SUPREME COURT OF QUEENSLAND

CITATION:	*Monadelphous Engineering Pty Ltd & Anor v Wiggins Island Coal Export Terminal Pty Ltd* [2014] QCA 330
PARTIES:	**MONADELPHOUS ENGINEERING PTY LTD** ABN 76 609 605 632 **MUHIBBAH CONSTRUCTIONS PTY LTD** ABN 76 609 605 632 (appellants) **v** **WIGGINS ISLAND COAL EXPORT TERMINAL PTY LTD** ABN 20 131 210 038 (respondent)
FILE NO/S:	Appeal No 10120 of 2014 SC No 9585 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	12 December 2014
DELIVERED AT:	Brisbane
HEARING DATE:	24 November 2014
JUDGES:	Muir, Fraser and Morrison JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs.**
CATCHWORDS:	EQUITY – EQUITABLE REMEDIES – INJUNCTIONS – INTERLOCUTORY INJUNCTIONS – SERIOUS QUESTION TO BE TRIED – GENERALLY – where the appellants ("MMM") entered into two contracts with the respondent ("WICET") to supply, install and construct works forming part of a coal export terminal – where MMM supplied to WICET bank guarantees to secure performance of MMM's obligations under the two contracts – where WICET sought to call upon those guarantees – where the primary judge, finding there were not serious questions to be tried, refused an application by MMM for an interlocutory injunction to restrain WICET from calling upon those guarantees – where MMM argues there was a serious question whether s 67J of the *Queensland Building and Construction Commission Act* ("the Act") precluded WICET from having any recourse to the

guarantees because each contract was a "building contract" – where it was agreed that if each contract was a "building contract" the Act's notice requirements would apply and WICET had not complied with those requirements – where this Court determined a "building contract" is a contract that involves any "building work" – whether there was a serious question to be tried that each contract involved "building work" as defined in Sch 2 of the Act and under regulations

STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – TO GIVE OPERATION AND EFFECT TO ACT – where MMM argues s 67J of the Act precludes WICET from having recourse to the guarantees because each contract was a "building contract" as defined in s 67AAA(1) – where parts of s 67AAA(1) are not reconcilable and are ambiguous – whether the term "building contract" under s 67AAA(1) refers to a contract requiring the carrying out of any "building work"

EQUITY – EQUITABLE REMEDIES – INJUNCTIONS – INTERLOCUTORY INJUNCTIONS – RELEVANT CONSIDERATIONS – GENERALLY – where the primary judge refused MMM's application for an interlocutory injunction, finding in any event the balance of convenience dictated that damages were an adequate remedy – where MMM gave evidence that demands on its bank guarantees would damage its reputation and ability to obtain future work – where this Court determined that there was a serious question to be tried with respect to only one of the two contracts and so WICET will have recourse to the guarantees under the other contract – whether in those circumstances there will be any further reputational damage if an injunction is not granted for the other contract – whether the balance of convenience favours granting an injunction with respect to the guarantees that one contract

Acts Interpretation Act 1954 (Qld), s 14B(1)(a), s 14B(3)(f), s 14D(b), s 14D(c)
Building and Construction Industry Payments Act 2004 (Qld), s 10(2), s 10(3)
Housing and Other Acts Amendment Act 2005 (Qld)
Queensland Building and Construction Commission Act 1991 (Qld), s 67AAA, s 67E(3), s 67J, s 67AAA, Sch 2
Queensland Building and Construction Commission Regulation 2003 (Qld), Sch 1AA
Queensland Building Services Authority Act 1991 (Qld), Pt 4A

Australian Alliance Assurance Co Ltd v Attorney-General (Qld) [1916] St R Qd 135, cited
Auztrak Pty Ltd v John Holland Pty Ltd [2006] QSC 103, considered
Minister for Resources v Dover Fisheries Pty Ltd (1993) 43 FCR 565; [1993] FCA 366, cited

Morton Engineering Co Pty Ltd v Stork Wescon Australia Pty Ltd (1999) 15 BCL 192, considered
Morton Engineering Co Pty Ltd v Stork Wescon Australia Pty Ltd [2000] 2 Qd R 148; [1999] QCA 61, cited
O'Connell v Nixon (2007) 16 VR 440; [2007] VSCA 131, cited
Walton Construction (Qld) Pty Ltd & Anor v Venture Management Resources International Pty Ltd & Anor [2010] QSC 31, cited

COUNSEL: T Matthews QC, with M Drysdale, for the appellants
A Crowe QC, with P Telford, for the respondent

SOLICITORS: Holding Redlich for the appellants
Minter Ellison for the respondent

[1] **MUIR JA:** I agree that the appeal should be dismissed with costs for the reasons given by Fraser JA.

[2] **FRASER JA:** A judge in the Trial Division refused an application by the appellants ("MMM") for an interlocutory injunction to restrain the respondent ("WICET") from calling upon bank guarantees supplied by MMM to WICET under two contracts and seeking the return of some of those bank guarantees. The primary judge held that there was no serious question to be tried and that in any event an interlocutory injunction should be refused because damages were an adequate remedy. MMM challenges both conclusions.

Serious question to be tried

[3] In the Trial Division the question whether there was a serious question to be tried turned upon the effect of two contracts between the parties and upon the proper construction and application of provisions of the *Queensland Building and Construction Commission Act* 1991 (Qld). The relevant contracts are the "GC12 Contract" and the "PE95 Contract". Under those contracts MMM contracted to supply, install and construct works forming part of a multibillion dollar coal export terminal being constructed for WICET at the Port of Gladstone. The GC12 Contract generally described the work as "all Stage 1 offshore plant and infrastructure". The PE95 Contract generally described the work as including "all works associated with…onsite installation / hook-up and completion of commissioning for Shiploader SL1 and its towed tripper."

