

SUPREME COURT OF QUEENSLAND

CITATION: *York Property Holdings Pty Ltd v Tomkins Commercial & Industrial Builders Pty Ltd* [2026] QCA 198

PARTIES: **YORK PROPERTY HOLDINGS PTY LTD AS
TRUSTEE FOR YORK PROPERTY TRUST**
ABN 94 831 587 168
(appellant)
v
**TOMKINS COMMERCIAL & INDUSTRIAL
BUILDERS PTY LTD**
ABN 98 061 732 778
(respondent)

FILE NO/S: Appeal No 2947 of 2026
SC No 1777 of 2025

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane – [2026] QSC 156 (Kelly J)

DELIVERED ON: 9 October 2026

DELIVERED AT: Brisbane

HEARING DATE: 17 September 2026

JUDGES: Bond JA, Thomson AJA, Cooper J

ORDERS: **1. The appeal is allowed.**
2. The orders of the Supreme Court of Queensland made on 24 June 2026 are set aside and in lieu thereof, the following orders be made:
(a) The interlocutory application filed by the respondent on 16 June 2026 is dismissed.
(b) The respondent must pay the appellant’s costs of the application.
3. The respondent must pay the appellant’s costs of the appeal.

CATCHWORDS: CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – THE CONTRACT – CONSTRUCTION OF PARTICULAR CONTRACTS AND IMPLIED CONDITIONS – SECURITY AND RETENTION FUNDS – where the appellant and respondent entered into a written contract for the construction of a residential tower – where the respondent purported to terminate the contract and ceased work on the site – where the appellant affirmed the contract and purported to take all the remaining work out of

the respondent's hands and to engage another contractor to complete the works taken out of the respondent's hands – where before all that work was completed the superintendent issued an interim certification for the amount of the increase in costs incurred by the appellant for the completed part of the work – where the appellant claimed the amount so certified as a debt under the contract and threatened to have recourse to contractual security in relation to the amount of the certificate – where the respondent sought an interlocutory injunction restraining the appellant from having recourse to security on the grounds that the certificate could not arguably give rise to an arguable claim under the contract – where the appellant was entitled to have recourse to the security if it claimed to have a claim under the contract

EQUITY – EQUITABLE REMEDIES – INJUNCTIONS – INTERLOCUTORY INJUNCTIONS – GENERALLY – where the respondent sought an interlocutory injunction restraining the appellant from having recourse to security in respect of the appellant's claim for monies owing pursuant to a superintendent's certificate – where the respondent sought an interlocutory injunction restraining the appellant from having recourse to security on the grounds that the certificate could not arguably give rise to an arguable claim under the contract – where the appellant was entitled to have recourse to the security if it claimed to have a claim under the contract – where the respondent did not establish a prima facie case that the appellant was threatening to act in breach of a negative stipulation in the contract, confining its ability to have recourse to the security

Adani Mining Pty Ltd v Pennings [2024] QSC 302, cited
AECI Australia Pty Ltd v Convey [2020] QSC 207, applied
Australian Broadcasting Corporation v O'Neill (2006)
 227 CLR 57; [2006] HCA 46, cited
Beecham Group Ltd v Bristol Laboratories Pty Ltd (1968)
 118 CLR 618; [1968] HCA 1, cited
Bowen Central Coal Pty Ltd v Aquila Coal Pty Ltd [\[2011\] QCA 334](#), cited
Bradto Pty Ltd v State of Victoria (2006) 15 VR 65; [2006]
 VSCA 89, cited
Clough Engineering Ltd v Oil & Natural Gas Corporation Ltd (2008) 249 ALR 458; [2008] FCAFC 136, cited
Daewoo Shipbuilding & Marine Engineering Co Ltd v Inpex Operations Australia Pty Ltd (2022) 404 ALR 503; [2022]
 NSWSC 1125, cited
FMT Aircraft Gate Support Systems v Sydney Ports Corporation [2010] NSWSC 1108, cited
Joyway Pty Ltd v Rochedale Holdings Pty Ltd [2022]
 QSC 273, cited
Live Earth Resource Management Pty Ltd v Live Earth LLC
 (2007) 73 IPR 289; [2007] FCA 1034, cited

Maradiegue v Moneytech Finance Pty Ltd [2024] QSC 160, cited
Mineralogy Pty Ltd v Sino Iron Pty Ltd [2016] WASCA 105, cited
Perpetual Ltd v Maglis [2025] QSC 71, 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, cited
Rolleston Coal Holdings Pty Ltd v ICRA Rolleston Pty Ltd [2020] QSC 331, cited
Shinetec (Australia) Pty Ltd v The Gosford Pty Ltd [2024] NSWCA 174, cited
Siemens Gamesa Renewable Energy Pty Ltd v Bulgana Wind Farm Pty Ltd [2019] VSCA 318, cited
Sino Iron Pty Ltd v Mineralogy Pty Ltd (No 2) (2017) 55 WAR 36; [2017] WASCA 76, cited
Stryker Australia Pty Ltd v Short [2026] QSC 174, cited
Toomey v Eagle Star Insurance Co Ltd [1994] 1 Lloyd's Rep 516, cited
Warner-Lambert Co LLC v Apotex Pty Ltd (2014) 311 ALR 632; [2014] FCAFC 59, cited
Zuce Tech Pty Ltd v Ebert [2024] QSC 297, cited

COUNSEL: P J Dunning KC, with T W Ambrose and B M O McKenna, for the appellant
D S Piggott KC, with J E Menzies and D M Mackenzie, for the respondent

