# RECENT DEVELOPMENTS IN RECOURSE TO BANK GUARANTEES

Michael Whitten QC

MTECC Seminar

RACV Club, 28 March 2018

# Introduction

In previous papers,[[1]](#footnote-1) principles were essayed relevant to performance securities, particularly bank guarantees provided for by building contracts, recourse to them and injunctions to restrain recourse.

One of the abiding themes throughout the early cases reflected:

'very long-standing principles permitting only very limited circumstances in which a beneficiary will be precluded from having recourse to what has always been regarded as 'as good as cash'.

More recently, a number of appellate decisions have tended to cast doubt on the hitherto fundamental notion of a bank guarantee being 'as good as cash'.

Further, developments over the last decade or so have seen, among other things, a marked divergence in curial approach to the weight to be afforded to pleas of reputational harm as a (seemingly powerful) basis for the grant of interlocutory relief.

In this paper, we will consider a number of those cases to see whether, and if so, to what extent, the *long-standing principles* on the subject have been reinforced, reshaped or replaced.

The principal context in which this jurisprudence has developed remains interlocutory applications for injunctions to restrain a beneficiary from calling on a guarantee.

# Interlocutory injunctions – general principles: a recap

For any interlocutory injunction, a successful applicant must demonstrate: [[2]](#footnote-2)

1. a serious question to be tried; or that the plaintiff has made out a prima facie case in the sense that if the evidence remains as it is, there is a probability at the trial the plaintiff will succeed;
2. that the plaintiff will suffer irreparable harm for which damages will not be an adequate remedy unless an injunction is granted; and
3. the balance of convenience favours the grant.

To those may be added the Victorian Court of Appeal’s ‘single test’ in ***Bradto Pty Ltd v State of Victoria***[[3]](#footnote-3)reflecting ‘fundamental principle’: that the court should take whichever course appears to carry the *lower risk of injustice* if it should turn out to have been ‘wrong’.

# Injunctions to restrain recourse to securities: a recap

An unconditional bank guarantee provided to secure performance of a contract operates autonomously from any dispute concerning the underlying contract. As such, a beneficiary is entitled to demand payment on the security (“calling it up” or “cashing” it), and the bank is obliged to meet that demand, regardless of whether or not the account party is in breach of the underlying contract.[[4]](#footnote-4)

The ‘autonomy priniciple’ was recently affirmed by the High Court in ***Simic v New South Wales Land and Housing Corporation***[[5]](#footnote-5) where Gageler, Nettle and Gordon JJ went on to opine:

“In effect, such securities ‘create a type of currency’ and are treated as being ‘as good as cash’. Instruments of this nature are essential to international commerce and, in the absence of fraud, should be allowed to be honoured free from interference by the courts.”

That view reflects what may be regarded as the traditional approach in Australia that a beneficiary under an irrevocable unconditional bank guarantee (principal or head contractor as the case may be) may call upon the security, save and except in the case of:

1. fraud;
2. unconscionability;[[6]](#footnote-6) or
3. breach an express or implied restriction (i.e. a negative stipulation) in the underlying contract.[[7]](#footnote-7)

The vast majority of reported decisions involve the third exception.

In all cases, the starting point for any analysis is the proper construction of the terms of the relevant contract by which the parties agreed to regulate the circumstances permitting, and requirements for, recourse.

In 2008, in ***Clough Engineering Ltd v Oil & Natural Gas Corp Ltd***, the Federal Court provided what many have accepted as the orthodox approach to construction in this context, one marked by great weight to the practical commercial nature of performance bonds. The decision supported the unconditional "as good as cash" nature[[8]](#footnote-8) of the security by establishing that recourse may be had where there is a bona fide claim, without necessarily having to establish a material entitlement.

# Philosophical shift away from *Clough?*

However, since the 2010 decision of the NSW Court of appeal in ***Lucas Stuart Pty Limited v Hemmes Hermitage Pty Limited*** [[9]](#footnote-9) a divergent approach has emerged. In that case, Macfarlan JA distinguished *Clough* and opined that the issue for construction was whether the Contractor had failed materially to comply with its obligations under the Contract, as opposed to failing to comply with a 'material obligation', which required a holistic approach to the interpretation of those obligations.