[4] MMM supplied to WICET bank guarantees to secure the performance of MMM's obligations under each contract. The total value of the bank guarantees retained by WICET was about $6 million under the PE95 Contract and about $32 million under the GC12 Contract. Clause 5.5 of each contract entitled WICET to have recourse to the bank guarantees in certain circumstances, including where WICET had a bona fide claim against MMM for liquidated or unliquidated damages. The clause provided that MMM would not seek to restrain WICET from having recourse to the guarantees. The primary judge found that the evidence raised questions whether some of WICET's claims were bona fide but that WICET's claim for liquidated damages under each contract was at least arguable. In relation to each contract, the amount of WICET's claim for liquidated damages was not less than the total value of the guarantees. It followed that, according to cl 5.5 of each contract, WICET was entitled to have recourse to the guarantees to satisfy its claim for liquidated damages. MMM does not challenge that conclusion.

[5] MMM challenges the primary judge's conclusion that there was no serious question to be tried that s 67J in Pt 4A of the *Queensland Building and Construction Commission Act* precluded WICET from having recourse to any of the guarantees under the contracts. Section 67J of that Act precludes a party to a "building contract" from using a security or retention amount to obtain an amount owed under the contract unless within a specified period the party has given notice in writing to the other party of the proposed use and of the amount owed. WICET did not challenge MMM's contentions that the liquidated damages claimed by WICET did not constitute an "amount owed" within the meaning of a definition in s 67J(5)[1] and that WICET had not given, and it was too late for it to give, the required notice. It follows that in relation to each contract s 67J precluded WICET from having recourse to any of the guarantees if the contract was a "building contract".

[6] The issues in this aspect of the appeal concern the proper construction and application of the definition of that term in Pt 4A of the *Queensland Building and Construction Commission Act*. Section 67AAA defines "building contract" as follows:

> "(1) For this part, a ***building contract*** means a contract or other arrangement for carrying out building work in Queensland but does not include—
>
> (a) a domestic building contract; or
>
> (b) a contract exclusively for construction work that is not building work.
>
> (2) In this section—
>
> **construction work** see the *Building and Construction Industry Payments Act 2004*, section 10."

[7] Sch 2 of that Act defines the meaning of "building work" in ten paragraphs and a concluding statement that it "does not include work of a kind excluded by regulation from the ambit of this definition". The potentially relevant paragraphs appear to be "(a) the erection or construction of a building", "(c) the provision of lighting, heating, ventilation, airconditioning, water supply, sewerage or drainage in connection with a building", and "(e) any site work (including the construction of retaining structures) related to work of a kind referred to above". Sch 2 defines "building" as including "any fixed structure".

[8] WICET contended that all of the work under both contracts was of a kind excluded by regulation from the ambit of the definition. The relevant regulation is s 5(1) of the *Queensland Building and Construction Commission Regulation* 2003 ("the Regulation"). It provides that for the definition of building work in Schedule 2 of the Act "work stated in schedule 1AA is not building work". Schedule 1AA describes work in 52 separate items. Item 19, which is headed "Work on harbours, wharfs and other maritime structures", refers to "[c]onstruction, maintenance or repair of harbours, wharfs and other maritime structures, unless the structures are buildings for residential purposes, or are storage or service facilities". Item 27, which is headed "Installation of manufacturing equipment", refers to "[i]nstallation of manufacturing equipment or equipment for hoisting, conveying or transporting materials or products, including luggage, mail or primary produce, but excluding the installation of fixed structures providing shelter for the equipment."

[9] The primary judge observed that the statutory construction issue ultimately distilled itself to the proper meaning of the term "building work". The primary judge considered

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1 See *Multiplex Ltd v Qantas Airways Ltd* [2006] QCA 337 at [6].

that the items in the regulation generally excluded large infrastructure projects although they also excluded some minor work; it was "tolerably clear" that the legislature intended to exclude major infrastructure projects. MMM's submission that the contracts were for building work because the work comprehended structures which might be characterised as storage and service facilities should not be accepted, because any storage facilities would be structures associated with onshore stockpile of coal and any service facilities would be involved with the delivery of coal to the stockpile. MMM's description of structures associated with the jetty, wharf and shiploader as "principally storage and service facilities" involved a strained interpretation of item 19 of the Regulation. The primary judge concluded that the work of building the jetty and wharf and installing the shiploader were properly described as the construction and maintenance of maritime structures other than storage or service facilities. They were therefore expressly excluded from the definition of "building work". The primary judge considered that this approach to construction was not inconsistent with the approach taken by Derrington J in *Morton Engineering Co Pty Ltd v Stork Wescon Australia Pty Ltd*.[2] In the primary judge's view, MMM's construction of s 67AAA did not give sufficient weight to the structure of that provision. The primary judge also held that an explanatory memorandum relating to a Bill for the relevant provisions of the Act referred to "building work" in a way which supported WICET's construction. The primary judge added that the shiploader was in any event exempt under item 27 of Sch 1AA of the Regulation.

