SUPREME COURT OF QUEENSLAND

CITATION:	*Saipem Australia Pty Ltd v GLNG Operations Pty Ltd* [2014] QSC 310
PARTIES:	**SAIPEM AUSTRALIA PTY LTD** (applicant) **v** **GLNG OPERATIONS PTY LTD** (respondent)
FILE NO/S:	8688 of 2014
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	19 December 2014
DELIVERED AT:	Brisbane
HEARING DATE:	17 October 2014
JUDGE:	Martin J
ORDER:	**Application dismissed.**
CATCHWORDS:	EQUITY – EQUITABLE REMEDIES – INJUNCTIONS – INTERLOCUTORY INJUNCTIONS – INJUNCTION TO PRESERVE THE STATUS QUO – where the applicant entered into a design and construction contract with the respondent – where advance payments were made to the applicant – where the applicant provided bank guarantees in respect of those advance payments – where bonus payments under the contract were payable on the basis of milestones being met before or between particular dates – where the contract provided for extensions of time for milestones – where there is a dispute over whether milestones were met, having regard to the extensions of time – whether there is a serious question to be tried – whether the advance payments are a 'debt due' under s 67J of the *Queensland Building and Construction Commission Act* 1991 – whether the applicant has a right to contractual or equitable set-off against the bonus payments – whether the circumstances are such as would allow the court to enjoin a call upon an unconditional bank guarantee – whether the balance of convenience favours the granting of the injunction *Competition and Consumer Act* 2010 (Cth) *Queensland Building and Construction Commission Act*

1991, Schedule 2, s 67A, s 67AAA, s 67E(3), s 67J

Air New Zealand Limited v Wellington International Airport Limited [2008] 3 NZLR 87
Bateman Project Engineering Pty Ltd v Resolute Ltd [2000] WASC 284
Clough Engineering Ltd v Oil and Natural Gas Corporation Ltd (2008) 249 ALR 458
Fletcher Construction Australia Ltd v Varnsdorf Pty Ltd [1998] 3 VR 812
H P Mercantile Pty Ltd v Dierickx [2013] NSWCA 479; (2013) 306 ALR 53
James v Commonwealth Bank of Australia (1992) 37 FCR 445
Lucas Stuart Pty Ltd v Hemmes Hermitage Pty Ltd [2010] NSWCA 283
Monadelphous Engineering Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd [2014] QCA 330
Multiplex Ltd v Qantas Airways Ltd [2006] QCA 337
Wood Hall Ltd v Pipeline Authority (1979) 141 CLR 443

COUNSEL: G A Thompson QC with C Muir for the applicant
PD Dunning QC with G Beacham for the respondent

SOLICITORS: King & Wood Mallesons for the applicant
Ashurst for the respondent

[1] Curtis Island is situated off the coast of Queensland near Gladstone. A liquefied natural gas plant is being built on the island. Its main task will be to convert coal seam gas into liquefied natural gas, so that it is easier to transport. The coal seam gas, which originates in the Surat Basin, will be transported by a pipeline from the gas fields to Curtis Island.

[2] This application is concerned with part of the contractual arrangements between the designer and builder of the pipeline, Saipem Australia Pty Ltd, and the principal, GLNG Operations Pty Ltd. Saipem seeks an interlocutory order restraining GLNG from calling upon two bank guarantees.

Interlocutory injunctions – the principles

[3] In order to obtain an interlocutory injunction, Saipem must demonstrate:

(a) A prima facie case in the sense that there is a sufficient likelihood of success to justify, in the circumstances, the preservation of the status quo pending the trial; and
(b) That the balance of convenience favours the granting of an injunction.

[4] These two considerations are often related and both need to be weighed in the balance when considering the appropriate order to be made.

The contractual background

[5] Saipem and GLNG entered into a contract dated 4 January 2011 under which Saipem is responsible for the design, procurement, supply, construction, testing and commissioning of a gas transmission pipeline and associated works (this includes the construction of a building to be used as an operation centre) to transfer the CSG to the LNG plant at Curtis Island.

[6] There have been a number of amendments to the contract. The relevant amendment for the purposes of this application – Amendment Deed No 4 ("the Deed") – came into existence on 6 November 2013. Its terms, so far as they are relevant to this application, concern the making of advance payments by GLNG to Saipem. Saipem had made GLNG aware that it was suffering from cash flow problems and GLNG had resolved to assist by making advance payments.