Thereafter, recent decisions can be identified as falling within two broad categories based on the Court's approach to construction of the contract; namely those in which:

1. the unconditional terms of the guarantee itself, and its purpose, influence the interpretation of the contract provisions governing recourse; and
2. the terms of the contract govern whether recourse is in fact 'unconditional'.

The different approaches demonstrate, in effect, a choice between whether construction is underpinned by a presumption as to the 'good as cash' purpose of a guarantee, or whether the terms of the contract inform the nature of the guarantee.

# *RCR O’Donnell Griffin Pty Ltd v Forge Group Power Pty Ltd* (recs and mgrs apptd) (in liq) [2016] QCA 214 (26 August 2016)

Forge was the head D&C contractor on the Diamantina Power Station project in Mt Isa. Forge engaged RCR as an electrical subcontractor. Under the subcontract, RCR provided Forge with two unconditional bank guarantees totaling approximately $5 million.

Clause 5.2 of the subcontract entitled Forge to have recourse to the guarantees where it remained “***unpaid after the time for payment***”.

Clause 34.7 empowered the Superintendent to certify liquidated damages as due and payable if RCR failed to reach practical completion by the date for practical completion.

During the course of the works, Forge became insolvent and receivers were appointed. The Principal, Forge and RCR entered into a Deed of Novation pursuant to which RCR entered a new contract with the Principal for performance of the remainder of the subcontract works. Forge’s receivers appointed a new superintendent, and shortly thereafter (within an hour!), the superintendent certified LDs in the amount of approximately $2.5 million. Forge’s receivers demanded payment of the LDs, and informed RCR that they intended to have recourse to the guarantees if the demand was not met.

RCR commenced proceedings. Forge argued that pursuant to clause 5.2, it was entitled to have recourse to the security on a bona fide (genuine) claim. RCR contended that Forge’s right of recourse was dependent upon the existence of an actual debt due to it. The primary judge held, inter alia, that Forge was entitled to have recourse to the guarantees.

On appeal, the plurality held that on the correct interpretation of clause 5.2, Forge was entitled to recourse *only* where, as a matter of objective fact (rather than subjective belief), there was an outstanding debt owed to it by RCR. McMurdo JA (Applegarth J agreeing) opined:[[10]](#footnote-10)

“[T]he precondition to recourse to the security was the fact of money being unpaid to [Forge]. Clause 5.2 was not in terms which referred to a belief, or grounds for a belief, that money remained unpaid. …

The implication that a security could be called upon merely where there was a claim in good faith could have no operation once the absence of merit in that claim was established.”

McMurdo JA also found that the superintendent had not been validly appointed, and that his certification of liquidated damages was therefore invalid. His Honour rejected Forge’s argument that clause 34.7 created an entitlement to LDs, even in the absence of a certificate issued by the superintendent.

It may be queried whether the QCA may have arrived at a different result had Forge’s entitlement to LDs been founded on a valid certificate.

# *CPB Contractors Pty Ltd v JKC Australia LNG Pty Ltd [No 2]* [2017] WASCA 123 (30 June 2017)

JKC, the head contractor on the ‘Ichthys’ LNG off-shore oil and gas project, claimed liquidated damages from its subcontractor, CPB, resulting from CPB’s delay in achieving certain milestones.

General Condition 35.3 of the subcontract provided, relevantly, that:

* 1. JKC could have recourse to CPB’s bank guarantees at any time in order to recover any ***amounts payable*** by CPB to JKC on demand; and
	2. CPB waived any right it had to obtain an injunction or any other remedy or right against JKC having recourse to the bank guarantees.

CPB sought to restrain JKC having recourse on the basis that the word ‘payable’ required an objective determination of JKC’s claim pursuant to the dispute resolution mechanism in the contract (i.e. was the sum in fact payable, or just a claim for payment).