Serious question to be tried: the arguments on appeal

[10] MMM argued that the primary judge erred in finding that major infrastructure projects were excluded from the operation of Pt 4A of the *Queensland Building and Construction Commission Act*. It argued that s 67AAA(1)(b) implied that a contract for construction work of which some is and some is not "building work" is a "building contract"; in other words, a contract must be exclusively for work that is not "building work" if it is to be excluded from the definition of a "building contract". The definition of "building work" extended to include "any fixed structure" whether or not it had walls and a roof[3] and both contracts required MMM to undertake at least some such work. Because the contracts were not exclusively for work which was excluded from the definition by the concluding statement in Sch 2 of the Act, each contract was a "building contract". In relation to item 19 of Sch 1AA of the Regulation, MMM argued that it did not exclude the work under either contract from the definition of "building work" because the relevant "maritime structures" included "storage or service facilities". In MMM's submission, the primary judge's conclusion that "any storage facilities would be structures associated with the onshore stockpile of coal, and service facilities would be those involved with its delivery to the stockpile" was not reasonably open on the evidence. MMM argued that its construction of s 67AAA was supported by the legislative history, the expressed purposes of the *Queensland Building and Construction of Commission Act*, and extrinsic evidence of the legislative purpose.

[11] WICET argued that the primary judge was correct for the reasons he gave in holding that there was no serious question to be tried concerning the operation of s 67J of the *Queensland Building and Construction Commission Act*. The focus of

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2 (1999) 15 BCL 192. An appeal to the Court of Appeal was dismissed: *Morton Engineering Co Pty Ltd v Stork Wescon Australia Pty Ltd* [2000] 2 Qd R 148.

3 The appellant cited *Ooralea Developments Pty Ltd v Civil Contractors (Aust) Pty Ltd* [2013] QSC 254 at [27].

s 67AAA(1) was upon the character of the contract as a contract for carrying out building work. The concluding statement in the definition of "building work" in Sch 2 of the Act excluded from the definition work "of a kind" excluded by regulation. WICET argued that work which was of that kind could not constitute "building work" in terms of the introductory words of s 67AAA(1), with the result that it was unnecessary to consider the exclusion in s 67AAA(1)(b), because that exclusion had no scope for operation where a contract was not one for carrying out "building work". WICET also argued that s 67AAA(1)(b) did not qualify the operation of each item in Sch 1AA of the Regulation so as to require the work described within the item to be "exclusively for" construction work that was not building work. The presence in the contract work of incidental elements associated with the construction of the jetty or the installation of the shiploader which might otherwise be described as "storage or service facilities" could not preclude the application of item 19 of the Regulation. The primary judge was right to conclude that all the work in the building of the jetty and wharf and the installation of the shiploader amounted to the construction and maintenance of maritime structures other than storage or service facilities. The primary judge was also correct in finding that the shiploader contract was in any event excluded from the definition of "building work" by item 27 of Sch 1AA.

Meaning of "building contract"

[12] It is arguable that the exclusion in s 67AAA(1)(b) of a contract "exclusively for construction work that is not building work" has no work to do because such a contract in any event could not be one "for carrying out building work…" within the meaning of the introductory words of the subsection. Those parts of the subsection could not be reconciled by the possibility that some "building work" might not be "construction work"[4] because work which is "not building work" within s 67AAA(1)(b) must also not be "building work" within the introductory words. Upon that construction, however, paragraph (b) would have no practical effect. It is therefore necessary to consider whether the section can be given a different construction which attributes meaning and effect to all of its components and produces a reasonable result.[5] The general principle that all words in a statute must prima facie be given meaning and effect applies with additional force where the word in question has been added by amendment and it is also necessary to give apparently redundant words a construction which "produces the greatest harmony and the least inconsistency".[6]

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4 Section 10(2) of the *Building and Construction Industry Payments Act* 2004 declares that "***construction work*** includes building work within the meaning of the *Queensland Building and Construction Commission Act 1991*", but that is made subject to the provision in s 10(3) that "***construction work*** does not include …(a) the drilling for, or extraction of, oil or natural gas; (b) the extraction, whether by underground or surface working, of minerals, including tunnelling or boring, or constructing underground works, for that purpose." The work described in s 10(3) is not specifically excluded by the definition of "building work" in Sch 2 of the *Queensland Building and Construction Commission Act* 1991, although it may be excluded by item 28 of Sch 1AA of the Regulation as "Construction work in mining".

5 See *Minister for Resources v Dover Fisheries Pty Ltd* (1993) 43 FCR 565 at 574 per Gummow J, referring to *AMP Inc v Utilux Pty Ltd* [1972] RPC 103 at 109 per Lord Reid. Gummow J referred also to other decisions including *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation (Cth)* (1981) 147 CLR 297 at 321 per Mason and Wilson JJ.

6 See *Statutory Interpretation in Australia*, 7th Edition, P S Pearce & Geddes at [2.26] quoting from *Australian Alliance Assurance Co Ltd v Attorney-General (Qld)* [1916] St R Qd 135 at 161 per Cooper CJ and referring to numerous decisions.

[13] The expression "contract or other arrangement for carrying out building work" might comprehend a contract or other arrangement which requires the carrying out of: building work only; mostly building work; a substantial amount of building work; or any building work. Paragraph (b) resolves that ambiguity if it is treated as implying that the definition of "building contract" refers to a contract or other arrangement which requires the carrying out of any building work. Such an implication seems appropriate in order to give some effect to what otherwise would be a meaningless exclusion of contracts which include no component of "building work". It is true that the exclusion in paragraph (b) does not necessarily convey such an implication if it is considered in isolation from the balance of the subsection. It is also true that some terminological differences between the introductory words of the subsection and the words of paragraph (b) preclude a completely satisfactory reconciliation of those parts of the subsection. Nevertheless, when the subsection is considered as a whole and with a view to giving meaning to each part of it, the construction that a "building contract" is a contract or other arrangement (other than a domestic building contract) which requires the carrying out of any building work in Queensland seems open on the text and substantially reconciles the different parts of the subsection in a way which gives an apparently reasonable meaning to the subsection as a whole.

