SUPREME COURT OF QUEENSLAND

CITATION:	*Built Qld Pty Limited v Pro-Invest Australian Hospitality Opportunity (ST) Pty Limited as Trustee for the Pro-Invest Australian Hospitality Opportunity (BRF Springhill) Trust* [2019] QSC 108
PARTIES:	**BUILT QLD PTY LIMITED** ACN 108 064 099 (applicant) **v** **PRO-INVEST AUSTRALIAN HOSPITALITY OPPORTUNITY (ST) PTY LIMITED AS TRUSTEE FOR THE PRO-INVEST AUSTRALIAN HOSPITALITY OPPORTUNITY (BRF SPRING HILL) TRUST** ACN 163 479 221 (respondent)
FILE NO:	BS No 5426 of 2017
DIVISION:	Trial Division
PROCEEDING:	Interlocutory Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	9 May 2019
DELIVERED AT:	Brisbane
HEARING DATE:	11, 12, 15 and 17 April 2019
JUDGE:	Martin J
ORDER:	**The application is dismissed.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – MOTIONS, INTERLOCUTORY APPLICATIONS AND OTHER PRE-TRIAL MATTERS – where the applicant is the contractor and the respondent is the principal in a design and construct contract – where the applicant arranged for a performance bond to be issued as part of the requirements of the contract – where the respondent alleges that the applicant has failed to rectify construction defects exceeding the value of the bond – where the respondent demanded payment of the bond – whether injunctive relief is available to restrain the respondent from calling on, or otherwise having recourse to, the bond – whether there is a serious question to be tried and the balance of convenience

favours the granting of an injunction

Queensland Building and Construction Commission Act 1991, s 67J

Barclay Mowlem Construction Ltd v Simon Engineering (Aust) Pty Ltd (1991) 23 NSWLR 451, cited

Castlemaine Tooheys Ltd v South Australia (1986) 161 CLR 148, cited

CBP Contractors Pty Ltd v JKC Australia LNG Pty Ltd (No 2) [2017] WASCA 123, cited

Clough Engineering Ltd v Oil and Natural Gas Corporation Ltd (2008) 249 ALR 458, cited

Queensland University of Technology v Project Constructions (Aust) Pty Ltd [2003] 1 Qd R 259, cited

RCR O'Donnell Griffin Pty Ltd v Forge Group Power Pty Ltd [2016] QCA 214, cited

Saipem Australia Pty Ltd v GLNG Operations Pty Ltd [2014] QSC 310, cited

Saipem Australia Pty Ltd v GLNG Operations Pty Ltd [2017] QSC 294, cited

Sugar Australia Pty Ltd v Lend Lease Services Pty Ltd (2015) 31 BCL 407, cited

COUNSEL: M Steele and B Reading for the applicant
S Webster for the respondent

SOLICITORS: Clayton Utz for the applicant
Thomson Geer for the respondent

[1] Built (the applicant) is the contractor and Pro-Invest (the respondent) is the principal in a design and construct contract for the development of a Holiday Inn Express hotel in Spring Hill.

[2] As part of the contractual requirements, Built arranged for Insurance Australia Limited to issue a performance bond – referred to as the security sum in the contract.

[3] The works under the contract achieved practical completion in March 2017. Since then, Built has commenced proceedings against Pro-Invest for money payable under the contract or for damages as a result of variation and delay claims. Pro-Invest has counterclaimed for, among other things, damages for Built's failure to complete its defect rectification obligation.

[4] In February 2018, the contract Superintendent issued a direction to Built to rectify defects. Built did not do that. Pro-Invest commissioned a report which concluded that the cost of rectification exceeds the value of the security.

[5] On 11 April 2019, Pro-Invest:

(a) delivered a copy of a notice under s 67J of the *Queensland Building and Construction Commission Act* 1991 to Built's registered office, and

(b) delivered a demand to IAL for immediate payment of the security sum.

[6] IAL became aware of these proceedings and has not yet responded to the call made by Pro-Invest.

[7] Built seeks an interlocutory injunction to prevent Pro-Invest from making a call on, or otherwise having recourse to, the performance bond.