SOLICITORS: Holding Redlich for the appellant
Thomsons for the respondent

- [1] **THE COURT:** By a contract dated 12 August 2021, the respondent (**the Contractor**) agreed to construct a residential tower at Main Beach on the Gold Coast for the appellant (**the Principal**). The contract provided for a contract sum of \$128,310,000 and a construction period of 36 months.
- [2] Pursuant to the contract the Contractor provided two unconditional insurance bonds, each in the amount of \$3,207,750, as security. Amongst other things, the contract provided that the Principal “may have recourse to *security* ... in respect of any claim to payment ... the *Principal* may have or claims to have against the *Contractor* under the *Contract*.”¹
- [3] Disputes arose between the Principal and the Contractor during the course of construction. On the one hand, and before the work under the contract had been completed, the Contractor contended it had validly terminated the contract and left the site. On the other hand, the Principal contended that it had validly affirmed the contract, taken the remaining contract work out of the hands of the Contractor pursuant to a contractual entitlement so to do, and proceeded to take steps to have a third party contractor perform that work.
- [4] The contract provided that when work taken out of the Contractor's hands had been completed, the Superintendent could assess the cost thereby incurred and could

¹ It will appear that the use of italics in the contract was a reference to defined terms within the contract.

certify as moneys due and payable accordingly the difference between that cost and the amount which would otherwise have been paid to the Contractor if the work had been completed by the Contractor.

- [5] At a stage when the third party contractor had completed some, but not all, of the remaining contract work, the Principal requested the Superintendent to certify the amount by which the costs which the Principal had incurred in relation to the work which had been completed over the amount which would have been paid to the Contractor if the Contractor had completed that work. The Superintendent certified \$17,522,623.56 as due and payable by the Contractor to the Principal.
- [6] The Principal demanded payment of that sum and the Contractor disputed the existence of the alleged debt and refused to pay. Amongst other things, the Contractor said that the contractual entitlement to certify could not exist until all the work taken out of its hands had been completed. The Contractor sought an undertaking from the Principal that it would not make a demand on the security, failing which the Contractor would apply for urgent injunctive relief. The undertaking was not forthcoming, and the parties co-operated to enable the Contractor's foreshadowed application to be brought before the primary judge at a time convenient to them both.
- [7] After hearing argument from both sides, and upon the Contractor giving the usual undertaking as to damages, the primary judge granted an interlocutory injunction restraining the Principal from making any demands on the security.
- [8] By the present appeal, the Principal seeks to overturn that outcome. For reasons which follow the appeal should succeed.

The relevant terms of the contract

- [9] The contract between the parties was entirely in writing. It was comprised of a formal instrument of agreement, general conditions of contract in an amended form of Australian Standard AS4000-1997 and annexure parts A to J to the general conditions of contract.
- [10] For present purposes the principal focus is on particular terms of the general conditions of contract.
- [11] By cl 1 certain definitions were to be applied in the interpretation and construction of the contract "except where the context otherwise required". Defined terms were italicised both in cl 1 itself and where they were used in the other clauses of the general conditions. Relevantly cl 1 provided:

“***security*** means:

- a) cash;
- b) retention moneys;
- c) bonds or inscribed stock or their equivalent issued by a national, state or territory government;
- d) interest bearing deposit in a bank carrying on business at the place stated in *Item 9(c)*;
- e) an approved unconditional undertaking (the form in Annexure Part C is approved) or an approved performance undertaking

given by an approved financial institution or insurance company; or

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

...

Superintendent means the person stated in *Item 5* as the *Superintendent* or other person from time to time appointed in writing by the *Principal* to be the *Superintendent* and notified as such in writing to the *Contractor* by the *Principal* ...

...

the Works means the whole of the *work* to be carried out and completed in accordance with the *Contract*, including *variations* provided for by the *Contract*, which by the *Contract* is to be handed over to the *Principal*;

...

work includes the provision of materials;

WUC (from ‘work under the Contract’) means the *work* which the *Contractor* is or may be required to carry out and complete under the *Contract* and includes *variations*, remedial *work*, *construction plant*, *retention works* and *temporary works*.”

- [12] Clause 1 also concluded with an interpretation clause. Amongst other things it provided that in the contract –

“(c) clause headings, subclause headings and the table of contents in these General Conditions of Contract will not form part of these General Conditions and will not be used in the interpretation of the *Contract*;

...

(n) ‘including’ and ‘includes’ are not words of limitation;

(o) a word that is derived from a defined word has a corresponding meaning;”

- [13] Pursuant to cl 2.1 the Contractor expressed its agreement to carry out and complete “WUC” in accordance with the contract and the Principal agreed to pay the Contractor the contract sum “adjusted by any additions or deductions made pursuant to the [c]ontract”.

- [14] Clause 5 governed the provision of security under the contract and the circumstances in which the Principal was permitted to have recourse to the security. Relevantly cl 5 provided:

“5 Security

5.1 Provision

Security will be provided in accordance with *Item 13* or *14*.

The total value of *security* held by the *Principal* will not exceed:

- a) prior to *practical completion* – 5% of the *contract sum*; and
- b) after *practical completion* – 2.5% of the *contract sum*.

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 2 *business days* written notice to the *Contractor*.

The provisions of this subclause 5.2 survive the termination or expiration of the *Contract*.

5.3 Change of security

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

5.4 Reduction and release

Upon the later of the:

- a) issue of the *certificate of practical completion*; or
- b) the date upon which the *Contractor* has returned to the *Superintendent* the duly executed copy of the *Deed of Release – Practical Completion*,

the *Principal's* entitlement to *security* (other than in *Item 13(e)*) will be reduced by the percentage or amount in *Item 13(f)* or *14(d)* as applicable, and the reduction will be released and returned within 14 days to the other party.