[14] Support for that construction may be derived from extrinsic evidence of the legislative intention. The *Queensland Building Services Authority Amendment Act* 1999 introduced Pt 4A into the *Queensland Building Services Authority Act* 1991 (which has since been renamed as the *Queensland Building and Construction Commission Act* 1991). The definition of "building contract" (which was then in s 67A) referred to "a contract or other arrangement, other than a domestic building contract, for carrying out building work in Queensland". That definition was replaced by the *Building and Construction Industry Payments Act* 2004. The replacement definition, in s 67AAA(1), defined "building contract" as meaning "a contract or other arrangement for carrying out building work in Queensland but does not include…a contract that includes construction work that is not building work". Before that amendment commenced, however, the *Housing and Other Acts Amendment Act* 2005 substituted the words "exclusively for" for the words "that includes" in paragraph (b). The definition has not been further amended.

[15] Consistently with that legislative history, the explanatory notes for the relevant clause of the Bill for the *Housing and Other Acts Amendment Act* 2005 described the purpose of the amendment as being "to make it clear that … if a party enters into a mixed contract to undertake 'building work' and 'construction work that is not building work' they have entered into a 'building contract' and the protection mechanisms of Part 4 of the QBSA Act 1991 apply; and … if a party enters into a contract solely for 'construction work' that is not 'building work' (eg a contract solely for electrical work[7]), it is not a 'building contract' and therefore outside of Part 4A of the QBSA Act 1991." Similarly, the second reading speech for the *Housing and Other Acts Amendment Bill* 2005 included a statement that the Bill would "reinforce the requirement that all construction contracts that include any amount of building work will be subject to the contractual protection provisions of part 4A of the Queensland Building Services Authority Act 1991". This material may be taken into account in the construction of this ambiguous provision.[8] It tends to confirm that the definition

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7 The reference to "electrical work" is explained by the presence in Sch 1AA of the Regulation (which was then already in force) of item 20, "electrical work under the *Electrical Safety Act 2002*."

8 *Acts Interpretation Act* 1954, s 14B(1)(a), (3)(f).

of "building contract" refers to a contract or other arrangement (other than a domestic building contract) which requires the carrying out of any building work in Queensland. I would hold that this is the correct construction of s 67AAA(1).

[16] MMM also referred to the object of the *Queensland Building and Construction Commission Act* 1991 expressed in s 3(a)(ii), "to regulate the building industry… to achieve a reasonable balance between the interests of building contractors and consumers…". What balance has been found by the legislature to be reasonable in relation to the contracts caught by Pt 4A may be ascertained only by construing the statutory provisions, including the definitions of "building contract", "building", and "building work". The objects in s 3 of the Act are expressed too generally to be of assistance in that exercise.

The meaning of "building work"

[17] As the primary judge considered, the issue ultimately concerns the effect of the definition of "building work". In this appeal the focus was upon the concluding statement in the definition in Sch 2 of the Act ("the definition") and items 19 and 27 in Sch 1AA of the Regulation. Various features of the definition and the items contribute to difficulties in some cases in deciding whether particular work is of a kind described in those or other items:

(a) Paragraph (a) is an important part of the definition of "building work" but its scope depends upon the meaning of "building", which is not defined except in so far as its ordinary meaning is extended to include "any fixed structure".

(b) Other paragraphs of the definition extend the meaning of "building work" a great distance beyond its ordinary meaning but are then substantially cut back by items in Sch 1AA. For example, para (f) of the definition includes "the preparation of plans or specifications for the performance of building work", but work of that kind which is performed by architects, engineers and licensed surveyors in the course of their professional practices is within items 4, 5 and 6 in Sch 1AA.

(c) Some work which falls squarely within the ordinary meaning of "building work" is expressly excluded, such as certain farm buildings (item 1) and any work performed by various governments or government instrumentalities or agencies (items 7, 8 and 9).

(d) Some items comprehend only minor work, such as certain work of a value of less than $3,300 (item 2) and some items comprehend both minor work and large scale infrastructure (including, for example, item 22, which comprehends the construction of a dam, and items 19 and 27).

(e) Some items comprehend work which would appear not to fall within any paragraph of the definition of "building work". For example, item 24 refers to the construction "of a sign that does not have a supporting structure" and gives the example of "a sign that consists of only a flat sheet of acrylic resin, fabric, metal or wood'".

[18] Some general statements may be made about the definition of "building work". First, whilst there are some exceptions to the general rule that delegated legislation under an Act does not assist in the construction of the Act,[9] the absence of any

[9] See *O'Connell v Nixon* (2007) 16 VR 440 at 447 [28] per Nettle JA (Chernov and Redlich JJA agreeing).

consistent theme and the presence of anomalies in Sch 1AA (such as that identified in (e) of the preceding paragraph) confirm my view that this is not one of those exceptional cases; the Regulation does not influence the meaning of the statutory definitions or any other aspect of the Act. Secondly, if the relevant work is "of a kind" described in an item it is outside the definition of "building work". It is therefore not necessary that the work be precisely described by the item. Thirdly, the legislative intention underlying s 67AAA(1) as revealed by the extrinsic material discussed earlier does not shed any light upon the definition of "building work" or upon the scope of any item in Sch 1AA. Neither topic is discussed in that extrinsic material. Fourthly, *Morton Engineering Co Pty Ltd v Stork Wescon Australia Pty Ltd* at first instance endorsed the approach that the items "should be given a reasonably liberal construction consistent with a practical application of what the legislature intended" and which "would avoid any unduly strict or technical limitations".[10] Similarly, on appeal it was held that the items should be given a "broad meaning".[11]