The WA Court of Appeal held that, on the proper interpretation of GC 35.3(a), JKC was entitled to have recourse if, at any time, it had an honest (bona fide) claim, in the events that had happened, to immediate payment under the subcontract. The Court found that CPB’s interpretation would defeat the purpose of the guarantees being ‘on demand’. It appeared[[11]](#footnote-11) to have been accepted before the Court of Appeal that, in this case, the unconditional nature of the bank guarantees was a relevant consideration in the determination of what was meant by “payable”. Further, the Court observed that having regard to the terms and context of the subcontract, the circumstances in which recourse could be had to the bank guarantees assisted in the conclusion that a purpose of the bank guarantees was to ensure that JKC to be ‘in the money’ to the extent of the bank guarantees, pending resolution of any dispute as to CPB’s liability for liquidated damages.

The Court also held, that on its proper construction, GC 35.3(b) operated as a waiver of CPB’s right to relief against prospective recourse to the bank guarantees and considered it unnecessary to determine whether the clause was an ouster of the Court’s jurisdiction.

CPB applied to the High Court for an interim injunction. In refusing the application, Nettle ACJ opined, albeit on a ‘necessarily preliminary and at best tentative’ basis, that:[[12]](#footnote-12)

“…the principles applicable to the construction of bank guarantees are well established[[13]](#footnote-13) and, subject to one possible exception … the reasoning and conclusions of the Court of Appeal accord closely with the weight of authority.”

The exception to which his Honour referred concerned the views of Macfarlan JA (with whom Campbell JA relevantly agreed) in *Lucas Stuart Pty Ltd v Hemmes Hermitage Pty Ltd* as to whether the fact that a bank guarantee is “unconditional” (in the sense that the issuer of the bank guarantee is obliged to pay without argument as to the underlying liability under the construction contract) is or may be an indication that amounts “payable” under the construction contract are permitted to be claimed under the bank guarantee notwithstanding that the underlying liability under the construction contract is bona fide disputed. Macfarlan JA stated that, contrary to the approach in *Clough* and cases which have followed it, it was not obvious why the terms of the guarantee given by the issuer should have been regarded as affecting the proper construction of the provision which related to the circumstances in which the Principal was entitled to call on the guarantee.

Counsel for CPB submitted that the difference in approach between *Clough* and the cases which have followed and applied it, and *Lucas Stuart*, raised a point of principle of general importance that was in the interests of justice for the High Court to consider. That, according to Nettle ACJ, was a matter for the panel determining the application for special leave to decide. But his Honour observed that a:

“… possible difficulty with the point is that it appears to have been accepted before the Court of Appeal that, in this case, the unconditionality of the bank guarantees was a relevant consideration in the determination of what was meant by “payable” in clause 35.3(a) of the sub-contract.”

# *Kawasaki Heavy Industries v Ltd v Laing O’Rourke Australia Construction Pty Ltd* [2017] NSWCA 291 (17 November 2017)

Kawasaki and Laing O’Rourke were parties to a subcontract to provide project services to JKC, the head contractor of a cryogenic tank project near Darwin. The subcontract required Kawasaki and Laing O’Rourke to provide performance bonds and advance payment bonds to JKC.

Kawasaki and Laing O’Rourke entered into a consortium agreement, which outlined each party's scope of works under the Subcontract. Kawasaki agreed to take responsibility for providing the performance and advance payment bonds to JKC, and Laing O’Rourke agreed to provide surety bonds to Kawasaki. The parties agreed that all disputes would be determined by international arbitration in Singapore, but interlocutory relief could be sought from a court of competent jurisdiction. By a third agreement, Laing O’Rourke agreed to perform some of the work allocated to Kawasaki by the consortium agreement.

After significant delays in the completion of the cryogenic tank project, a dispute arose between the subcontractors. While JKC asserted an entitlement to damages from the subcontractors, it did not call on the Kawasaki bonds. However, Kawasaki made a call on the surety bonds issued in its favour. Laing O’Rourke sought to restrain Kawasaki from calling on the bonds, on the basis that there was a serious question to be tried about whether Kawasaki was entitled to call on the bonds when JKC had not yet called on the corresponding bonds provided under the subcontract.