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

The *Principal's* entitlement otherwise to *security* will cease 14 days after the later of:

- c) the date of issue of the *final certificate*; or
- d) the date upon which the *Contractor* has returned to the *Superintendent* the duly executed copy of the *Deed of Release – Final Completion*.

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

5.5 Trusts and interest

...

5.6 Escrow Arrangement

...”

[15] It may be interpolated that Item 13 of annexure part A to the general conditions of contract provided that the security was to be in the form of “[t]wo unconditional surety bonds each for 2.5% of the *contract sum*”.

[16] Clause 20 provided:

“20 Superintendent

The *Principal* will ensure that at all times there is a *Superintendent*, and that the *Superintendent* fulfils all aspects of the role and functions:

- i) honestly and in good faith;
- ii) within the time prescribed under the *Contract* or where no time is prescribed, within a reasonable time; and
- iii) otherwise in accordance with the *Contract*; and

The *Superintendent* will carry out its role and functions as agent for the *Principal* and not as an independent certifier, assessor or valuer, and is under no obligation to act independently.

...”

[17] Clause 37 provided for the Contractor to seek payment on an interim basis by giving progress claims to the Superintendent and for the Superintendent to assess the progress claims and to issue the progress certificates evidencing the Superintendent’s opinion of the moneys due from the Principal to the Contractor pursuant to the progress claim. Each progress certificate was required to take into account “the Superintendent’s assessment of retention monies and moneys due from the Contractor to the Principal pursuant to the contract.” The clause also permitted the Superintendent to issue a progress certificate even if the Contractor did not make a progress claim as required. The clause went on to require the Principal (or the Contractor as the case may be) to pay the amount certified to be due. Neither a progress certificate nor a payment of monies would be an admission of liability and would operate as a payment on account only.

[18] Clause 37.4 of the contract provided the mechanism for the ultimate resolution of monies owed under the contract. Relevantly the clause provided:

“37.4 Final payment claim and certificate

Within 28 days after the expiry of the last *defects liability period*, the *Contractor* will give the *Superintendent* a written *final payment claim* endorsed ‘Final Payment Claim’ being a progress claim together with all other claims whatsoever in connection with the subject matter of the *Contract* together with the *Deed of Release (Final Completion)* executed by the *Contractor*.

Subject to receipt by the *Principal* of the *Deed of Release (Final Completion)* executed by the *Contractor*, within 42 days after the expiry of the last *defects liability period* or within 10 *business days* after receipt of the *final payment claim*, whichever is the earlier, the *Superintendent* will issue to both the *Contractor* and the *Principal* a *final certificate* evidencing the moneys finally due and payable between the *Contractor* and the *Principal* on any account whatsoever in connection with the subject matter of the *Contract*.

Those moneys certified as due and payable will be paid by the *Principal* or the *Contractor*, as the case may be, within 5 *business days* after the *Principal* receives the *final certificate*, or within 15 *business days* after the *Superintendent* receives the *final payment claim*.

The *final certificate* will be conclusive evidence of accord and satisfaction, and in discharge of each party's obligations in connection with the subject matter of the *Contract* except for:

- a) fraud or dishonesty relating to *WUC* or any part thereof or to any matter dealt with in the *final certificate*;
- b) any *defect* or omission in the *Works* or any part thereof which was not apparent at the end of the last *defects liability period*, or which would not have been disclosed upon reasonable inspection at the time of the issue of the *final certificate*;
- c) any accidental or erroneous inclusion or exclusion of *any work* or figures in any computation or an arithmetical error in any computation; and
- d) unresolved issues the subject of any notice of *dispute* pursuant to clause 42, served before the 7th day after the issue of the *final certificate*."

[19] The clause also provided:

"37.6 Other moneys due

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

37.7 Set off

The *Principal* may at any time deduct from, or set off against, any amounts due to the *Contractor* under this *Contract*, or otherwise at law in respect of the *WUC* for amounts, damage, or losses due and payable by the *Contractor* to the *Principal* under the *Contract* and any amount in respect of a bona fide claim which the *Superintendent* certifies (acting reasonably) against the *Contractor* under the *Contract*.

Nothing in this subclause 37.7 limits any other right for the *Principal* to set off amounts under any other provision of this *Contract*."

[20] Clause 39 set out certain rights which either party might have against the other in the event that the other committed a substantial breach of contract. Relevant for present

purposes are the clauses governing the Principal's rights in the event that the Contractor committed such a breach. "Substantial breaches" were defined to include a wrongful suspension of work by the Contractor. In the event of a substantial breach by the Contractor, cl 39.3 permitted the Principal to give to the Contractor a notice to show cause in writing why the Principal should not exercise a right referred to in cl 39.4. Clauses 39.4, 39.5 and 39.6 then provided:

"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 clause 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*.”

- [21] Clause 42 was the dispute resolution clause and provided a mechanism by which disputes could be resolved, ultimately by reference to expert determination, rather than by litigation. Nevertheless, cl 42.4 specified:

“42.4 Summary relief

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.”