The PE95 Contract

[19] The PE95 Contract describes itself as being for "all works associated with…onsite installation / hook-up and completion of commissioning for Shiploader SL1 and its towed tripper". It includes a "Scope of Work" section which describes Stage 1 of the larger WICET Development as including "remote rail receival station, overland unloading conveyor, stockyard with stacking and reclaiming conveyors, stacking machines, loading conveyors, 1.8 km long jetty and offshore wharf with a single Shiploader." Clause 1.2 of the same section of the contract states that "…PE95 generally includes all works associated with the supply, manufacture, protective treatment, workshop testing, offsite pre-assembly and commissioning, delivery to site, onsite installation / hook-up and completion of commissioning for Shiploader SL1 and its towed tripper." That description is substantially repeated with some elaboration as the first paragraph of cl 2.1 under the heading, "2. Scope of work". It is consistent with what is shown on a photograph which Mr Tanti, a project manager employed by MMM, described as showing the shiploader "installed on the wharf rail of the [WICET'S] Island Coal Export Terminal."[12]

[20] The location of the shiploader on a rail on the side of the wharf adjacent to the water and its function compel the conclusions that it is or forms part of a "maritime structure" within the meaning of item 19 and that it is also "… equipment for hoisting, conveying or transporting materials…" within the meaning of item 27. MMM argued, however, that certain provisions of the PE95 Contract established an arguable case that specific parts of the work fell within one or more of the paragraphs in the definition of "building work" and were not excluded from that definition by item 19 or item 27.

[21] The concluding exception in item 19 does not apply merely where a part of a maritime structure is a residence, a storage facility, or a service facility. According to its own terms, the exception operates only where the maritime structure itself constitutes a building for residential purposes or a storage or service facility. The shiploader is obviously not a residence and its function also disqualifies it as

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10 *Morton Engineering Co Pty Ltd v Stork Wescon Australia Pty Ltd* (1999) 15 BCL 192 at 195 – 196 (Derrington J).

11 *Morton Engineering Co Pty Ltd v Stork Wescon Australia Pty Ltd* [2000] 2 Qd R 148, especially at 152 [11] (de Jersey CJ, Pincus and Thomas JJA).

12 Affidavit of Mr Tanti, 13 Oct 2014, para 8; AB 490.

a storage facility. The intended meaning of "service facilities" in this context is not easy to discern, but the inclusion in item 19 of "wharfs" would be rendered otiose if the function of a wharf in the loading and unloading of ships and boats was sufficient to characterise it as a "service facility". Since the shiploader has the same function and may even be regarded as being a part of the wharf upon which it moves on fixed rails, it is not a "service facility" for the purposes of item 19. Accordingly the exception in the concluding words of item 19 does not apply. The question then is whether the work under the PE95 Contract is of a kind described in item 19 as "construction … of … maritime structures". Because that description is wider than the description in item 27 it is not necessary to consider the content of the latter item.

[22] It is arguable that all of the work required by the PE95 Contract is necessarily within item 19 merely on the basis that the work is part of stage 1 of the WICET development and that might itself constitute a "maritime structure", namely a coal export port, which also could not be characterised as a building for residential purposes or as a storage or service facility. An analogy might be drawn with a major harbour, which item 19 treats as an example of a "maritime structure" even though it may comprise a great extent and variety of different works, each of which otherwise might be described as a separate "building" or "structure". The purpose of all of the work in stage 1 is to create a facility for the export of coal by ship. Reference to dictionaries confirms that the ordinary meaning of "maritime" includes "relating to the sea" or "situated near the sea" (see, for example, the Chambers Dictionary, 11th Ed). MMM's argument suggested that "maritime structures" are confined to structures in the sea, but wharves, jetties, navigation marks, and lighthouses would all be regarded as "maritime structures" and some of those structures may be built on land. On the other hand, the descriptions of some aspects of stage 1, such as the "remote rail receival station" and the "overland unloading conveyor", suggest that their functional and spatial relationships with the sea might be too remote to qualify them as "maritime structures". Evidence about the functions and locations of those and other structures to be built as part of stage 1 might be important in resolving this issue. The primary judge did not hold, and I would not hold, that MMM does not have a case fit for trial that some aspects of the construction of stage 1 amount to "building work".

[23] A narrower approach is to treat item 19 as comprehending all work which is directly or indirectly required to produce the shiploader. However the statutory criterion is not whether the relevant work is directly or indirectly necessary for the production of a structure described in an item. It is whether the work is of a kind stated in the item. Whilst that criterion does not require the work to be precisely described in the item, it does require the work to fall within a broad and practical interpretation of the item. It is necessary to apply that criterion in deciding whether the particular provisions of the PE95 Contract upon which MMM relied require work which is not excluded from the definition of "building work".

[24] MMM referred to cl 2.13 in the "Scope of Works" section of the PE95 Contract. That clause obliged MMM to "be responsible for the engineering design, supply and installation of the necessary temporary services and structures to enable the specified commissioning works to be completed at [MMM's] preassembly yard", including "but not necessarily be limited to… [p]ower supply…[w]ater supply…". It would be strange to include the work of commissioning the shiploader within "building work" when the work of assembling the shiploader is excluded from that definition. The commissioning works are an integral aspect of the work of constructing

the shiploader. More generally, the "temporary" character of any services and structures required by this clause points to the closeness of the relationship between the work upon those services and structures and the creation of the shiploader. I would hold that it is work "of a kind" described in item 19 as the construction of a maritime structure.

[25] MMM also referred to paragraphs (b), (f), and (p) in cl 2.1 of the PE95 Contract in the "Scope of Works" section. Those paragraphs are preceded by the introductory words "[MMM] shall make allowance for".

