SUPREME COURT OF QUEENSLAND

CITATION:	*York Property Holdings Pty Ltd v Tomkins Commercial & Industrial Builders Pty Ltd* [2026] QSC 156
PARTIES:	**YORK PROPERTY HOLDINGS PTY LTD AS TRUSTEE FOR YORK PROPERTY TRUST (ABN 94 831 587 168)** (applicant) **v** **TOMKINS COMMERCIAL & INDUSTRIAL BUILDERS PTY LTD (ABN 98 061 732 778)** (first respondent) **JOHN TUHTAN (REGISTRATION NO. J1190798)** (second respondent) **HWL EBSWORTH LAWYERS (ABN 37 246 549 189)** (third respondent)
FILE NO/S:	BS No 1777 of 2025
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	Orders made 24 June 2026; Reasons delivered 25 June 2026
DELIVERED AT:	Brisbane
HEARING DATE:	24 June 2026
JUDGE:	Kelly J
ORDER:	**Upon the first respondent, by its counsel, giving the usual undertaking as to damages, and undertaking not to demand under cl 5.4 of the Contract the return of the bank guarantees (defined below) until the determination of the issues in this proceeding or earlier order:** **1. Until trial or earlier order, the applicant be restrained, by itself, its officers, employees and agents, from calling on, demanding receiving or having any recourse to and converting into money Bond No. TT0020/120 and Bond No TT0020/121, both dated 30 August 2021 and issued by Tokio Marine & Nichido Fire Insurance Co Ltd c/- BCC Surety Pty Ltd ("Bank Guarantees") in respect of any certification under cl 39.6 of the general conditions of Contract, including any amount or amounts purportedly certified by the Superintendent payable from the first respondent to**

the applicant in the document styled "MIDWATER, MAIN BEACH, CLAUSE 39.6 ASSESSMENT" dated 10 June 2026.

2. The costs of the application filed 16 June 2026 are costs in the proceeding.

CATCHWORDS: CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – THE CONTRACT – CONSTRUCTION OF PARTICULAR CONTRACTS AND IMPLIED CONDITIONS – SECURITY AND RETENTION FUNDS – where the applicant and first respondent entered into a written contract for the construction of a residential tower – where the first respondent was the contractor – where the first respondent purported to terminate the contract and ceased work on the site – where the first respondent claims an entitlement to approximately $23.3 million for work performed – where the applicant disputes the validity of the purported termination and purported to affirm the contract – where the applicant subsequently issued a notice under the contract exercising an asserted right to take the remaining works out of the first respondent's hands – where the applicant engaged another contractor to complete the works – where the superintendent certified that an amount was payable by the first respondent to the applicant – where the first respondent disputes any liability and seeks an interlocutory injunction restraining the applicant from having recourse to security – whether the first respondent has established a prima facie case – whether the balance of convenience favours the grant of interlocutory relief

ABC v O'Neill (2006) 227 CLR 57 (2006) 226 CLR 256, cited
Agar v Hyde (2000) 201 CLR 552, cited
Batistatos v Roads and Traffic Authority (NSW), considered
Daewoo Ship Building & Marine Engineering Co Ltd v Inpex Operations Australia Pty Ltd (2022) 404 ALR 503, cited
Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd (2017) 261 CLR 544, cited
Electricity Generation Corporation v Woodside Energy Ltd (2014) 251 CLR 640, cited
FMT Aircraft Gate Support Systems v Sydney Ports Corporation [2010] NSWSC 1108, cited
McDonald v Dennys Lascelles (1933) 48 CLR 457, cited
Pacific Carriers Ltd v BNP Paribas (2004) 218 CLR 451, cited
Rawcorp Pty Ltd v MDP No 15 Pty Ltd [2026] QSC 38, cited
RCR O'Donnell Griffin Pty Ltd v Forge Group Power Pty Ltd [2016] QCA 214, considered
Saipem Australia Pty Ltd v GLNG Operations Pty Ltd (No 2) [2016] 1 Qd R 254, cited