Background facts²

- [22] On 10 September 2024, the Contractor purported to terminate the contract and left the site. The Contractor had contended that the Principal owed it amounts in the order of \$23.3 million for the work it had performed to that time.
- [23] The Principal regarded the Contractor as having committed a substantial breach of contract. It disputed the validity of the Contractor’s termination and purported to affirm the contract. On 12 September 2024, the Principal issued a notice under cl 39.4(a) to take out of the Contractor’s hands the whole of the work remaining to be completed under the contract. On the Principal’s case that notice also gave it the right pursuant to cl 39.4(a) to suspend payment until it became due and payable pursuant to cl 39.6.
- [24] In or about January 2025, the Principal engaged a third party contractor to perform the remaining works under the contract.
- [25] By a letter dated 11 May 2026 copied to the Contractor and the Superintendent, the Principal 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”.
- [26] At the time of the hearing before the primary judge it was uncontroversial that the entirety of the work taken out of the Contractor’s hands had not yet been completed. The Principal anticipated that completion of that work would occur in or about October 2026.
- [27] On 29 May 2026, the Principal provided to the Superintendent an assessment that the Principal had obtained from a quantity surveyor of costs incurred by the Principal up to 31 March 2026 to progress the works taken out of the Contractor’s hands. On 10 June 2026, the Superintendent purported to certify \$17,522,623.56 as payable from the Contractor to the Principal 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”.

² The accuracy of the summary of the background facts recorded by the primary judge was accepted by both parties before this Court. The summary expressed under this heading is an edited version of that section of his Honour’s reasons.

- [28] 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 clause 39.6. We note that completion of WUC on site is still being undertaken by the Principal. This Certificate is not a Final Certificate”.
- [29] On 11 June 2026, the Principal wrote to the Contractor 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 the Contractor to the Principal “within a reasonable time and, in any case, by no later than by 9am on Thursday 18 June 2026”.
- [30] The Contractor contended that the Superintendent’s interim certification under cl 39.6 could not validly give rise to a certification under the Contract of monies due and payable on two independent grounds. First, the Contractor contended that it had validly terminated the contract some 18 months before the relevant certification such that cl 39.4 was not engaged. Second, the Contractor submitted that on the proper construction of the contract, the Superintendent could only certify an amount as due and payable under cl 39.6 when all of the work taken out of the Contractor’s hands had been completed.
- [31] The parties thereafter exchanged correspondence. By 11 June 2026, the Contractor, through its lawyers, requested an undertaking, that the Principal not take any steps to to call on the securities until 4 pm on 24 June 2026.
- [32] By an interlocutory application filed 16 June 2026, the Contractor applied for an interlocutory injunction restraining the Principal from calling on the securities. As part of that application, the Contractor sought a declaration as to the proper construction of cl 39.6 of the general conditions. When the matter came on for hearing, the Contractor did not press that part of the application which sought a declaration.

The reasons of the primary judge

- [33] The primary judge commenced by identifying the principles governing interlocutory injunctions having regard to *Australian Broadcasting Corporation v O’Neill*.³ Having done so his Honour turned first to the question whether the Contractor had established a prima facie case for the interlocutory injunction which it sought.
- [34] The primary judge noted the existence of previous authorities which suggested that in cases where interlocutory injunctions had been sought to restrain a party from calling upon a bank guarantee it was necessary to be satisfied that there was a strong prima facie case justifying the court’s interference.⁴ His Honour proceeded on that basis.
- [35] Before the primary judge the Contractor did not seek to justify its claim for an injunction by reference to its argument that it had long since validly terminated the

³ *Australian Broadcasting Corporation v O’Neill* (2006) 227 CLR 57 at [65].

⁴ *Daewoo Shipbuilding & Marine Engineering Co Ltd v Inpex Operations Australia Pty Ltd* (2022) 404 ALR 503 at [70] to [71] and *RCR O’Donnell Griffin Pty Ltd v Forge Group Power Pty Ltd* [2016] QCA 214 at [97].

contract. Accordingly – and the parties before this Court accepted correctly – the primary judge did not further consider that basis on which the Contractor had sought to impugn the validity of the certificate on which the Principal based its claim to be entitled to have recourse to the security.

- [36] The primary judge thought that the critical issue was whether the Contractor had shown a probability that, at trial, it would establish that the Principal possessed no presently accrued right or entitlement to call upon the security provided under cl 5.2 of the contract. Applying observations made by Pembroke J in *FMT Aircraft Gate Support Systems v Sydney Ports Corporation*⁵, the primary judge proceeded on the basis that a “claim” within the meaning of cl 5.2 was not to be equated with an entitlement or an established liability. The “claim” must be a genuine, arguable claim “under the Contract”. However, claims which were untenable or irrational and misconceived were not properly regarded as claims which could justify recourse to security.
- [37] His Honour then construed cll 39.4 and 39.6 so as to reach the conclusion that the Principal’s claim based on the Superintendent’s interim certification purportedly made under cl 39.6 was misconceived, untenable and could not properly be regarded as a claim to payment made under the Contract. He reached this result by construing the clauses as not permitting any form of interim certification by the Superintendent of the relevant cost overrun. On his Honour’s view of the contract the certification could only occur when all of the work which had been taken out of the Contractor’s hands had been completed.
- [38] That construction was sufficient to justify his Honour’s conclusion that:
- “I am satisfied to a high degree of certainty that, on the evidence as it presently stands, [the Contractor] will establish that [the Principal’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 am similarly satisfied that if the evidence remains as it is, at the trial, [the Contractor] will establish that [the Principal] presently has no accrued right or entitlement to have recourse to the security.”
- [39] His Honour’s reasoning was as follows:
- (a) Clause 39.4 entitled the Principal to take out of the Contractor’s hands “the whole or part of the work remaining to be completed”.
 - (b) Where cll 39.5 and 39.6 referred to “work taken out of the Contractor’s hands”, the reference was to the work taken out of the Contractor’s hands, which by cl 39.5, the Principal undertook to complete.
 - (c) The opening phrase of cl 39.6 was inconsistent with the contention that certification could be made at a time when that work, the work taken out of the Contractor’s hands, had not been completed.
 - (d) Other contextual considerations strongly militated against the validity of interim certification.
 - (i) Clause 39.6 did not mention interim certifications and there was no provision made for the timing of interim certifications.