[7] The original contract provided for certain Advance Payments to be made to Saipem by GLNG in the period following the execution date. The Deed contains the following recital:

> "(C) In order to facilitate and incentivise the timely completion of the works by Saipem, GLNG Operations has agreed to:
>
> (1) provide further advance payments to Saipem to assist Saipem with its cash flow; and
>
> (2) in consideration of the achievement of specified completion dates and the agreement by Saipem not to commence arbitration or litigation, or seek any third party determination of any Dispute or Claim until after 12 July 2014, convert all or part of these further advance payments into bonus payments,
>
> on the terms and conditions of this deed."

[8] The contract, read with the Deed, provided that Saipem was to receive "Milestone Advance Payments" and two bonus payments: "Bonus Payment 1" and "Bonus Payment 2".

[9] "Bonus Payment 1" was defined in the Deed in the following way:

> "'Bonus Payment 1' means, if the Curtis Island Pipeline Completion Date is:
>
> (a) on or before 31 March 2014, AUD 60,000,000;
>
> (b) after 31 March 2014, but on or before 12 May 2014, the amount in AUD calculated as follows:
>
> 60,000,000 – (*n* x (60,000,000/42))
>
> (where *n* equals the number of days from and including 1 April 2014 until and including the Curtis Island Pipeline Completion Date); and
>
> (c) after 12 May 2014, AUD 0."

[10] The Deed defined "Bonus Payment 2" in similar terms, save that the first date was 12 May 2014, the second date was 12 July 2014 and the number of days in that period was 61.

[11] The period between the sets of dates referred to in the definitions of the Bonus Payments is commonly referred to by the parties in correspondence and in some of the affidavits as the "Bonus Window".

[12] A mechanism for extending the completion dates for Bonus Payment 1 and Bonus Payment 2 was inserted into the contract by clause 61 contained in the Deed. If an extension of time is granted under that clause then the Bonus Window is, to that extent, extended.

[13] Clause 61 provides:

> "(a) If the Contractor is or will be delayed in achieving Bonus 1 Completion Date or Bonus 2 Completion Date by an event described in paragraphs 2 or 3 of the definition of Delay Event and the Contractor satisfies the requirements of clause 21.3 to require an Extension of Time as applied to Bonus 1 Completion Date or Bonus 2 Completion Date, then the Contractor will be entitled to an equivalent extension of time to the Bonus Payment 1 Completion Date or Bonus Payment 2 Completion Date (or both, as applicable).
>
> (b) Subject to clause 54.10, the Contractor shall be entitled to:
>
> (i) Bonus Payment 1 if the Contractor achieves Curtis Island Pipeline Completion and Curtis Island Pipeline tie-ins for interconnect and isolating valves from Marine Crossing (refer to Variation Orders 156 and 160, both executed on 30 October 2013) on or before the Bonus Payment 1 Completion Date; and
>
> (ii) Bonus Payment 2 if the Contractor achieves Mechanical Completion on or before the Bonus Payment 2 Completion Date.
>
> (c) The Contractor shall issue a Tax Invoice to the Company:
>
> (i) if the Contractor is entitled to Bonus Payment 1 pursuant to clause 61(b)(i), for the amount of Bonus Payment 1, less any Milestone Advance Payment paid by the Company to the Contractor which has not then been repaid, set off or deducted under clause 60.3(c)), within thirty (30) Days after the Curtis Island Pipeline Completion Date; and
>
> (ii) if the Contractor is entitled to Bonus Payment 2 pursuant to clause 61(b)(ii), for the amount of Bonus Payment 2, less any Milestone Advance Payment paid by the Company to the Contractor which has not then been repaid, set off or deducted under clause 60.3(c) or 61(c)(i), within thirty (30) Days after the Date of Mechanical Completion.
>
> (d) The Company will pay to the Contractor the amount of:
>
> (i) Bonus Payment 1 within fifteen (15) Days after receipt of a Tax Invoice and statutory declaration under clause 61(c)(i); and
>
> (ii) Bonus Payment 2 within fifteen (15) Days after receipt of a Tax Invoice and statutory declaration under clause 61(c)(ii).
>
> (e) The Contractor acknowledges and agrees that any of the Milestone Advance Payments paid to the Contractor

pursuant to clause 60.3(a) (if any) which have not then been repaid, set off or deducted under clause 60.3(c) shall be set off against the Company's liability to pay any Bonus Payment pursuant to this clause 61."

[14] Saipem submits that it is entitled to extensions of time for both Bonus Payment 1 completion date and Bonus Payment 2 completion date and is therefore entitled to bonus payments.