Southern Han Breakfast Point Pty Ltd v Lewence Construction Pty Ltd [2015] NSWSC 502, considered
Southern Han Breakfast Point Pty Ltd v Lewence Construction Pty Ltd (2016) 260 CLR 340, considered

COUNSEL: For the applicant/first respondent: D Piggott KC, J Menzies and D MacKenzie
For the respondent/applicant: P Dunning KC and T Ambrose

SOLICITORS: For the applicant/first respondent: Thomsons
For the respondent/applicant: Holding Redlich

A Contractor applies to enjoin a Principal from calling on security

[1] On or about 12 August 2021, the first respondent ("Tomkins"), as the Contractor, entered a written Contract with the applicant ("York"), as the Principal, for the construction of a residential tower at Main Beach on the Gold Coast. The Contract includes an amended form of AS 4000-1997 general conditions ("the general conditions").

[2] Cl 5 of the general conditions of the Contract is headed "Security". Cl 5.1 provided for the form and amount of the security to be provided by Tomkins. By way of security, Tomkins provided two unconditional bonds issued by Tokio Marine & Nichido Fire Insurance Co Ltd, each styled as an "unconditional undertaking" and payable on demand up to $3,207,750. There is no issue that these securities, as provided, complied with cl 5.1 and constitute security for the purposes of the Contract.

[3] Cl 5.2 of the general conditions of the Contract is in an amended form to the form of cl 5.2 as it appears in AS 4000-1997 provides. Clause 5.2 of the general conditions of the Contract provides as follows:

> "**5.2 Recourse**
>
> The Principal may have recourse to security:
>
> (a) Where an amount due to the Principal under the Contract or otherwise remains unpaid after the time for payment;
>
> (b) In respect of any claim to payment (liquidated or otherwise), the Principal may have or claims to have against the Contractor under the Contract,
>
> on the giving of two business days written notice to the Contractor
>
> The provisions of this subclause 5.2 survive the termination or expiration of the Contract."

[4] Clause 39 of the general conditions of the Contract is headed "Default or Insolvency". Clause 39.2 provides for York to be able to give Tomkins a written notice to show

cause where Tomkins has committed a substantial breach of the Contract. Cls 39.4 to 39.6 provide:

> "**39.4 Principal's rights**
>
> If the Contractor fails to show reasonable cause by the stated date and time, the *Principal* may by written notice to the *Contractor*;
>
> (a) take out of the Contractor's hands the whole or part of the work remaining to be completed and suspend payment until it becomes due and payable pursuant to subclause 39.6; or
>
> (b) terminate the *Contract*.
>
> **39.5 Take out**
>
> The Principal will complete *work* taken out of the Contractor's hands and may:
>
> (a) use materials, equipment and other things intended for *WUC*; and
>
> (b) without payment of compensation to the *Contractor*.
>
> (i) take possession of, and use such of the *construction plant* and other things on or in the vicinity of the *site* as were used by the *Contractor*, and
>
> (ii) Contract with such of the *Contractor's* subcontractors and consultants; and
>
> (iii) take possession of, and use, such of the *design documents*,
>
> as are reasonably required by the *Principal* to facilitate completion of *WUC*.
>
> If the *Principal* takes possession of *construction plant, design documents* or other things, the *Principal* shall maintain them and, subject to cl 39.6, on completion of the *work*, shall return such of them as are surplus.
>
> The *Superintendent* will keep records of the cost of completing the *work*.
>
> **39.6 Adjustment on completion of work taken out**
>
> When *work* taken out of the *Contractor's* hands has been completed, the Superintendent will assess the cost thereby incurred and will certify as moneys due and payable accordingly the difference between that cost (showing the calculations therefor) and the amount which would otherwise have been paid to the *Contractor* if the *work* had been completed by the *Contractor*.
>
> If the *Contractor* is indebted to the *Principal*, the *Principal* may retain *construction plant* or other things taken under subclause 39.5 until the debt is satisfied. If after reasonable notice, the *Contractor* fails to pay the debt, the *Principal* may sell the *construction plant* or

> other things and apply the proceeds to the satisfaction of the debt and the costs of sale. Any excess will be paid to the *Contractor*."