⁵ *FMT Aircraft Gate Support Systems v Sydney Ports Corporation* [2010] NSWSC 1108 at [13] to [15].

- (ii) There was no provision for progressive payments of any interim certifications under 39.6, which was in contrast with the detailed regime for progressive payments under cl 37.
- (iii) Clause 39.4 provided for a suspension of the Contractor's entitlement to payment, the commercial purpose of which was identified by the High Court in *Southern Han Breakfast Point Pty Ltd v Lewence Construction Pty Ltd*. That commercial purpose would seem to contemplate only one reconciliation of amounts owing, which reconciliation would occur when the work was complete and would include the suspended payments. The Principal's argument did not adequately address how the suspension would work in the context of an interim certification.
- (iv) Clause 39.6 conferred a right on the Principal to sell construction plant and other things as were used by the Contractor to discharge the certified debt. It would be odd if this type of lien attached to property in respect of a debt arising from an interim certification, especially as, conceivably, the amount of a "debt" calculated on an interim certification might be reduced by a further or final certification.

[40] The primary judge then addressed the balance of convenience. As to this:

- (a) He accepted the Contractor's argument that the strength of its prima facie case was itself a significant factor favouring interlocutory relief. His Honour also accepted that calling upon the securities could produce consequences for the Contractor extending beyond the immediate monetary amount involved. In particular, recourse might adversely affect existing financing arrangements and occasion reputational consequences. Such losses would likely be difficult both to prove and quantify and therefore would not be readily compensable by an award of damages.
- (b) He regarded it as significant in assessing the balance of convenience that the Contractor had undertaken "not to demand the return of the securities until the determination of the issues raised in the proceeding or earlier order." His Honour regarded that to be significant as it meant that the Principal would not lose the benefit of the securities. (Before this Court the Contractor pointed out that if, as was expected, practical completion was achieved in October, there was an argument that one of the securities would have to be returned to the Contractor. Accordingly, said the Contractor, the primary judge was simply recognising that that undertaking had value.)
- (c) The primary judge ultimately concluded that the balance of convenience favoured the grant of the interlocutory injunction sought.

The discretion of the primary judge miscarried

[41] It was common ground that on an appeal of the present nature, the standard of appellate review is that provided for in *House v The King*.⁶

[42] On appeal, the Principal argued that the primary judge's discretion had miscarried because the decision proceeded upon an erroneous construction of cl 5.2; or alternatively on an erroneous construction of cl 39.6; or alternatively on an erroneous assessment of the balance of convenience inquiry.

⁶ See *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 at [2], [90] and [96].

- [43] For reasons which follow, the Principal was right to contend that the decision proceeded on an erroneous construction of cl 5.2. The result of the proper construction of that clause is that it is unnecessary either to resolve the question of the proper construction of cl 39.6 or whether the primary judge made any reviewable error in his assessment of the balance of convenience.
- [44] The Contractor should be regarded as seeking to enforce by injunction a negative stipulation in the contract, that stipulation being a promise by the Principal not to have recourse to the security unless contractually entitled to do so. It has often been recognised that the provisions of a contract may qualify a contractual right to have recourse to the security and that the primary focus must always be on the proper construction of the contract in question: see the cases discussed in *Clough Engineering Ltd v Oil & Natural Gas Corporation Ltd* and *Shinetec (Australia) Pty Ltd v The Gosford Pty Ltd*.⁷
- [45] Both parties accepted that the evident intention of the present contract was that the Principal could have recourse to security only in the particular circumstances provided for in cl 5.2. The strength of the prima facie case which the Contractor sought to establish depended on the strength of its argument that the conditions had not been met.
- [46] Pursuant to cl 5 the Principal had a right to have recourse to the security in either of two circumstances:
- (a) first, where an amount due to the Principal under the contract or otherwise remains unpaid after the time for payment; and
 - (b) second, in respect of any claim to payment (liquidated or otherwise), the Principal may have or claims to have against the Contractor under the contract.
- [47] The question whether the first circumstance could be said to exist would have directed attention to the arguable contractual validity of the Principal's claim that an amount was due under the contract and had not been paid within time. However, before the primary judge and this Court the Principal sought to justify its claim to an entitlement to have recourse to the security only by reference to the second circumstance. Accordingly, argument before this Court and before the primary judge focussed on whether the Contractor had a prima facie case that the latter condition could **not** be said to exist.
- [48] As has been explained, the primary judge found the Contractor had a strong prima facie case because the Principal's claim was based upon an interim certification purported to be made under cl 39.6 and his Honour was satisfied to a high degree of certainty that, on the proper construction of cl 39.6, such a claim was misconceived, untenable and not properly to be regarded as a claim to payment made under the contract.
- [49] The error made by the primary judge was, in our respectful opinion, to apply the analysis of Pembroke J in *FMT Aircraft Gate Support Systems v Sydney Ports Corporation* without addressing the significance of the differences between the wording of the condition on the right to have recourse to the security in that case and the wording of the condition on the right to have recourse to the security in the present case.

⁷ *Clough Engineering Ltd v Oil & Natural Gas Corporation Ltd* (2008) 249 ALR 458 at [77]; *Shinetec (Australia) Pty Ltd v The Gosford Pty Ltd* [2024] NSWCA 174 at [141].