[15] The nature of those payments was further described in clause 60.3(c) which was inserted by the Deed. It provides:

> "(c) Subject to clause 61, the Contractor agrees that the Milestone Advance Payments paid to the Contractor are an advance on payment of, and not in addition to, the Contract Price and must be repaid by the Contractor. The Company may require the Milestone Advance Payments to be repaid in the following manner:
>
> (ii) without limitation to clause 54.10(c), if at any time the Contractor, in breach of clause 54.10, initiates arbitration or litigation, or seeks a third party determination of any Claim or Dispute existing at the Effective Date or submitted after the Effective Date, prior to the Bonus Payment 2 Completion Date;
>
> (iii) at any time after 12 July 2014;
>
> (iv) the Contract is terminated by the Company under clause 53.2(a); or
>
> (v) within fifteen (15) Days of Notice where a Contractor Event of Default has occurred,
>
> the Company may:
>
> (vi) set off or deduct from any amount due and payable to the Contractor under, or in connection with, this Contract or the Works the amount still owing from the Contractor to the Company on account of the Milestone Advance Payments in accordance with clause 25.10(a); and
>
> (vii) by Notice, require the Contractor to pay the Company within fifteen (15) Days the Milestone Advance Payments which have not been set off or deducted by the Company under clauses 60,3(c)(v), 61(b)(i) or 61(b)(ii) or otherwise repaid by the Contractor."

[16] The requirement for bank guarantees is contained within clause 60.5 (inserted by the Deed). So far as is relevant, that clause provides:

> "**60.5 Further Advance Payment Security**
>
> Prior to the date of issue of each Tax Invoice under clause 60.2(c), (d), (e), and (f), the Contractor must provide the Company with a Bank Guarantee in favour of the Company ('**Milestone Payment Security'**) for an amount equal to the value of the amount of the

Milestone Advance Payment, (the Parties acknowledging that the Milestone Payment Security may be replaced on a quarterly basis (or at such other times as agreed by the Parties) with a replacement Milestone Payment Security for a lesser amount equivalent to the value of the remaining Milestone Advance Payment already paid by the Company to the Contractor which has not then been repaid, set off or deducted under clause 60.3(c)).

(a) The Milestone Payment Security is for the purpose of securing the repayment of the Milestone Advance Payments by the Contractor to the Company in accordance with clause 60.3(c). The Company will, within fifteen (15) Days of receiving (by way of set-off, deduction or repayment in accordance with clause 60.3(c) or 61) an aggregate amount of not less than the total Milestone Advance Payment, return any Milestone Payment Security then held by the Company to the Contractor.

(b) The Company will have the right to call on, demand, receive and use the proceeds of the Milestone Payment Security:

(i) if the Contractor has not satisfied its obligations to repay the Company under clause 60.3(c) or if any set off, deduction, or payment pursuant to clause 60.3(c) is challenged, set aside or otherwise unable to be retained by the Company for any reason;
(ii) if the Company has a bona fide belief that an Insolvency Event in respect of the Contractor has occurred;
(iii) if the Contractor has abandoned the Works; or
(iv) if the Contractor has abandoned that part of the Works to which a Milestone Payment Security relates, in which case the Company's right under this clause 60.5(c) is limited to an amount equal to the relevant Milestone Advance Payment paid in respect of that part of the Works.

(c) The provisions of clause 5.3, 5.5(b), (c), (d) and (e) will apply to any Milestone Payment Security as if the references in that clause to "Performance Security" were to "Milestone Payment Security".

(d) The parties acknowledge and agree that:

(i) to the extent:

(A) section 67N of the QBSA Act applies;
(B) the Works are ‘building work’ as that term is defined under the QBSA Act; and
(C) any securities held under this Contract exceed the limit for securities which are permitted to be held under the QBSA Act pursuant to section 67N,

the amount of that excess does not relate to the need to correct defects identified during any defects

liability period, but instead to the recovery by the Company of other liabilities or amounts which may become payable to the Company by the Contractor under or in connection with this Contract, the Contractor's performance of this Contract or any breach by the Contractor of this Contract or for any other purpose provided for in the Contract;

(ii) section 67K(2) of the QBSA Act provides that a 'commercial building contract' is subject to a condition that before practical completion of the works is reached, the Total value of the following is to be not more than 5% of the contract price for a contract:

(A) all retention amounts for the contract that are being withheld; and

(B) all securities for the contract given and still held; and

(iii) by initialling in the space provided below, it is expressly agreed between the Parties that:

(A) this Contract is not subject to the condition of section 67K((2) of the QBSA Act referred to in clause 60.5(e)(ii); and

(B) the Contractor will be bound by the terms in this clause 60.5(e).”

[17] The guarantees in respect of which the application is made were provided pursuant to clause 60.5.

The Factual Background

[18] Under the terms of the Deed GLNG has made advance payments to Saipem of $95,000,000.