The test

[8] Built must demonstrate that there is a serious question to be tried and that the balance of convenience favours the granting of an injunction.

Is there a serious question?

[9] Built identifies the serious question as being whether Pro-Invest was entitled to make the call on the performance bond having regard to two matters:

(a) whether Pro-Invest complied with s 67J of the *Queensland Building and Construction Commission Act* 1991, and

(b) whether Pro-Invest complied with the contractual requirements for calling on the security.

Did Pro-Invest comply with s 67J of the *Queensland Building and Construction Commission Act* 1991?

[10] Section 67J provides:

> "(1) The contracting party for a building contract may use a security or retention amount, in whole or in part, to obtain an amount owed under the contract, only if the contracting party has given notice in writing to the contracted party advising of the proposed use and of the amount owed.
>
> (2) The notice must be given within 28 days after the contracting party becomes aware, or ought reasonably to have become aware, of the contracting party's right to obtain the amount owed.

> (3) If, because of subsections (1) and (2), the contracting party is stopped from using a security or retention amount, the contracting party for the contract is not stopped from recovering the amount owed in another way.
>
> (4) This section does not apply if, under the contract—
>
> > (a) work has been taken out of the hands of the contracted party or the contract has been terminated; or
> >
> > (b) the security or retention amount is to be used to make a payment into court to satisfy a notice of claim of charge under the *Building Industry Fairness (Security of Payment) Act 2017*.
>
> (5) In this section—
>
> *amount owed*, under a building contract, means an amount that, under the contract, is a debt due from the contracted party for the contract to the contracting party for the contract because of circumstances associated with the contracted party's performance of the contract.
>
> *use of security or retention amount* includes the act of converting securities into cash where the securities are held as negotiable instruments."

[11] Thus, Pro-Invest had to give appropriate notice to Built before it could call on the performance bond.

[12] The call on the CGU was made at about 10am on 11 April 2019. According to Built, notice of intention to make the call did not arrive at its offices until about 11:33am on the same day. This is disputed by Pro-Invest.

[13] Where there is a conflict in the evidence, then regard is to be had to the nature and quality of the evidence. Whether a serious question is shown to exist is determined by asking: if the evidence remains as it is, is there a probability that at the trial of the action the question will be decided in the applicant's favour?[1]

[14] The evidence from Pro-Invest on this point was precise. A solicitor employed by Thomson Geer (Pro-Invest's solicitors) deposes to delivering a copy of the s 67J notice at 9.48am on 11 April to a receptionist at Built's office. He knows that was the time because he checked the time on his mobile phone. On his return to his office he called – at 10.13am – another solicitor and told him that the notice had been delivered. At 10.15am he prepared a file note recording those matters. He sent that file note to the other solicitor at 10.42am.

[15] There is no affidavit from the receptionist. There is an affidavit from an in-house lawyer at Built that he was told by a receptionist that: she did not record the time she received the notice, she placed it on Built's treasurer's desk, she sent an email to Built's treasurer telling him that at 11.43am, and that those events occurred within "approximately 10 minutes of the notice having been served."

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[1] *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148 at 153.

[16] The lack of contemporaneity that pervades the hearsay account for the applicant compares unfavourably to the account which is supported by file notes and reference to specifically checking the time. If the evidence were to remain as it is, it is more likely than not that the issue would be decided in favour of Pro-Invest.

[17] Pro-Invest also argued that, for a number of reasons, it was not obliged to serve a notice under s 67J. In the light of my decision that there is no serious question about service, I need not consider those issues.

Did Pro-Invest comply with the contractual requirements for calling on the security?

[18] This argument requires a consideration of a number of clauses from the relevant contract. Built contends that the necessary pre-conditions did not exist for Pro-Invest to validly call on the performance bond. It also involves the more general question of the construction of the contract so far as the clause inhibiting an application of this kind is concerned.