[26] Clause 2.1(b) refers to "Site establishment and disestablishment including provision of construction offices, facilities, plant and equipment (both onsite and at [MMM's] preassembly yard) including temporary fencing as required for [MMM's] security." This work seems a further step removed from the direct work of constructing the shiploader, but the temporary character of any structure produced by the work is again apparent. For the reasons given in relation to cl 2.13 and also bearing in mind the necessity to adopt a liberal and practical interpretation of item 19, this work is within, albeit nearer the outer bounds of, work of a kind described in that item as construction of a maritime structure.

[27] Clause 2.1(f) refers to "Design, supply, installation and subsequent removal of any temporary works required, including, for instance, hardstand or temporary access to the erection site and temporary structures and supports as necessary to complete the Works." The erection of "temporary structures and supports" seems an integral aspect of the construction of the shiploader. In that and other respects the emphasis upon the temporary nature of the works again points to the closeness of the relationship between this work and the creation of the shiploader. This is also work of a kind described in item 19.

[28] Clause 2.1(p) refers to "All other works necessary to complete the Works as described in the Contract documents whether or not detailed in this Scope of Work." Nothing appears to exclude this from the work of constructing the shiploader.

[29] In summary, the PE95 Contract is exclusively for "all works associated with…onsite installation / hook-up and completion of commissioning for Shiploader SL1 and its towed tripper", a description of works of a kind which is excluded from the definition of "building work" by item 19 of Sch 1AA in the Regulation. The particular contractual provisions upon which MMM relied do not justify a contrary conclusion. I am not persuaded that MMM might succeed at a trial in proving that the preparatory, incidental and temporary work described in those provisions amount to "building work". In the result, MMM did not demonstrate that there was a serious question to be tried that the PE95 contract was a "building contract" as defined in s 67AAA(1) of the *Queensland Building and Construction Commission Act* 1991. It therefore did not demonstrate that there was a serious question to be tried that s 67J of that Act precluded WICET from having recourse to any of the guarantees supplied by MMM under the PE95 Contract. For these reasons I would affirm the primary judge's decision to refuse the interlocutory injunction claimed by MMM in relation to the PE95 Contract upon the ground that there was no serious question to be tried.

[30] I would add that it is open to question whether any of the contractual provisions upon which MMM relied describe work which is "building work" within the meaning of the relevant paragraphs of the definition of that term. "Building work"

described in paragraph (a) is necessary if the work described in paragraphs (c) and (e) is to be characterised as such work. The definition of "building", upon which the relevant aspect of the scope of paragraph (a) appears to hinge in this case, gives as examples of a "fixed structure" a fence "other than a temporary fence", a "water tank connected to the stormwater system for a building", and an "inground swimming pool or an aboveground pool fixed to the ground." The examples and the text of the definition "are to be read in the context of each other and the other provisions of the Act, but, if the example and the provision so read are inconsistent, the provision prevails."[13] There is no such inconsistency here. For that reason, the use of the example to select the intended meaning of "fixed structure" from amongst the available meanings does not contravene the provision in s 14D(b) of the *Acts Interpretation Act* that an example "does not limit, but may extend, the meaning of the provision". Consistently with the ordinary meaning of "fixed structure" and with what one would expect in an Act regulating the building industry, the examples suggest that the product of construction work is not within paragraph (a) of the definition of "building work" if it is not fixed to the soil in such a way as to require it to be treated as part of the land rather than as a chattel. The requisite degree of fixation must depend upon the circumstances revealed by the evidence, but the expression "fixed structure" in this context may not comprehend works to facilitate and to endure only during the construction of a building, which are designed and constructed in such a way as to be readily removed upon completion of the building, and which a building contract requires the contractor to remove upon completion of the building.[14] That seems to describe all of the work required by the clauses upon which MMM relied. However, as this point was not the subject of detailed argument, I refrain from expressing a final conclusion upon it.

The GC12 Contract

[31] The GC12 Contract described itself as being for "Offshore Marine Works: Approach Jetty and Ship Berth". That suggests that the object of the contract is the construction of a maritime structure of a kind excluded from the definition of "building work" by item 19 of Sch 1AA.

[32] MMM again relied upon contractual provisions associated with the fulfilment of the contract's main object found in the "Scope of Works" section of the contract. Clause 1.2 describes the GC12 "construction package" as including "all Stage 1 offshore plant and infrastructure including but not necessarily limited to the following:…". There follow some 26 brief descriptions, most of which appear to involve items forming an integral part of the offshore marine works but some of which are more remotely associated with those works. MMM referred to the items described as "Wharf crib and offices building for operations, maritime security, quarantine and customs (excluding supply)" and "Wharf Substation No. 3 (excluding supply)". MMM referred also to part "2. Scope of Work", which occupies 29 pages of the GC12 Contract. The first paragraph of cl 2.1 describes the work as comprehending "the supply… installation ... and commissioning of all marine, civil, piling, concrete, structural, mechanical, piping, electrical, control, communication and fire system works as detailed herein and in the Specifications…". (I note in passing that "civil" works are included in addition to "marine" works.)

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13 *Acts Interpretation Act* 1954, s 14D(c).

14 Compare Derrington J's statement in *Morton Engineering Co Pty Ltd v Stork Wescon Australia Pty Ltd* (1999) 15 BCL 192 at 195 that "any fixed structure" may include "any structure that is fixed, even if only temporarily." The definition construed in that case did not include the examples which appear in the current definition.

[33] MMM also referred to the following paragraphs of cl 2.1 which describe matters for which it was obliged to make allowance:

> "(b) Site establishment and disestablishment including provision of construction offices, facilities, plant and equipment including temporary fencing as required for the Contractor's security on site and in their offsite construction area.
>
> (c) Provision of temporary electricity, water, data and telephonic communications during execution of Works onsite.
>
> …
>
> (f) Supply, installation and subsequent removal of any temporary works required, including for instance hardstand or temporary access to the erection site and temporary structures and supports as necessary to complete the Works."