- [50] The contract considered by Pembroke J had been entered into on 20 June 2007. The general conditions of contract were part of a suite of conditions of contract based on the AS4000-1997 general conditions of contract. This Court was informed that the unamended form of AS4000-1997 provided that “[s]ecurity shall be liable to recourse by a party who remains unpaid after the time for payment where at least 5 days have elapsed since that party notified the other party of intention to have recourse.” That form of cl 5 of the standard form had been amended in the contract before Pembroke J such that the right of “the Purchaser” to have recourse to the security was in the following terms:⁸

“The Purchaser may have recourse to security where the Purchaser has any claim or entitlement to payment of damages, costs or an amount or debt due by the Contractor to it under this contract.”

- [51] The amended form of wording required the Purchaser to have either a “claim” or an “entitlement” to damages, costs, or an amount or debt due in order to have recourse to the security. Pembroke J persuasively examined what the former might mean, in this passage:⁹

“The issue in this case turns on the meaning of the word ‘claim’ in clause 5.2. The structure and syntax of clause 5.2 are significant. The word ‘claim’ is clearly used in contradistinction to the word ‘entitlement’. For further emphasis, the two words are separated by the conjunction ‘or’ - a word ordinarily used to identify alternatives. Although it is tempting to make general statements about the policy and purpose of clauses of this nature, ultimately each will turn on its own construction. This is illustrated by the decided cases in this area of the law. To date most of them have turned on the meaning of the word ‘entitlement’ where used in different syntactical and grammatical contexts: See *Bachmann Pty Ltd v BHP Power New Zealand Ltd* [1999] 1 VR 420 especially at paragraphs [30], [32] and [39] – [46] per Brooking JA.

For example, in *Hughes Bros Pty Limited v Telede Pty Ltd* (1989) 7 BCL 210 the relevant clause permitted recourse to the security ‘whenever the proprietor may be entitled to the payment of monies’; in *Reed Construction Services Pty Ltd v Kheng Seng (Aust) Pty Ltd* (1999) 15 BCL 158 the relevant clause permitted recourse to the security ‘whenever the proprietor shall be entitled to the payment of monies’; in *Bachmann Pty Ltd v BHP Power New Zealand Ltd* (supra), the relevant clause permitted recourse to the security when the principal ‘becomes entitled to exercise a right under the contract in respect of the security’; and in *Pearson Bridge (NSW) Pty Ltd v State Rail Authority of New South Wales* (1982) 1 Australian Construction Law Reports 81 and *Barclay Mowlem Construction Ltd v Simon Engineering (Australia) Pty Ltd* (1991) 23 NSWLR 451 the relevant clause also adopted the formula ‘becomes entitled’.

All of these variations on a theme may give rise to legitimate questions about the content and circumstances of the entitlement on which they

⁸ *FMT Aircraft Gate Support Systems v Sydney Ports Corporation* [2010] NSWSC 1108 at [5].

⁹ *FMT Aircraft Gate Support Systems v Sydney Ports Corporation* [2010] NSWSC 1108 at [7] to [15] (emphasis, namely underling, is in the original).

hinge. It is fair to say that, whenever the language permits, the courts have, especially in more recent times, adopted a generous approach to the meaning of ‘entitlement’ – to reflect the perceived commercial purpose. In this contract, the drafter has endeavoured to remove any doubt by introducing an additional factor. This results in a qualitative difference. The notion of a “claim” as an alternative to ‘entitlement’ has been invoked.

Both parties in this case are sophisticated commercial entities. I infer that they are and always have been well advised. They can be taken to have been aware of the numerous disputes and judicial decisions in this country concerning such clauses. They may be taken to have entered into this contract against that background.

It is obvious that the words ‘has any claim or entitlement’ were intended to broaden the circumstances in which the principal could have recourse to the security. They reflect an allocation of risk that necessarily embodies a mutual accommodation of competing interests. The evident commercial purpose is that, as long as there is a claim or entitlement within the meaning of clause 5.2, the contractor and not the principal will be the party who is out of pocket pending final resolution of the dispute: *Fletcher Construction Australia Ltd v Varnsdorf* [1998] 3 VR 812 at 826 (Callaway JA).

Nevertheless, whatever the extent of the broadening of the circumstances that was intended, the formulation used in clause 5.2 still requires consideration of the precise meaning and extent of the word ‘claim’. The word is used in many different contexts in the law. Its ordinary meaning however is of an assertion or demand.

It is stating the obvious to say that a valid claim within the meaning of clause 5.2 must be non-fraudulent. In that sense, it must be a genuine claim. It adds nothing to say that it must be bona fide. On the other hand, despite occasional suggestions to the contrary, I am satisfied that a mere honest or bona fide ‘belief’ in a claim is insufficient: cf *Clough Engineering Ltd v Oil & Natural Gas Corporation Ltd* [2008] FCAFC 136 at [102]. The test could not be subjective honesty or bona fides. More is required. A claim that is irrational and misconceived could not justify recourse to the security simply because the claimant had an honest, but wrongheaded, belief in the correctness of its claim. Equally, it is inappropriate to insist that the claim be ‘genuine and fair’ as the plaintiff submitted. And it is certainly not necessary that the claim be reasonable. Both would impose requirements on the principal that could well be onerous and productive of disputes.

What is required in my view is an arguable claim - one that is not specious, fanciful or untenable: *Hughes Bros v Telede Pty Ltd* (supra) at 216 (Cole J). This is at least consistent with decisions that have held that an ‘entitlement’ for the purpose of such a clause will have been established even though there is a genuine dispute or serious issue to be tried as to the existence of the right which underpins the entitlement: *Fletcher Construction v Varnsdorf* (supra) at 821-3 (per Charles JA).

For my part, I think that the test of what is a ‘claim’ for the purpose of a contractual provision such as clause 5.2 is relatively undemanding. An appropriate analogy is the criterion used for determining whether there should, or should not be, summary dismissal of a claim or proceeding: *General Steel Industries v Commissioner for Railways* (1964) 112 CLR 125. Such an approach would, in my view, reflect the commercial purpose and the allocation of risk which I have explained.”