[5] On 10 September 2024, Tomkins purported to terminate the Contract and left the site. It claims an entitlement to amounts in the order of $23.3 million for the work it had performed to that time. York disputes the validity of Tomkins' termination and has purported to affirm the Contract. On 12 September 2024, York issued a notice under cl 39.4(a) of the Contract exercising an asserted right to take work out of Tomkins' hands. It is not in controversy that, by that notice, York purported to take out of Tomkins' hands the whole of the work remaining to be completed under the Contract. Pursuant to cl 39.4(a) the effect of York having taken the remaining work out of Tomkins' hands was, *inter alia*, to "suspend payment until it became due and payable pursuant to subclause 39.6 of the Contract". In or about January 2025, York engaged another company to perform the remaining works under the Contract. It is uncontroversial that the work taken out of Tomkins' hands has not been completed. York anticipates that completion of that work will occur in or about October 2026.

[6] By a letter dated 11 May 2026 copied to Tomkins and the superintendent, York stated that it had "expended considerable resources in the more than 18 months since the take out notice", there was "still significant work to do" and it was "an appropriate time to make a claim under the Contract in relation to the work done as of 31 March 2026 in respect of the take out notice". It may be observed that, as at 11 May 2026, according to Tomkins' asserted position, the Contract had been validly terminated since on or about 10 September 2024. On 29 May 2026, York provided to the superintendent an assessment that York had obtained from a quantity surveyor of costs incurred by York up to 31 March 2026 to progress the works taken out of Tomkins' hands. On 10 June 2026, the superintendent purported to certify $17,522,623.56 as payable from Tomkins to York under cl 39.6 of the Contract. The certificate issued by the superintendent was stated to be "pursuant to cl 39.6 of the Contract". The amount certified reflected a calculation involving the difference between the sum of the "Total amount certified by the superintendent at PC36" ($53,254,903.20), "Total adjudicated sums to be added" ($19,883,821.47) and "Additional costs incurred by Principal since take out" ($50,591,935.93) less "Amount Contractor would have been paid" ($106,208,037.04). The certificate contained a note at the bottom "This certificate is issued under cl 39.6. We note that completion of WUC onsite is still being undertaken by the Principal. This certificate is not a final certificate". On 11 June 2026, York wrote to Tomkins noting the superintendent's certificate dated 10 June 2026, and requesting that "this debt", being the amount certified by the superintendent of $17,522,623.56, be paid by Tomkins to York "within a reasonable time and, in any case, by no later than by 9am on Thursday, 18 June 2026".

[7] Tomkins disputed any liability to pay. Tomkins disputes that the superintendent's interim certification under cl 39.6 of the Contract is valid such as to give rise to a certification under the Contract of monies due and payable on two independent grounds. First, Tomkins contends that it validly terminated the Contract some 18 months before the relevant certification such that cl 39.4 was not engaged. Secondly, Tomkins submits that on the proper construction of the Contract, the superintendent could only certify an amount as due and payable under cl 39.6 when the work taken out of the Contractor's hands has been completed.

[8] The parties thereafter exchanged correspondence. By 11 June 2026, Tomkins, through it lawyers, was requesting an undertaking, that York not take any steps to enforce the alleged debt including by calling on the securities. York provided an undertaking not to call on the securities until 4pm on 24 June 2026.

[9] By an interlocutory application filed 16 June 2026, Tomkins applied for an interlocutory injunction retraining York from calling on the securities. As part of that application, Tomkins sought a declaration as to the proper construction of cl 39.6 of the general conditions. When the matter came on for hearing, Tomkins did not press that part of the application which sought a declaration.