[34] The quoted clauses are mostly very similar to provisions in the PE95 Contract which I have concluded do not supply evidence that "building work" is required to be carried out. In this case, however, MMM adduced additional evidence which bears upon the issue. For present purposes it is necessary to refer to only some of that evidence.

[35] Mr Perkins, a project manager engaged by MMM, referred to the "Scope of Work" section of the GC12 Contract and deposed that as part of the scope of works MMM carried out the following work:

> "(a) installation of concrete footings for buildings, along with slabs for walkways, outdoor meeting areas and workshop areas;
>
> (b) construction of a bus 'drop off' area and car park;
>
> (c) installation of offices, crib facilities, kitchen, toilets, and other amenities;
>
> (d) construction of roofs between buildings;
>
> (e) installation of tanks and associated piping for the supply of drinking water and the storage of sewerage;
>
> (t) installation of generators and associated wiring to power the offices and crib huts;
>
> (g) installation of storage and work shop areas; and
>
> (h) installation of temporary fencing to secure storage and work shop areas."

[36] Mr Perkins also referred to and exhibited a photograph of the facility. Mr Meulman, who was employed by MMM as the area manager of the wharf for the GC12 Contract, referred to a copy of the same photograph which was marked up to identify what was said to be building work constructed on land. Mr Meulman also referred to drawings, plans, specifications, and other documents which refer to this work. Some of the buildings are described as being temporary ("temporary office and amenities buildings (including meeting room, training room, crib facilities, kitchen and toilets)"), but some may not necessarily be in that category (for example, "workshop area", "generators", "drinking water tanks", "sewerage tanks", and "storage area.") The effect of Mr Meulman's evidence is that all of this work was specified as part of the scope of work under the GC12 Contract. At least some of the structures depicted on the photograph appear to be both substantial and a considerable distance from the waterline.

[37] At a trial the evidence might suggest that the whole of this export coal terminal, or at least the whole of the work within the GC12 Contract, should be treated as

a single "maritime structure", just as a single "harbour" may comprise a variety of different works, some in the sea and some on land above high water mark. At this interlocutory stage, however, the evidence drawn to the Court's attention reveals an arguable case that the GC12 Contract required MMM to construct fixed structures which are physically and functionally quite distinct from the wharf, jetty, shiploader, and other works which comprise the relevant maritime structure or structures within item 19 and the equipment described in item 27. That being so, it is arguable that some of the work required by this contract falls within one of the paragraphs in the definition of "building work" and is not within either of the items in Sch 1AA upon which WICET relied as excluding the work from that definition.

[38] It follows that, although the evidence at a trial might paint a different picture, upon the construction of s 67AAA(1) which I prefer, there is a serious question to be tried whether the GC12 Contract is a "building contract" as defined in s 67AAA(1) of the *Queensland Building and Construction Commission Act* 1991. There is thus a serious question to be tried whether MMM is entitled to an injunction restraining WICET from having recourse to the guarantees supplied by MMM under the GC12 Contract.

Balance of convenience

[39] As I have mentioned, the primary judge found that there was no serious question to be tried in relation to either contract. The primary judge went on to hold that injunctive relief should be refused in any event because the balance of convenience dictated that damages were an adequate remedy. The primary judge acknowledged the evidence adduced by MMM to the effect that calling up the bank guarantees would diminish its prospects of obtaining further work and effect its ability to obtain future bank guarantees, but assessed that concern in the light of other factors: the total value of WICET's claims is about $160,000,000 but the total amount of available security under the guarantees was only about $38,000,000; the total contract sum for both contracts was about $390,000,000 but WICET had so far paid in excess of $500,000,000 although the work was not yet complete; and WICET was in a strong financial position to meet any damages ultimately awarded against it. The primary judge noted that one of the deponents for WICET, Ms Zeljko, deposed to the effect that MMM in truth faced little or no reputational risk, but observed that a contractor's right to rely upon such a risk as a material factor had been widely recognised in the cases: *Abigroup Contractors Pty Ltd v Peninsular Balmain Pty Ltd*,[15] *Barclay Mowlem Construction Ltd v Simon Engineering (Australia) Pty Ltd*,[16] *Reed Construction Services Pty Ltd v Kheng Seng (Australia) Pty Ltd*, [17] *Austrak Pty Ltd v John Holland Pty Ltd*,[18] and *Walton Construction (Qld) Pty Ltd & Anor v Venture Management Resources International Pty Ltd & Anor*.[19] The primary judge considered, however, that the evidence did not establish such a serious high level risk that the calling of the bank guarantees would cause irreparable harm, as was found by Douglas J in *Walton Construction v Venture Management Resources International*. The primary judge also took into account that WICET appeared to have a valid contractual entitlement to have recourse to the security, having established a bona fide claim in circumstances in which MMM had made an express contractual promise that it would not seek to injunct or otherwise restrain WICET from having recourse to the security.

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15 Unreported, Supreme Court of NSW, SC No 55034 of 1999, 2 December 1999.
16 (1991) 23 NSWLR 451.
17 Unreported, Supreme Court of NSW, SC No 4690 of 1998, 20 November 1998.
18 [2006] QSC 103.
19 [2010] QSC 31.