[19] The relevant clauses are:

> "Security Provision
>
> 5.1 Provision
>
> Security shall be provided in accordance with Item 14 or 15 prior to the commencement of WUC and maintained during the term of the Contract. All delivered security shall be transferred in escrow.
>
> Provision of security by the Contractor is a precondition to payment pursuant to the Contract.
>
> 5.2 Recourse
>
> The Principal may have recourse to security and may convert into money security that does not consist of money where an entitlement exists pursuant to subclause 37.6.
>
> 5.6 No entitlement to injunction
>
> Except as provided in subclause 5.2, the Contractor shall have no entitlement as a consequence of the conversion of a security into money.
>
> The Contractor acknowledges that:
>
> (a) the Principal has a right to convert security which does not consist of money into money in accordance with subclause 5.2;
>
> (b) the Contractor has no entitlement to obtain an injunction preventing the Principal from converting security which does not consist of money into money.
>
> 35 Defects liability
>
> 35.1 …

> If the rectification is not commenced or completed by the stated dates, the Principal may have the rectification carried out by others but without prejudice to any other rights and remedies the Principal may have. The cost thereby incurred shall be certified by the Superintendent as moneys due and payable to the Principal.
>
> 37.6 Other moneys due
>
> Without limiting the Principal's rights under any provision in the Contract, the Principal may deduct from any moneys due to the Contractor pursuant to the Contract, any amount which is payable by the Contractor to the Principal, whether or not the Principal's right to payment arises by way of damages (whether liquidated or unliquidated), debt, restitution or otherwise.
>
> If the moneys payable to the Contractor are insufficient to discharge the liability of the Contractor to pay such sum to the Principal, the Principal may have recourse to the security or any retention moneys. Nothing in this subclause 37.6 shall affect the right of the Principal to recover from the Contractor the whole of any such moneys or any balance that remains owing."

[20] The gist of the argument for Built is that Pro-Invest was not entitled to call on the security in this case because there is no amount presently payable to Pro-Invest, and there is no basis to contend that any amount payable to Pro-Invest exceeds the amount payable to Built. Built contends that cl 37.6 requires that an amount be "payable" by Built to Pro-Invest and that under cl 35.1 an amount is only "payable" in respect of the rectification of defects when the Superintendent has first "certified" that monies are due and payable.

[21] Pro-Invest contends that there are three reasons for rejecting the argument advanced by Built:

(a) First, cl 35.1 expressly provides that the remedy available to Pro-Invest is "without prejudice to any other rights and remedies". Thus, Built has available to it a remedy such as the pursuit of damages for breach of contract.

(b) Secondly, cl 37.6 expressly recognises a right to have resort to the security in respect of payments for damages.

(c) Thirdly, the word "payable" does not require that Pro-Invest establish that Built is obliged to pay damages. It is sufficient that a bona fide entitlement be asserted.

[22] The drafting of the clauses relevant to this application is not a fine example of that art. Clause 5.6 commences: "Except as provided in subclause 5.2, the Contractor shall have no entitlement as a consequence of the conversion of a security into money." But, cl 5.2 does not afford the Contractor any entitlement – it provides the Principal with the ability to have recourse to the security in certain circumstances. In any event, cl 5.2 only relates to circumstances after the conversion of a security into money, not the circumstances before such a conversion.

[23] Clause 5.2 defines when the Principal may have recourse to the security, namely, where an entitlement exists pursuant to cl 37.6. The entitlements provided for in that clause are:

(a) The Principal may deduct, from any money due to the Contractor, any amount which is payable by the Contractor to the Principal.

(b) If the monies payable to the Contractor are insufficient to discharge the liability of the Contractor to pay that sum, then the Principal may have recourse to the security.

[24] A large part of the debate between the parties was about the meaning of the word "payable". Built argued that the position of Pro-Invest was a mere assertion as to the amounts owing and so was insufficient to found an entitlement to call on the security. As there had been no certification by the Superintendent of any amount owing, there could not be any "presently owing amount" under the contract. Built relied upon decisions which support that stance including *Queensland University of Technology v Project Constructions (Aust) Pty Ltd*[2] and *RCR O'Donnell Griffin Pty Ltd v Forge Group Power Pty Ltd.*[3]