Matters of general principle

[10] The general principles applicable to the grant of an interlocutory injunction were not in dispute. There are two main inquiries. The first is whether the party applying for the injunction has made out a *prima facie* case, in the sense that if the evidence remains as it is, there is a probability that, at the trial, that party would be held entitled to relief. The second inquiry is whether the inconvenience or injury which the party seeking the injunction would be likely to suffer if an injunction were refused outweighs or is outweighed by the injury which the party proposed to be subjected to the injunction would suffer if it were granted.[1] As to the *prima facie* case inquiry, it is sufficient that the moving party shows a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial.[2] The High Court has recognised that at the stage of the first inquiry, how strong the probability needs to be depends upon the nature of the rights a moving party asserts and the practical consequences likely to flow from the order sought.[3] This consideration has found particular resonance in the circumstances of an application to injunct a party from calling on a bank guarantee where courts ordinarily have considered it necessary to be satisfied that there is a strong *prima facie* case justifying the court's interference.[4] In *RCR O'Donnell Griffin Pty Ltd v Forge Group Power Pty Ltd*[5] McMurdo JA observed that a court hearing an interlocutory injunction must be "alert to the risk that if the Principal was to be enjoined from having recourse to the security, pending resolution of the dispute as to whether it was entitled to do so, the benefit to the Principal of the security could be substantially diminished".

A prima facie case

[11] The party applying for the injunction is required to make out a *prima facie* case, in the sense that if the evidence remains as it is, there is a probability that, at the trial, that party would be held entitled to relief. I am prepared to proceed on the basis that in this type of application, being an application to injunct a party from calling on a bank guarantee, I need to be satisfied that there is a strong *prima facie* case justifying the Court's interference.[6]

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1 *ABC v O'Neill* (2006) 227 CLR 57 at 82 [65].
2 Ibid.
3 Ibid.
4 *Daewoo Ship Building & Marine Engineering Co Ltd v Inpex Operations Australia Pty Ltd* (2022) 404 ALR 503 at [70]-[71].
5 [2016] QCA 214 at [97].
6 *Daewoo* at [71].

[12] It will be recalled that Tomkins disputes the validity of the asserted debt on the basis that it has validly terminated the Contract some 18 months before the relevant certification such that cl 39.4 was not engaged and alternatively because on the proper construction of the Contract, the superintendent could only certify an amount as due and payable under cl 39.6 when the work taken out of the Contractor's hands has been completed. York submitted that there could only be "a serious question to be tried", (which I understood to be a reference to the requirement to make out a *prima facie* case) "if York does not have a right to have recourse under cl 5.2 of the Contract". York added that absent any allegation of fraudulent or unconscionable conduct, "... there [could] be no question that York has a right to have recourse to Tomkins' security". On York's approach, whether the Contract has been validly terminated by Tomkins or whether cl 39.6 contemplated an interim certification when work taken out of the Contractor's hands has not yet been completed were irrelevant to making out a prima facie case.[7] In York's submission, Tomkins simply could not establish a prima facie case.

[13] On this application, for the purpose of establishing a *prima face* case, Tomkins was required to satisfy the Court that if the evidence remains as it is, there is a probability that, at the trial, it will establish that York has no accrued right or entitlement to have recourse to the security. For the purpose of that inquiry, it can be accepted that cl 5.2 was expressed to survive, and will have survived, any termination of the Contract. However, the material inquiry is whether, if the evidence remains as it is, under cl 5.2, York "may have recourse to security … in respect of any claim to payment, [York] may have or claims to have against [Tomkins] under the Contract".

[14] The need to establish a strong *prima facie* case when seeking to injunct a call on a bank guarantee has led Courts on occasion to construe contractual provisions on the interlocutory application.[8] The general principles to be applied in construing a commercial contract such as the Contract were not in dispute. The terms of a commercial contract are to be understood objectively by what a reasonable business person would have understood them to mean.[9] The reasonable business person is someone placed in the position of the parties at the time of the contract.[10] It is from that person's perspective that the court considers the language used by the parties, the surrounding circumstances known to them and the commercial purpose and objects of the Contract.[11] A court is entitled to approach the task of giving a commercial Contract a business like interpretation on the assumption "that the parties intended to produce a commercial result".[12] A commercial contract is to be construed so as to avoid it "making commercial nonsense or working commercial inconvenience".[13]

[15] The first task of construction is directed to whether cl 5.2 was intended to allocate risk pending the final determination of the parties' rights. York argued that the objective purpose of cl 5.2 was to provide security but also to allocate the risk as to

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7 York's written submissions [61] to [63].