- [52] But the contract in the present case was entered into more than 14 years after the contract considered by Pembroke J. Although the general conditions of the present contract were also based on the AS4000-1997 general conditions of contract, the parties had agreed to broaden the circumstances in which the Principal could have recourse to the security beyond the circumstances in which the Principal “may have” a claim to payment under the contract to include circumstances in which the Principal “claims to have” a claim to payment under the contract.
- [53] By permitting recourse to the security when the Principal claims to have a claim, the parties introduced wording which made a further qualitative difference to the circumstances in which the Principal could be said to have an entitlement to have recourse to the security. The contractual language thereby introduced subjectivity into the calculus and eschewed the need for objective assessment of the validity of the subject claim, save that the claim which the Principal claimed to have was required to be a claim for payment “under the contract”. The entitlement to have recourse would exist when the Principal actually had a claim in the sense described by Pembroke J, but also – and critically – when the Principal advanced in good faith the assertion that it had such a claim. In the form of words used in this contract, the Principal’s ability to have recourse to the security is not the subject of the negative stipulation that the Principal will have recourse to the security only when a claim exists which may be objectively assessed as possessing the characteristics discussed by Pembroke J.
- [54] That decision by the contracting parties reflects an allocation of risk that necessarily embodies a mutual accommodation of competing interests. The evident commercial purpose is that, as long as the Principal had claimed to have a claim to payment under the contract, it would be the Contractor and not the Principal who would be the party who was out of pocket pending final resolution of any dispute as to the validity of the claim.
- [55] We reach that view having regard to the terms used in this contract. We note however that our conclusion would be further supported by the proposition, affirmed in *Clough Engineering Ltd v Oil & Natural Gas Corporation Ltd*¹⁰ and also by Pembroke J, that parties to a commercial contract such as the present contract are to be taken to have contracted against a background which includes the earlier authorities on the construction of similar contracts.
- [56] That is not to say that an objective assessment of whether the claim has those characteristics will always and necessarily be irrelevant. There might well be cases in which such an assessment could shed light on whether the claim could be said to

¹⁰ *Clough Engineering Ltd v Oil & Natural Gas Corporation Ltd* [2008] FCAFC 136; 249 ALR 458 at [81](4), citing the observations of Hobhouse LJ in *Toomey v Eagle Star Insurance Co Ltd* [1994] 1 Lloyd’s Rep 516 at 520.

be advanced in good faith. For example, could the Principal really be said to have claimed to have a claim for payment under the contract, if the claim advanced was explicitly a claim for damages in tort? Similarly, if before the claim was made there had been a binding declaration of right as between the two contracting parties that the proper construction of cl 39.6 did not permit interim certification.

[57] In the present case none of those circumstances applied, and the Contractor did not challenge the Principal's good faith in advancing its claim based on the interim certification it had obtained.

[58] Even if it had, the objective assessment of the merits of the argument that cl 39.6 could be invoked before the final completion of all the work taken out of the Contractor's hands would not have assisted that challenge. There is certainly much to be said in favour of the view expressed by the primary judge. However the contrary view is not so unarguable as to impugn the Principal's good faith in advancing the argument. Some points can be made in favour of the Principal's contention:

- (a) The contract governed the relationship between the parties in relation to at least a contemplated three year construction period for which the Contractor would be paid over \$128 million.
- (b) The contract contemplated that the contract sum would be paid progressively by amounts paid on account. Progress certificates could result in debts owed by Principal to Contractor or vice versa, the final resolution of which would await the final certificate. And the implementation of the mechanism for interim payment did not depend on a progress claim being made by the Contractor: the process could be engaged in by the Principal even if no progress claim was advanced. Thus debts created pursuant to cl 39.6 could find themselves taken into account as part of the progress claim mechanism, with the result of the creation of promises to pay in accordance with the time frames specified in that mechanism.
- (c) Clauses 39.5 and 39.6 must be capable of operating in relation to circumstances in which that which is taken out of the Contractor's hands was the whole of the remaining WUC, which might well be a very large amount of work and lead to a considerable costs burden on the Principal over a considerable period. The reasonable businessperson standing in the shoes of the parties might find it surprising that the ordinary contractual mechanism of working out interim payments on account would not apply in such circumstances.
- (d) Some support for that conclusion might be found in the fact that in cl 39.6 the definite article was not used before "work". If the intention had been that there would only be one final certification of the whole of whatever work was taken out of the Contractor's hands, the definite article would have been used.
- (e) The ordinary meaning of the term "work", a term defined only inclusively in cl 1 was certainly apposite to cover the entirety of the remaining work under the contract if that was what was taken out of the Contractor's hands. But it would also be apposite to cover the parts of that work, if they were conceptually capable of being divided up into parts each of which could be regarded as "work".

[59] The final resolution of the question of the proper construction of cl 39.6 does not have to be essayed.