At first instance, Ball J granted Laing O’Rourke an ex parte injunction preventing Kawasaki from calling on the bonds. Kawasaki applied to discharge the interlocutory injunction.

On the return of the injunction, Stevenson J found that the balance of convenience favoured continuation, on the basis that there was a serious question to be tried. Kawasaki appealed.

Kawasaki argued[[14]](#footnote-14) that a special rule of construction exists for contracts which provide for the issue of performance bonds being that only ‘clear words’ in such a contract can support a construction that prevents the beneficiary from calling on the performance guarantee. Kawasaki further contended that the inherent nature of a performance bond as a “risk allocation device” necessitates such an approach.

The NSW Court of Appeal eschewed any notion that *Clough* stands as a general proposition that a special rule of construction exists for contracts giving rise to performance bonds. Instead, the Court highlighted[[15]](#footnote-15) that the undertakings in S*imic* were addressed by the High Court using the same rules of construction as govern commercial contracts:[[16]](#footnote-16) “*objectively by reference to its text, context and purpose. As was stated in* ***Electricity Generation Corporation v Woodside Energy Ltd***at [35]:

“[T]he objective approach [is] to be adopted in determining the rights and liabilities of parties to a contract. The meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean… [I]t will require consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract. Appreciation of the commercial purpose or objects is facilitated by an understanding ‘of the genesis of the transaction, the background, the context [and] the market in which the parties are operating’. As Arden LJ observed in Re Golden Key Ltd [[2009] EWCA Civ 636 at [28]], unless a contrary intention is indicated, a court is entitled to approach the task of giving a commercial contract a businesslike interpretation on the assumption ‘that the parties…intended to produce a commercial result’. A commercial contract is to be construed so as to avoid it ‘making commercial nonsense or working commercial inconvenience’.” (footnotes omitted)

The Court of Appeal also did not agree with the generality of the characterization of the bonds as “risk allocation devices”.[[17]](#footnote-17) The Court considered it more relevant to establish the *particular* risk against which the bonds were designed to give protection to Kawasaki. In that regard, the Court held[[18]](#footnote-18) that the bonds were for the purpose of securing against a call by JKC on the Kawasaki Bonds. There were various indications within the Consortium Agreement that the parties intended that Laing O’Rourke’s bonds were security for Kawasaki’s liabilities, which could only be engaged upon JKC making a call on the Kawasaki bonds. Further, the terms of the Laing O’Rourke subcontract did not demonstrate that the parties intended to change the circumstances in which Kawasaki could call on the surety bonds.

In dismissing the appeal, the Court considered[[19]](#footnote-19) that Stevenson J was correct to determine whether there was a serious question to be tried, rather than determining the case “as if” on a final basis, for to do so would have been inconsistent with the Consortium Agreement, which entrusted an arbitral tribunal with the determination of all disputes.

# *Dedert Corporation v United Dalby Bio-Refinery Pty Ltd* [2017] VSCA 368 (12 December 2017)

Dedert entered into a contract to supply and install a "combo eco-dry system" at United’s refinery. The contract required Dedert to provide United with a bank guarantee to secure its performance. Clause 5.2 (of the amended AS 4902 contract) provided that:

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

After supply and installation of the drying system, United complained of defects in the system which required rectification. It then gave Dedert notice of its intention to call on the bank guarantees in respect of losses resulting from the defects. Dedert sought an injunction.

At first instance, the trial judge found that cl 5.2 did not preclude United from calling on the security in respect of bona fide claims for amounts which *may become due* from the contractor for breach of contract. Dedert appealed.

Kaye JA, with whom Priest JA agreed (providing his own reasons on the issue of interpretation of commercial contracts), allowed the appeal, set aside the trial judge's decision, and granted an injunction restraining United from calling upon the security.