8 *Daewoo* at [76].

9 *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* (2017) 261 CLR 544 at 551 per Kiefel, Bell and Gordon JJ.

10 Ibid.

11 *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at 461-462 [22] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ; *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at 656 [35] per French CJ, Hayne, Crennan and Kiefel JJ.

12 *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at 657 [35].

13 Ibid.

which party should be out of pocket pending final resolution of any dispute. York focused upon the language of the clause and noted that the language was not expressed in terms of entitlement or in terms which permitted recourse only where an amount was "actually and indisputably payable". York also referred to the form of the security being unconditional bonds. There are some other notable aspects of the Contract and cl 5.2. First, cl 5.2 does contain words of limitation on the "claim". It is not any claim to payment but a claim to payment "under the Contract". Those words are properly regarded as words of limitation. They may be contrasted with words such as "claims under the Contract or otherwise".[14] Secondly, the Contract does not contain any clause to the effect that Tomkins covenanted with York to not institute any proceedings or take any steps to injunct recourse to the security even where Tomkins disputed York's asserted right to payment.[15] Rather, the Contract includes within the general conditions, cl 42.4, which provides "Nothing herein will prejudice the right of a party to institute proceedings to enforce payment due under the Contract or to seek injunctive or urgent declaratory relief". Having regard to all of these matters I am not satisfied that, on its proper construction, cl 5.2 is intended to allocate risk pending the final determination of the parties' rights. There was no covenant that Tomkins would not seek injunctive relief. The parties contemplated that Tomkins had a right to seek injunctive relief. The parties should be taken to have objectively contemplated that York could be restrained from having access to the security if Tomkins could establish a strong prima facie case that York had no entitlement to have recourse to the security and the balance of convenience otherwise favoured an injunction.

[16] I will proceed on the basis that a "claim" within the meaning of cl 5.2 is not to be equated with an entitlement or an established liability. The "claim" must be a genuine, arguable claim but claims which are untenable or irrational and misconceived are not properly regarded as claims which could justify recourse to security.[16] In *FMT Aircraft Gate Support Systems v Sydney Ports Corporation*[17], Pembroke J said that an appropriate analogy was the criteria used for determining whether there should be summary dismissal of a claim or proceeding. In *General Steel Industries v Commissioner for Railways,*[18] when discussing the jurisdiction, whether statutory or inherent, to summarily terminate a proceeding, Barwick CJ noted that its exercise should not be reserved for those cases where argument is unnecessary to evoke the futility of a plaintiff's claim. In that context, Barwick CJ observed that "[a]rgument perhaps even of an extensive kind may be necessary to demonstrate that the case of the plaintiff is so clearly untenable that it cannot possibly succeed". More recently, in *Batistatos v Roads and Traffic Authority (NSW)*[19], the plurality[20] repeated an earlier statement in *Agar v Hyde*[21] in the following terms:

> "The test to be applied has been expressed in various ways, but all of the verbal formulae which have been used are intended to describe a high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way."

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14 See for example *Rawcorp Pty Ltd v MDP No 15 Pty Ltd* [2026] QSC 38 at [31]
15 Cf *Saipem Australia Pty Ltd v GLNG Operations Pty Ltd (No 2)* [2016] 1 Qd R 254
16 *FMT Aircraft Gate Support Systems v Sydney Ports Corporation* [2010] NSWSC 1108 at [13] to [15]
17 [2010] NSWSC 1108 at [15].
18 (1964) 112 CLR 125.
19 (2006) 226 CLR 256 at 275 [46].
20 Gleeson CJ, Gummow, Hayne and Crennan JJ.
21 (2000) 201 CLR 552 at 575-576 [57].