The discretion having miscarried, what order should be made

- [60] If this Court found that the primary judge’s discretion had miscarried, the parties joined in asking this Court to determine the application for interlocutory injunction rather than to remit the matter to the trial division for further consideration. Accordingly, we are to consider that question.
- [61] It is necessary first to articulate the principles by which the proper exercise of the discretion should be performed.¹¹
- [62] On an application for an interlocutory injunction, it is necessary to make two main inquiries: first, has the applicant shown that it has a prima facie case, and second, has the applicant shown that the balance of convenience favours granting the relief claimed.¹²
- [63] In order to satisfy the first inquiry, an applicant does not have to show that it will probably succeed at trial. Rather, it is sufficient that the applicant shows a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial.¹³ How strong the probability of success needs to be depends upon the nature of the rights asserted and the practical consequences likely to follow from the orders sought.¹⁴ The first inquiry is sometimes described as whether there is a “serious question” to be tried. There is no objection to the use of that phrase if it is understood as conveying the notion that the seriousness of the question must, like the likelihood of success, be sufficient in the circumstances to justify the order sought.¹⁵
- [64] The second inquiry is whether the balance of convenience supports the relief claimed; in other words, whether the inconvenience or injury which the applicant would be likely to suffer if an injunction were refused outweighs, or is outweighed by, the injury which the respondent would suffer if an injunction were granted.¹⁶ The adequacy of an award of damages and the question of the sufficiency of the usual undertaking are to be considered as part of the totality of the balance of convenience question.¹⁷
- [65] The two inquiries are related and not independent of each other, so that the weight of considerations in regard to one may well affect the other.¹⁸ The Court should weigh

¹¹ What follows is a modification for present purposes of an analysis Bond JA previously expressed in *AECI Australia Pty Ltd v Convey* [2020] QSC 207 at [13] to [18], cited with approval in *Rolleston Coal Holdings Pty Ltd v ICRA Rolleston Pty Ltd* [2020] QSC 331 at [28] to [31] (Bowskill J), *Joyway Pty Ltd v Rochedale Holdings Pty Ltd* [2022] QSC 273 at [16] (Martin SJA), *Maradiegue v Moneytech Finance Pty Ltd* [2024] QSC 160 at [7] (Martin SJA), *Zuce Tech Pty Ltd v Ebert* [2024] QSC 297 at [20] (Freeburn J), *Adani Mining Pty Ltd v Pennings* [2024] QSC 302 at [117] (Brown J), *Perpetual Ltd v Maglis* [2025] QSC 71 at [23] (Bowskill CJ), *Rawcorp Pty Ltd v MDP No 15 Pty Ltd* [2026] QSC 38 at [20] (Wilson J), and *Stryker Australia Pty Ltd v Short* [2026] QSC 174 at [17](e) (Freeburn J).

¹² *Australian Broadcasting Corporation v O’Neill* (2006) 227 CLR 57 at [65] to [72] per Gummow and Hayne JJ (Gleeson CJ and Crennan J agreeing at [19]); *Bowen Central Coal Pty Ltd v Aquila Coal Pty Ltd* [2011] QCA 334 at [37] to [38].

¹³ *Australian Broadcasting Corporation v O’Neill* (2006) 227 CLR 57 at [65].

¹⁴ *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618 at 622, cited with approval in *Australian Broadcasting Corporation v O’Neill* (2006) 227 CLR 57 at [65].

¹⁵ *Australian Broadcasting Corporation v O’Neill* (2006) 227 CLR 57 at [70] to [71].

¹⁶ *Mineralogy Pty Ltd v Sino Iron Pty Ltd* [2016] WASCA 105 at [87].

¹⁷ *Bowen Central Coal Pty Ltd v Aquila Coal Pty Ltd* [2011] QCA 334 at [39]; see also *Sino Iron Pty Ltd v Mineralogy Pty Ltd (No 2)* [2017] WASCA 76 at [131]. The sufficiency of AECI’s undertaking was not the subject of challenge before Bond J.

¹⁸ *Live Earth Resource Management Pty Ltd v Live Earth LLC* [2007] FCA 1034 at [13]; *Warner-Lambert Co LLC v Apotex Pty Ltd* (2014) 311 ALR 632 at [70]; *Mineralogy Pty Ltd v Sino Iron Pty Ltd* [2016] WASCA 105 at [87].

in the balance all relevant factors, including the strength of the case to be tried and the factors affecting the balance of convenience. Then the Court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been “wrong”, in the sense of granting an injunction to a party which fails to establish its right at an ultimate trial, or failing to grant an injunction to a party which succeeds at trial.¹⁹

- [66] It is the reference in the foregoing summation of general principle to “the nature of the rights asserted and the practical consequences likely to follow from the orders sought” which requires the consideration of the cases which have considered interlocutory injunctions to restrain a contracting party from having recourse to security. Reference has been made to those cases at [44] above.
- [67] In the present case, for reasons already expressed and given that the Contractor did not challenge the good faith of the Principal, we find that the Contractor did not establish a prima facie case that the Principal was threatening to act in breach of a negative stipulation in the contract, confining its ability to have recourse to the security. That conclusion is reached because we conclude that on the proper construction of cl 5.2 the Principal was entitled to have recourse to the security if it advanced in good faith the assertion that it had a claim to payment under the contract. No case was advanced by the Contractor which challenged the proposition that the Principal’s claim to payment under the contract had not been advanced in good faith.
- [68] No prima facie case having been established, the application for injunction must fail.
- [69] The Court makes the following orders:
- (a) The appeal is allowed.
 - (b) The orders of the Supreme Court of Queensland made on 24 June 2026 are set aside and in lieu thereof, the following orders be made:
 - (i) The interlocutory application filed by the respondent on 16 June 2026 is dismissed.
 - (ii) The respondent must pay the appellant’s costs of the application.
 - (c) The respondent must pay the appellant’s costs of the appeal.

¹⁹ *Bradto Pty Ltd v State of Victoria* (2006) 15 VR 65 at [35]; *Mineralogy Pty Ltd v Sino Iron Pty Ltd* [2016] WASCA 105 at [84]; *Siemens Gamesa Renewable Energy Pty Ltd v Bulgana Wind Farm Pty Ltd* [2019] VSCA 318 at [107].