The majority held that clause 5.2 contained an implicit prohibition against recourse to the security in circumstances other than where the principal remained unpaid after the time for payment. Kaye JA followed the interpretive approach of the Queensland Court of Appeal in *RCR O’Donnell* (discussed above), where the relevant clause was in almost identical terms.

His Honour found that United’s claim for unliquidated damages for breach of contract (or direct losses) was not for an amount which was then due and payable under the contract. On the proper construction of the relevant provision, he held:[[20]](#footnote-20)

 “…it was an implied negative stipulation in the contract that the respondent would not invoke recourse to the security in the absence of there being an account ‘unpaid’ by the applicant to the respondent ‘after the time for payment’.”

Accordingly, as the ‘direct losses’ asserted by the Principal did not constitute amounts which remained ‘unpaid after the time for payment’, United had no basis to call upon the security.

As to the fact that the bank guarantee was ‘unconditional’, Kaye J observed:[[21]](#footnote-21)

“…where the contract did not preclude [the Principal] from having recourse to the security, the undertaking or guarantee should be unconditional in its form and effect."

In his dissenting judgment, Whelan JA embraced the more traditional *Clough* approach. His Honour’s helpful summary of his reasons is instructive, relevantly (for this paper):[[22]](#footnote-22)

“(1) The role of ‘unconditional’ securities of the kind in issue here, as being the functional equivalent of cash, is of fundamental importance.

(2) There is no doubt that the respondent has a contractual right as against the bank to call up the security. It can only be prevented from doing so if the contract between the respondent and the applicant contains an implicit prohibition on it doing so. There is no explicit prohibition.

(3) The implicit prohibition relied upon by the applicant before the trial judge was cl 5.2. The argument was that cl 5.2 comprehensively prescribed the circumstances in which recourse could be had to the security and, thus, recourse in other circumstances is implicitly prohibited. The trial judge rejected this contention. He was clearly correct to do so. Before us, it was accepted that cl 5.2 is not comprehensive. At the least, recourse is also permitted in the circumstances provided for by cls 39.7 and 39.9.[[23]](#footnote-23)

(4) ….

(5) The balance of convenience overwhelmingly favours the respondent. The terms of the undertaking the respondent gave the trial judge, and which it proffered to this Court, mean the applicant will suffer little, if any, detriment if the injunction is not granted. On the other hand, granting the injunction is likely to have the effect of depriving the respondent of the security provided for by the contract, and of precluding it from exercising the undoubted contractual right which it presently has against the bank.

(6) I do not consider that this Court’s decisions in Bachmann Pty Ltd v BHP Power New Zealand Ltd[[1]](http://classic.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VSCA/2017/368.html?stem=0&synonyms=0&query=dedert&nocontext=1" \l "fn1) and Fletcher Construction Australia Ltd v Varnsdorf Pty Ltd[[2]](http://classic.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VSCA/2017/368.html?stem=0&synonyms=0&query=dedert&nocontext=1" \l "fn2) and the decision of the Full Court of the Federal Court in Clough Engineering Ltd v Oil & Natural Gas Corporation Ltd[[3]](http://classic.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VSCA/2017/368.html?stem=0&synonyms=0&query=dedert&nocontext=1" \l "fn3) are distinguishable. I consider that the decision of the Queensland Court of Appeal in RCR O’Donnell Griffin Pty Ltd v Forge Group Power Pty Ltd (rec and mgr appt) (in liq)[[4]](http://classic.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VSCA/2017/368.html?stem=0&synonyms=0&query=dedert&nocontext=1" \l "fn4) is distinguishable, and to the extent it is not, I prefer the analysis in Bachmann, Fletcher Construction and Clough Engineering. The decisions in Bachmann and Fletcher Construction are particularly significant in relation to the construction of cl 39.7.”

His Honour also considered the two reasons for a guarantee - to provide security and to allocate risk – and opined that if, upon a proper construction of the contract, the commercial purpose was to allocate risk, then in the words of Callaway JA in *Fletcher Construction Australia Ltd v Varnsdorf*:[[24]](#footnote-24)

“No implication may be made that is inconsistent with an agreed allocation of risk as to who shall be out of pocket pending resolution of a dispute and clauses in the contract that do not explicitly inhibit the beneficiary from calling upon the security should not be too readily construed to have that effect. As I have already indicated, they may simply refer to the kind of default which, if it is alleged in good faith, enables the beneficiary to have recourse to the security or its proceeds.”