[40] WICET argued that the primary judge identified and applied the relevant principles and appropriately distinguished the evidence in this case from the evidence in cases in which reputational harm to a contractor was found to justify the grant of an interlocutory injunction. The primary judge's focus upon the allocation of risk in the contract was submitted to be consistent with authorities collected in *Ceresola TLS AG v Thiess Pty Ltd*.[20]

[41] I accept the submission for MMM that the primary judge's assessment was influenced by his conclusion that there was no serious question to be tried that s 67J of the *Queensland Building and Construction Commission Act* prohibited WICET from having recourse to the guarantees. A provision of a building contract which is inconsistent with a provision of Pt 4A has effect only to the extent that it is not inconsistent with the provisions of Pt 4A (s 67E(3)). Specifically, "a building contract is unenforceable … to the extent that the contract provides for…security in a way that is inconsistent with a condition to which the contract is subject under division 2" (s 67E(3)). Accordingly, the provisions of the GC12 Contract which allocate the risk that the guarantees will be called upon by WICET to MMM will have no effect if MMM succeeds at trial upon the serious question to be tried upon which it relies to claim the injunction. Those contractual provisions therefore cannot be relied upon when assessing the harm MMM will sustain if an interlocutory injunction is withheld and MMM succeeds at the trial.[21]

[42] Upon this point MMM relied upon affidavits by its employees Mr Mutch, Mr Tanti, and Mr Perkins. Mr Mutch is MMM's General Manager – Engineering Construction Infrastructure and has held various general manager positions with MMM for 16 years. He deposed that the number of times a contractor's security had been cashed was an important part of the contractor's reputation in the construction industry, that security history would be part of a financial audit conducted by prospective clients, government clients pay particular attention to whether securities provided in other projects had been the subject of recourse, private clients also paid close attention to the security history of a contractor, and MMM's reputation was critical for its ability to acquire new work. Mr Mutch deposed that he was unaware of any previous occasion upon which MMM had a bank guarantee or insurance bond called upon or cashed, he had always been able to tell potential clients of that fact, the lack of any previous call upon security provided by MMM was a key factor in its ability to obtain bank guarantees and insurance bonds at low cost, and a call upon security might jeopardise its ability to do so in the future or influence the terms and conditions upon which security was provided. Mr Perkins deposed that MMM's security history was an important part of its reputation and that its business had been built on meeting its contractual obligations without the need for security being called upon. Mr Tanti gave similar evidence and that if the PE95 bank guarantees were called up MMM would suffer damage to its prospects for securing future work and that may also affect its ability to obtain future bank guarantees.

[43] WICET relied upon affidavits by its company secretary and general counsel for the relevant project, Ms Zeljko. Ms Zeljko deposed in her first affidavit that it was not

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20 [2011] QSC 115.

21 See also *Siemens Limited v Forge Group Power Pty Ltd (in liq)* [2014] QSC 184 at [32], in which Philip McMurdo J granted an interlocutory injunction in a case in which the applicant established a serious question to be tried that according to the parties' agreement the respondent was not entitled to call upon the securities, notwithstanding Calloway JA's observation in *Fletcher Construction Australia Ltd v Varnsdorf Pty Ltd* [1998] 3 VR 812 at 826 to the effect that securities were given "to allocate the risk as to who shall be out of pocket pending resolution of a dispute".

unusual for security provided by contractors to be the subject of disputes and that such disputes usually receive publicity. In Ms Zeljko's second affidavit she deposed to the variety of different matters which were taken into account by clients when deciding which contractor should be awarded a contract. Ms Zeljko acknowledged that the contractor's reputation was one of the relevant factors, but she deposed that in the tendering processes in which she had been involved she did not recall a potential contractor having lost a tender because of its past record of having bank guarantees called upon. Senior Counsel for MMM directed attention to Ms Zeljko's involvement in tendering processes, which appears to have been confined to periods between 2000 and 2002, 2004 to 2006, (possibly) 2010 to 2013, and with WICET only from February 2014. Senior Counsel for MMM also pointed out that Ms Zeljko did not depose to a recollection that any potential contractor with an adverse security history had won a tender in any of the tendering processes in which she had been involved.

[44] The evidence concerning reputational damage upon which WICET relied suffered from the weaknesses identified in the submissions for MMM. Even so, like Chesterman J in *Auztrak Pty Ltd v John Holland Pty Ltd*,[22] I would not have been inclined to attribute great significance to MMM's evidence about the effect on its business reputation of a demand on a bank guarantee supplied under a contract which allowed WICET to make such a demand merely upon the basis of a bona fide claim; but like Chesterman J I am also disinclined to disregard the strong expressions of opinion to the contrary by judges of very considerable experience in this field. I conclude that MMM has shown that it may be prejudiced by WICET calling upon the guarantees. I would also accept that this prejudice might prove very difficult to quantify.

[45] However, my conclusion that an interlocutory injunction must be refused in relation to the PE95 contract means that the balance of convenience in relation to the GC12 Contract falls to be assessed upon the footing that WICET will have recourse to the guarantees under the PE95 Contract. MMM therefore can not rely upon the strongest aspect of its evidence of reputational damage, namely, that there has been no case in which a client has called upon a security supplied under a contract by MMM. The evidence does not show that, if WICET has recourse to the guarantees supplied under the GC12 Contract, MMM will suffer materially greater reputational damage than any damage it will in any event suffer upon the calling up of the guarantees under the PE95 Contract. In the result, there is no evidence that the refusal of an interlocutory injunction to restrain WICET from having recourse to the guarantees under the GC12 Contract will cause material harm to MMM. For that reason there is no justification for granting an interlocutory injunction to restrain WICET from having recourse to the guarantees supplied under the GC12 Contract.

Proposed order

[46] The primary judge did not err in refusing to grant an interlocutory injunction. The appeal should be dismissed with costs.

[47] **MORRISON JA:** I have read the reasons of Fraser JA and agree with those reasons and the order his Honour proposes.

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22 [2006] QSC 103 at [34].