the respondent to call upon the performance bonds now would cause any particular financial prejudice to the respondent. Nor is there any evidence that, apart from any impact they may have on the applicant's reputation, calls by the respondent upon the performance bonds would cause the applicant particular financial prejudice.
>
> 45 Courts have recognised on a number of occasions that calls upon performance bonds may cause significant damage to a contractor's reputation and financial standing that is not readily curable by an award of damages (see for example *Barclay Mowlem Construction Ltd v Simon Engineering (Aust) Pty Ltd* (1991) 23 NSWLR 451 at 461-462 and *Reed Construction Services Pty Ltd v Kheng Seng (Australia) Pty Ltd* (1999) 15 BCL 158 at 167).

[70] Ms Carlyon submitted that the harm claimed by Hawkins is overstated and that Hawkins can avoid such reputational damage by paying the LDs up to the level of the Bond. I decline to dismiss Hawkins' claimed harm but there is merit in the submission

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46 *Lucas Stuart Pty Ltd v Hemmes Hermitage Pty Ltd* [2010] NSWCA 283.

that Hawkins can avoid the reputational damage of a call on the Bond by making payment of the Bond sum without prejudice to the adjudication determination (equivalent to pay now, argue later). Avoiding reputational damage by making payment is similarly reflected in Hawkins' request for interim relief to remain in place for 48 hours after the adjudication determination to allow Hawkins to make payment rather than have the Bond called. As EPL says, Hawkins could do so now. This weighs against the need for interim relief to protect Hawkins' reputation.

[71] However, I do not consider this entirely negates the need. In circumstances where there is a serious question to be tried that EPL is not entitled to call upon the Bond, and evidence of the reputational harm of a call, the harm may not be entirely avoided by making payment to discharge the Bond in order to avoid a call being actioned. The same argument did not feature as a way of avoiding the reputational harm in the Australian cases. I am not satisfied that damages would be an adequate remedy for Hawkins.

[72] Further, although payment could be without prejudice to later substantive determination of liability for LDs, the result effectively assumes EPL's entitlement to the Bond sum despite the serious question to be tried. The open correspondence between solicitors prior to the hearing suggests that each party sought to improve its position. Hawkins offered to pay the Bond sum into a trust account pending adjudication determination, with payment replacing the Bond but introducing some uncertainty as to what would amount to an adjudication determination in EPL's favour. On the other hand, EPL maintained that Hawkins could make payment of the Bond sum and discharge the Bond at any time.

[73] As indicated, in a case where the strength or weakness of a claim can be clearly ascertained at the interim stage, that can weigh in the balance of convenience. In the bond context, that would likely involve an assessment of the parties' allocation of contractual risk. Here, that is the very issue and I do not consider it helpful to weigh the strength of the case beyond being satisfied it meets the threshold for interim relief. Further, as Mr Cooper noted, this case is unlike any of the others referred to in that EPL has called on the Bond while an adjudication of the very dispute is pending and indeed well advanced. This raises a status quo issue.

[74] As is not uncommon, each party relied on its characterisation of the status quo to support its position on balance of convenience. Ms Carlyon submitted the effect of the injunction would be to displace the status quo, namely that EPL has an entitlement to the Bond. She submitted that Hawkins extracted commercial benefits in consideration for the Bond being granted, which it would retain while EPL would lose the benefit of the Bond if an injunction is granted. I consider that characterisation depends on the disputed pre-conditions to calling on the Bond.

[75] On the other hand, Mr Cooper submitted that granting the interim injunction sought does no more than hold the position. He submitted that preservation of the status quo favours granting the injunction as Hawkins only seeks an injunction preventing a call on the Bond pending the adjudicator's determination in April, whereas Ms Carlyon submitted that determination does not mean EPL will receive payment in April as the adjudication only seeks a ruling on whether the LDs are valid. Although Mr Cooper submitted that I can have a degree of confidence, I accept that the outcome of the adjudication may not resolve the dispute. Even so, Mr Cooper made clear that Hawkins seeks temporary interim relief on the assumption of a determinative adjudication and acknowledged that any extension of interim relief beyond that would only be by way of further order of the Court. I consider that, if the adjudication determines that LDs are valid under the contract, prejudice to EPL resulting from further delay pending disputes as to the amount owing can be addressed by limiting the term of any interim relief until the adjudicator's determination of the current LDs dispute in April (irrespective of the outcome of that determination).

[76] In the meantime, as Mr Cooper submitted, the Bond remains in place and there can be no question about the ongoing ability of the issuer (ANZ) to meet a call on it. EPL's concern that under the contract the Bond is released upon practical completion (which may occur soon) has been, and can continue to be, addressed in the form of any interim order, that is precluding Hawkins/ANZ from releasing the Bond (except as provided in cl 8 of the Bond) while any interim order is in place. Hawkins consented to such an interim order on 14 February 2024, and I consider this arrangement would need to continue for the balance of convenience to favour ongoing interim relief. On that basis, I consider that the balance of convenience does favour interim relief until the adjudicator's determination of the current LDs dispute in April. In summary,

the key considerations are that I am not satisfied that damages would be an adequate remedy for Hawkins, the limited period of an interim order and the mechanism for avoiding release of the Bond in the meantime.

Overall justice

[77] Steeping back, having considered the serious question to be tried and the balance of convenience considerations referred to, I consider that overall justice in this case favours continuing to restrain a call on the Bond for a further short period pending the adjudicator's determination in April 2024.

Result

[78] I make an interim order:

(a) restraining EPL from calling on, otherwise requesting payment under, or having recourse in any other way to any funds obtained from, the whole or any part of the Bond; and

(b) that Hawkins and ANZ are not entitled to release the Bond except as provided in cl 8 of the Bond;

pending the adjudicator's determination of the current LDs dispute in April 2024 (irrespective of the outcome of that determination).

[79] If costs cannot be agreed, memoranda (not exceeding three pages) may be filed within 20 working days, and I will determine costs on the papers.

Gault J