

**COURT OF APPEAL**

**MUIR JA**

**Appeal No 10534 of 2014  
SC No 10469 of 2014**

**GENERAL TRADE INDUSTRIES PTY LTD  
ACN 105 470 497**

**Applicant**

**v**

**AGL ENERGY LIMITED  
ACN 115 061 375**

**Respondent**

**BRISBANE**

**FRIDAY, 7 NOVEMBER 2014**

**JUDGMENT**

**MUIR JA:** The applicant seeks an order that the respondent be restrained from making demand, calling upon or receiving the proceeds of two guarantees. One of the guarantees has already been “called upon”. Based on the material there was no complaint about that. The second guarantee was issued on 6 May of 2014.

The applicant’s case is based upon the construction of the release entered into between the parties and also upon the provisions of s 67J of the *Queensland Building and Construction Commission Act 1991* (Qld). The argument based on s 67J was not mounted before the primary judge. I am not prepared to hold that the argument advanced by the applicant is unarguable, but on the face of s 67J, giving it a literal – and I rather think fairly obvious – construction, the provision can only apply where a security is being used to obtain “an amount

owed under the contract”. “Amount owed” is defined in subsection (5) as a debt due from the contracted party for the contract to the contracting party because of circumstances associated with the contracted parties’ performance of the contract. The later qualifying words do not appear to relate to a calling up of moneys to be retained as security pursuant to a clause such as 5.3 of the construction contract.

The applicant’s other argument is based on clause 5 of the deed of release. Again, although it does not seem to me that the applicant has anything like the better side of the argument, I’m not prepared to find that there is no arguable case. A problem facing the applicant’s construction is that if the applicant is right, then clause 5(c) would appear to be pointless or largely so. Yet the parties have obviously set out to preserve rights and obligations under important clauses, such as 29, which deals with defective work, 34.6, which relates to practical completion and, significantly, 35, which makes provisions for defect liability. The parties to the deed are obviously setting out to preserve provisions relating to the role of security provided under the contract and, significantly for present purposes, the replacement of that security under clause 5.3.

The applicant argues that the entitlement to any security has ceased because the contract has been terminated. Reliance in that regard is placed on clause 5.4 of the contract, but, significantly, clause 5 does not talk in terms of termination and clause 5(c) specifically states that nothing in clause 5(a) terminates the obligations in the listed clauses. Having regard to those matters and bearing in mind the very limited evidence I have before me of any prejudice to the applicant, I have concluded that the stay should not be granted. I have an affidavit of Mr Pike who deposes to the prejudicing of the financing of the applicant and the affectation of its ability to obtain bank guarantees in the future if a call is made on either of the guarantees.

That assertion loses a great deal of credibility in circumstances in which a call was made in respect to one without any demur from the applicant. Also, it does not have a great deal of credibility in circumstances in which all that is to happen is that the moneys will be held in an account of a public listed company to await events which will reveal whether or not any

moneys can, in fact, be deployed from that fund. In those circumstances, s 67J will presumably apply, in any event, to the way in what the moneys can be taken and the notice that must be given. Accordingly, I order that the application be refused.

Now, the question of costs.

**MS DOWNES:** The respondent seeks costs, your Honour.

**MUIR JA:** Mr Foley.

**MR FOLEY:** I don't think there's too much I can say. Just bear with me for a moment, thanks, your Honour. Yes, there's nothing I can say to that.

**MUIR JA:** I order that the applicant pay the respondent's costs of the application.