# Reputational harm: a rational view

While the jurisprudence in this area has seen a recognition that pleas of reputational harm are a relevant consideration on the balance of convenience (more accurately, whether damages would be an adequate remedy), more recently, courts appear to be taking a more robust, and commercially canny view of the evidence adduced in support of such claims.[[25]](#footnote-25)

In what is perhaps the most recent indication from at least one High Court judge, Nettle ACJ in his decision in *CPB Contractors Pty Ltd v JKC Australia LNG Pty Ltd*, expressed doubts about CBP’s claims of reputational harm in the event an injunction was not granted:

 “[The Subcontractor's director] said as well that a call on the bank guarantees would be an indication to “the market” that CPB cannot uphold its obligations in delivering projects. Perhaps; but I take leave to doubt it. Granted, as CPB contends, the prospect of reputational harm has been accepted as a relevant consideration by several experienced construction law judges. But each case depends on its facts. Here, it is clear from [the WASC] and the Court of Appeal’s reasons for judgment that there has not yet been a determination of CPB’s alleged substantive liability for liquidated damages – that remains to be determined in the international arbitration – and it is clear from the Court of Appeal’s reasons for judgment that their Honours’ conclusion as to the proper construction of the sub-contract is that JKC should “be in the money, to the extent of the Bank Guarantees, pending resolution of any dispute”. If that be correct, and until and unless there is a successful appeal it must be accepted that it is correct, the fact that JKC is permitted to draw down under relevantly unconditional bank guarantees pending determination of the issue of substantive liability can hardly be seen as reflecting on CPB’s performance or, therefore, reputation as a contractor.

Further, his Honour observed, as had the Court of Appeal, that it was open to CPB to avoid the risk of reputational damage by tendering a sum equal to the amount of the claim, on account, in substitution for the amount payable under the bank guarantees.[[26]](#footnote-26)

# Conclusion

While it may be superficially attractive to attempt to explain the seemingly different approaches discussed above by reference to traditional versus contemporary preferences, or parochial tensions between different States, a more sombre analysis reveals that, in truth, there are few if any organic differences in judicial approach to these applications.

The rules for construction of contractual provisions have been developed consistently by the High Court throughout the years.

The significance of bank guarantees as being (intended to be) as good as cash has never been rejected.

The purpose for which the securities are to be provided under the relevant contracts –for performance or risk allocation devices as to whom is to be out of pocket pending determination of the underlying dispute/s - has always been and remains of importance in any construction exercise.

However, the real difference, it is submitted, is the way in which contract drafting has evolved over the last 10 to 20 years. Key phrases governing entitlement to recourse such as “*becomes entitled to exercise a right under the Contract*” vs “*to recover amounts payable on demand*” vs “*remains unpaid after the time for payment*” vs “a*ny amounts due and payable*”, to name but a few, are at the heart of any controversy in this area.

Such drafting efforts, whether by adoption of standard form contracts or amendments thereto or entirely bespoke provisions, reflect the modern commercial struggle between the interests of beneficiaries (Principals or head contractors who want easy recourse) and account parties (contractors or subcontractors who want recourse to be more difficult) and their respective bargaining powers.

It remains incumbent on the courts to balance those competing interests and measures and preserve the commercial currency and certainty of performance securities, by the consistent application of principle aimed ultimately at keeping parties to their ‘real’ bargain.

The above decisions demonstrate the potential danger in affording drafting devices such prominence in analysis, thereby requiring a court to go looking for ‘implied’ restrictions on recourse, which can ultimately outweigh and compromise the fundamental reason/s for the provision of security in the first place.