[25] Pro-Invest relied upon a decision of the Court of Appeal of Western Australia in *CBP Contractors Pty Ltd v JKC Australia LNG Pty Ltd (No 2).*[4] In that case a similar clause was considered. It permitted a party to have recourse to security "at any time in order to recover any amounts that are payable … on demand." The party seeking the injunction contended that the word "payable" meant that the principal "may only make a demand upon the bank guarantees where it is objectively established that the amount demanded is due and payable." The argument was rejected on the basis that the waiver of the right to seek an injunction preventing recourse to the security makes "no sense and serves no purpose" if the word "payable" requires an uncontested or uncontestable right to be paid. The Court of Appeal concluded that the use of the word "payable" in that context did "not signify only an admitted sum or a sum objectively or authoritatively established …"[5]

[26] I do not accept that the decision in *CBP Contractors* assists Pro-Invest. As with so many of these clauses, minor changes can make a major difference. In cl 37.6 the reference to "any amount which is payable by the contractor to the Principal" appears to then be comprehended by the reference to "the Principal's *right* to payment". The reference to a "right to payment" allows for an argument that the "amount which is payable" is something which is more than a mere assertion of money owing. It is sufficient to raise a serious question about the proper construction of the relevant agreement.

Balance of convenience

[27] Clause 5.6 creates a "substantial hurdle [for Built] to overcome when dealing with the balance of convenience."[6] It has been said that the existence of such a clause "provides a very strong

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[2] [2003] 1 Qd R 259.

[3] [2016] QCA 214.

[4] [2017] WASCA 123.

[5] At [114].

[6] *Saipem Australia Pty Ltd v GLNG Operations Pty Ltd* [2014] QSC 310 at [69].

argument that [a party] has given up any right to injunctive relief on that ground, in a bargain which the Court should respect."[7]

[28] In *Clough Engineering Ltd v Oil and Natural Gas Corporation Ltd*[8] a Full Court of the Federal Court of Australia considered issues of construction and the importance of commercial practice in dealing with these types of clauses. They noted[9] that a "court ought not too readily favour a construction which is inconsistent with an agreed allocation of risk as to who is to be out of pocket pending resolution of the dispute about breach." The court went on to say:

> "[83] It follows that clear words will be required to support a construction which inhibits a beneficiary from calling on a performance guarantee where a breach is alleged in good faith, that is, non-fraudulently."

[29] Built submits that it will suffer significant reputational and other damage for which damages will not be an adequate remedy if the call made by Pro-Invest is not restrained. Evidence was led of the financial circumstances of Built and the manner in which it conducts its business through the use of performance bonds which a financier can decline to provide for any reason. Further, enquiries as to the financial status of Built would necessarily disclose the fact that one of its bonds had been "cashed". The damage that can be caused to a builder's reputation has been recognised in other decisions. See, for example, *Barclay Mowlem Construction Ltd v Simon Engineering (Aust) Pty Ltd.*[10]

[30] The purpose of the performance bond in this contract falls into that category referred to by Osborn and Ferguson JJA in *Sugar Australia Pty Ltd v Lend Lease Services Pty Ltd*[11] where they said:

> "[21] If a provision in a building contract requiring a performance bond is intended to operate as a risk allocation device pending the final determination of the dispute between the parties then that intention must be fundamental to a consideration of the justice of an application made to restrain recourse to such a bond pending final determination of the dispute."

[31] That consideration was endorsed by McMurdo JA in *RCR O'Donnell Griffin Pty Ltd* where his Honour said 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."[12]

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[7] *Saipem Australia Pty Ltd v GLNG Operations Pty Ltd* [2017] QSC 294 at [39].

[8] (2008) 249 ALR 458.

[9] At [82].

[10] (1991) 23 NSWLR 451.

[11] (2015) 31 BCL 407.

[12] At [97].

[32] This case differs from many of those to which I was referred because the call has already been made. What is sought is an order which would, in effect, prevent Pro-Invest from receiving the money the subject of the bond. There is, of course, a way in which Built might protect itself even though the call has been made and that is by paying the amount the subject of the call to Pro-Invest and then to take such action as it may be advised in the primary proceeding.

[33] I am not satisfied that the balance of convenience favours the making of the order sought by Built, particularly because of the nature of the restraint to which Built subjected itself by the terms of the contract. Built agreed to the allocation of risk which cl 5.6 entails and should not be allowed to contradict that in these circumstances.

Conclusion

[34] The application is dismissed.