[17] York's claim to the debt is necessarily based on the Contract not having been validly terminated by Tomkins. That is, if the Contract was validly terminated by Tomkins, as at the time of termination, York will have had no accrued or unconditionally acquired rights under cls 39.4 or 39.6.[22] The debt is premised upon York having exercised rights after Tomkins' purported termination under cls 39.4 and 39.6 so as to give rise to the debt. Those rights will not have survived termination if the Contract was validly terminated by Tomkins. York's claim in debt is not based on cl 5.2. It is based on cls 39.4 and 39.6. I reject York's submissions that whether the Contract was validly terminated is irrelevant to the prima facie case issue. It is plainly relevant. However, on the current state of the evidence, I am not satisfied that there is a probability that, at the trial, Tomkins will establish it was entitled to terminate the Contract. The evidence on this application did not appear to be directed to this particular issue and the parties did not make any submissions about whether the Court could be satisfied on the evidence that Tomkins will establish it was entitled to terminate the Contract.[23]

[18] On the current state of the evidence, and acknowledging that there are yet to be pleadings on this issue or disclosure arising out of those pleadings, I am satisfied to a high degree of certainty that, at the trial Tomkins will establish that York's claim in debt based upon an interim certification purported to be made under cl 39.6 is misconceived, untenable and not properly regarded as a claim to payment made under the Contract. My reasons for that conclusion may be set out as follows:

(a) Clause 39.4 entitles the Principal to take out of the Contractor's hands "the whole or part of the work remaining to be completed". That is, cl 39.4 speaks in terms of the Principal taking out of the Contractor's hands the whole of the remaining work or part of the remaining work;

(b) After cl 39.4, the contractual language, notably in cls 39.5 and 39.6, is expressed in terms of "work taken out of the Contractor's hands". It is that work, the work taken out of the Contractor's hands, which by cl 39.5, the Principal undertakes to complete.

(c) The opening phrase of cl 39.6 is "when work taken out of the Contractor's hands has been completed …". That language is inconsistent with the contention that certification can be made at a time when that work, the work taken out of the Contractor's hands, has not been completed.

(d) There are other contextual considerations which strongly militate against a conclusion that cl 39.6 countenances interim certification. Notably:

    (i) Clause 39.6 does not mention interim certifications;

    (ii) There is no provision made for the timing of interim certifications. On York's case, the timing is at large and subject to when York considers "it is an appropriate time to make a claim";[24]

    (iii) There is no provision for progressive payments of any interim certifications under 39.6, which is in contrast with the detailed regime for progressive payments under cl 37.

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22 *McDonald v Dennys Lascelles* (1933) 48 CLR 457 at 476-7
23 See in particular Tomkins' written submissions [33].
24 see letter dated 11 May 2026

(iv) Clause 39.4 provides for a suspension of the Contractor's entitlement to payment. In *Southern Han Breakfast Point Pty Ltd v Lewence Construction Pty Ltd*,[25] the joint judgment observed that the commercial purpose of the suspension, in the event of a substantial breach by the Contractor, was to provide a form of security to the Principal in the event that the costs of completion of the work taken out of the Contractor's hands were greater than the amount the Principal would have had to otherwise pay if the Contractor had completed the work itself. The joint judgment added that this commercial purpose "would be undermined were cl 39.4 to be interpreted as suspending payment only for the work taken out of [the Contractor's] hands".

(v) The High Court approved of the following statement made by the trial judge in *Southern Han* about the commercial purpose of the suspension:[26]

> "Clause 39.6 provides for a reconciliation of the payments due by the parties when the work is complete. The suspended payments are included in that reconciliation. From a practical point of view, the retention of payments that would have been due but for the suspension provides a form of security to [the Principal] in the event that the costs of completion are greater than the price [the Principal] would have had to have paid if [the Contractor] had completed the work itself. Any other interpretation involves a strained meaning of the words used and makes little commercial sense."

(vi) York's construction does not address the suspension and how it is meant to operate in the context of an interim certification. The commercial purpose of cl 39.6 would seem to recognise only one reconciliation occurring when the work is complete which includes the suspended payments;

(vii) Clause 39.6 confers a right on the Principal to sell construction plant and other things as were used by the Contractor to discharge the debt. It would be odd if this type of lien attached to property in respect of a debt arising from an interim certification. I accept Tomkins' submission to the effect that cl 39.6 ultimately requires a certification of the difference between the cost of completing the work taken out of the hands of the Contractor and the amount which would have been paid to the Contractor if the work had been performed by the Contractor. Conceivably, the amount of a "debt" calculated on an interim certification might be reduced by a further or final certification.