1. “*Calling on a Performance Security: As Good As Cash?”* 18 June 2013 - http://208.76.83.195/~mtecccom/wp-content/uploads/2015/10/Michael\_Whitten\_CALLING\_ON\_A\_PERFORMANCE\_GUARANTEE.pdf

“*Recourse to Securities: Reputational Harm – Does it always tip the scales?”* April 2016

<https://mtecc.com.au/recourse-to-securities-reputational-harm/>

I would like to acknowledge and thank Ms Jennika Anthony-Shaw of the Victorian Bar and member of MTECC for her most valuable research and contribution to the preparation and presentation of this paper. [↑](#footnote-ref-1)
2. *Castlemaine Tooheys Ltd v State of South Australia* (1986) 161 CLR 148, 153.  [↑](#footnote-ref-2)
3. [2006] VSCA 89 at [35]. [↑](#footnote-ref-3)
4. *Wood Hall Ltd v The Pipeline Authority* (1979) 141 CLR 443; *Olex Focas Pty Ltd v Skodaexport Co Ltd* [1997] ATPR (Digest) [46-163]; *Reed Construction Services Pty Ltd v Kheng Seng (Australia) Pty Lt*d (1999) 15 BCL 158; *Bachmann Pty Ltd v BHP Power New Zealand Ltd [1999] 1 VR 420 and Fletcher Construction Australia Limited v Varnsdorf Pty Ltd* [1998] 3 VR 812; *Boral Formwork & Scaffolding Pty Ltd v Action Makers Ltd* [2003] NSWSC 713; *Vos Construction & Joinery Qld Pty Ltd v Sanctuary Properties Pty Ltd & Anor* [2007] QSC 332. [↑](#footnote-ref-4)
5. [2016] HCA 47 at [88] [↑](#footnote-ref-5)
6. For a rare case involving allegations of fraud and unconscionability, see *Ottoway Engineering Pty Ltd v Westpac Banking Corporation (No 3)* [2017] FCA 1500 (13 December 2017). [↑](#footnote-ref-6)
7. *Clough Engineering Ltd v Oil & Natural Gas Corp Ltd* (2008) 249 ALR 458 [↑](#footnote-ref-7)
8. Recently affirmed in *Simic v New South Wales Land and Housing Corporation* [2016] HCA 47 at [5]. [↑](#footnote-ref-8)
9. [2010] NSWCA 283 [↑](#footnote-ref-9)
10. at [95], [96] [↑](#footnote-ref-10)
11. at [89] [↑](#footnote-ref-11)
12. *CPB Contractors Pty Ltd v JKC Australia LNG Pty Ltd* [2017] HCATrans 147 (14 July 2017) [↑](#footnote-ref-12)
13. Referring to the decisions in fn 4 and 5 above, as well as *RCR O’Donnell*, ibid. [↑](#footnote-ref-13)
14. at [39], relying on *Clough* at [83]. [↑](#footnote-ref-14)
15. [65] [↑](#footnote-ref-15)
16. *Simic* at [78] [↑](#footnote-ref-16)
17. cf Callaway JA in *Fletcher Construction Australia.* [↑](#footnote-ref-17)
18. [86] [↑](#footnote-ref-18)
19. [95]-[96] [↑](#footnote-ref-19)
20. [105] [↑](#footnote-ref-20)
21. [117] [↑](#footnote-ref-21)
22. [2] [↑](#footnote-ref-22)
23. Clause 39.7 permitted the Principal to “set-off any amount due and payable” by the Contractor, and 39.9 permitted recourse to the security in respect of such amounts. [↑](#footnote-ref-23)
24. [827] [↑](#footnote-ref-24)
25. For example, see *Redline Contracting Pty Ltd v MCC Mining (Western Australia) Pty Ltd (No 2)* [2012] FCA 1 and *Sugar Australia Pty Ltd v Lend Lease Services Pty Ltd* [2015] VSCA 98, per Kaye JA. [↑](#footnote-ref-25)
26. A view not dissimilar to that expressed by Kenneth Martin J in *Central Petroleum Ltd v Century Energy Services Pty Ltd* [2011] WASC 211. [↑](#footnote-ref-26)