[19] I am satisfied to a high degree of certainty that, on the evidence as it presently stands, Tomkins will establish that York's claim in debt based upon an interim certification purported to be made under cl 39.6 is misconceived, untenable and not properly regarded as a claim to payment made under the Contract. In those circumstances, I

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25 (2016) 260 CLR 340 at 364 [76].

26 *Southern Han Breakfast Point Pty Limited v Lewence Construction Pty Limited* [2015] NSWSC 502 at [46] ("*Southern Han*").

am similarly satisfied that if the evidence remains as it is, at the trial, Tomkins will establish that York presently has no accrued right or entitlement to have recourse to the security.

The Balance of Convenience

[20] The strength of Tomkins case is a relevant factor to be taken into account when considering where the lower risk of injustice lies. I accept Tomkins' submission that its strong *prima facie* case is a significant matter in its favour on the balance of convenience.

[21] Calling on the security might be expected to have adverse consequences for Tomkins' existing finance facilities and also lead to reputational damage. Those consequences may well be difficult to prove as a matter of causation and also quantify in terms of damage. They are not matters which are readily amenable to a reliable damages assessment. I reject York's argument based upon a purported breach by Tomkins of cl 4.1 of the deed of indemnity. By applying for this injunction and establishing its strong prima face case, Tomkins is not to be regarded as "interfering" with a claim under the relevant bonds. Each side sought to impugn the financial wherewithal of the other. York questioned the value of Tomkins' usual undertaking. Tomkins questioned whether it would be able to recover the value of the securities from York. I did not regard the evidence adduced from either side in respect of these issues as particularly compelling and the submissions on those mattes did not tend to rise above matters of conjecture.

[22] As a price for obtaining the injunction, in addition to the usual undertaking, Tomkins undertakes not to demand the return of the securities until the determination of the issues raised in the proceeding or earlier order. I regard this latter undertaking as significant as it means that York will not lose the benefit of the securities. I reject York's submission that this undertaking will necessarily "deny York the right to call on the security in respect of any subsequent certificate issued by the Superintendent under cl 39.6, even one issued after the completion of all remaining work". As matters presently stand, it is uncontroversial that the work taken out of the hands of the Contractor has not been completed and is some months away from completion. Presently, the only certification purportedly made under cl 39.6 is an interim certification in respect of incomplete work. York continues to rely upon that certification as giving rise to a debt. York sought to maintain before this Court, the correctness of its asserted construction that it is entitled to request interim certifications under cl 39.6 of incomplete work at any time it considers appropriate. In these present circumstances, the terms of the interlocutory injunction are appropriate. The interlocutory injunction will apply until the determination of the issues in the proceeding "or earlier order". If new facts emerge or the circumstances, I have outlined change, it would be open to York to apply to discharge the injunction.

[23] Ultimately, for the reasons I have outlined, I am satisfied that the balance of convenience favours the grant of the interlocutory injunction.

Orders

Upon the first respondent, by its counsel, giving the usual undertaking as to damages, and undertaking not to demand under cl 5.4 of the Contract the return of the bank guarantees (defined below) until the determination of the issues in this proceeding or earlier order:

1. Until trial or earlier order, the applicant be restrained, by itself, its officers, employees and agents, from calling on, demanding receiving or having any recourse to and converting into money Bond No. TT0020/120 and Bond No TT0020/121, both dated 30 August 2021 and issued by Tokio Marine & Nichido Fire Insurance Co Ltd c/- BCC Surety Pty Ltd ("Bank Guarantees") in respect of any certification under cl 39.6 of the general conditions of Contract, including any amount or amounts purportedly certified by the Superintendent payable from the first respondent to the applicant in the document styled "MIDWATER, MAIN BEACH, CLAUSE 39.6 ASSESSMENT" dated 10 June 2026.

2. The costs of the application filed 16 June 2026 are costs in the proceeding.