[19] So far as the Bonus Payments are concerned, GLNG has certified for the purposes of Bonus Payment 1 that the Curtis Island Pipeline Completion Date was 16 April 2014 and, so far as Bonus Payment 2 is concerned, that mechanical completion occurred on 26 July 2014.

[20] Saipem disagrees with both of those Completion Dates and has made claims for extensions of time. It seeks to use those extensions to extend the date by which the Curtis Island Pipeline Completion and mechanical completion was required.

[21] Those claims have been assessed by GLNG and it has allowed one for a shorter period than is claimed by Saipem and has rejected the other three claims.

[22] Saipem earned, on the basis of GLNG’s certification and assessments, a bonus payment of just over $45,000,000 as Bonus Payment 1. As the date by which mechanical completion was required was 12 May 2014, and the assessment date was outside the Bonus Window, Saipem is not entitled to any further bonus payment so far as GLNG is concerned.

[23] Notices of dispute have issued under the contract in relation to those assessments and the assessment by GLNG of the four claims for extension of time.

[24] If Saipem is successful and the disputes are resolved in its favour then it will be entitled to an amount up to the total of the bonus payments. On 1 September and 9 September 2014, GLNG gave notice to Saipem that it requires repayment of the Milestone Advance Payments to the extent that GLNG has not set them off against bonus payments that Saipem has earned or against other sums payable to Saipem under the contract. Saipem has not repaid the Milestone Advance Payment to GLNG.

[25] It is in those circumstances that GLNG sought to have recourse to the Milestone Security for the outstanding amount.

What is the serious question?

[26] Two broad issues are identified by the applicant as constituting the serious question necessary for the purposes of this application. The first is that there is a dispute between the parties as to whether s 67J of the *Queensland Building and Construction Commission Act* 1991 ('the Act') operates in a way which precludes GLNG from calling on the guarantees because, on Saipem's submission, there is no debt due because there is a dispute about the payment of money. Secondly, there is the question raised as to whether the circumstances are such as would allow the court to enjoin a call upon an unconditional bank guarantee.

The *Queensland Building and Construction Commission Act* 1991

[27] In order to understand the argument for the applicant on this point it is necessary to set out some parts of the Act. Most of the relevant provisions are to be found in Part 4A of the Act.

[28] Section 67A defines "security", for a "building contract" as meaning something:

> "(a) given to, or for the direct or indirect benefit of, the contracting party for the contract by or for the contracted party for the contract; and
> (b) intended to secure, wholly or partly, the performance of the contract; and
> (c) in the form of either, or a combination of both, of the following—
> (i) an amount, other than an amount held as a retention amount for the contract;
> (ii) 1 or more valuable instruments, whether or not exchanged for, or held instead of, a retention amount for the contract."

[29] A "building contract" means a contract or other arrangement for carrying out building work in Queensland but does not include a domestic building contract or a contract exclusively for construction work that is not building work.

[30] "Building work" is defined in Schedule 2 of the Act as meaning:

> "(a) the erection or construction of a building; or
> (b) the renovation, alteration, extension, improvement or repair of a building; or

(c) the provision of lighting, heating, ventilation, airconditioning, water supply, sewerage or drainage in connection with a building; or

(e) any site work (including the construction of retaining structures) related to work of a kind referred to above; or

(f) the preparation of plans or specifications for the performance of building work; or

(fa) contract administration carried out by a person in relation to the construction of a building designed by the person; or

(g) fire protection work; or

(h) carrying out site testing and classification in preparation for the erection or construction of a building on the site; or

(i) carrying out a completed building inspection; or

(j) the inspection or investigation of a building, and the provision of advice or a report, for the following—

(i) termite management systems for the building;

(ii) termite infestation in the building;

but does not include work of a kind excluded by regulation from the ambit of this definition."

[31] Section 67E generally provides that part 4A does not have the effect of making a building contract, or a provision of a building contract, void or voidable. There are exceptions, though, and section 67E(3) provides:

> "(3) Without limiting subsection (2), a building contract is unenforceable against the contracted party for the contract to the extent that the contract provides for retention amounts or security in a way that is inconsistent with a condition to which the contract is subject under division 2."

[32] Section 67J is in Division 2 of Part 4A and so is subject to s 67E(3). It imposes some conditions with respect to setoffs under building contracts. That section 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 *Subcontractors' Charges Act 1974*.

(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."

Is the contract a "building contract"? Are the bank guarantees securities within the meaning of the Act? Does s 67J apply?

[33] Saipem argues that GLNG is required by section 67J to give a notice in writing to Saipem before it can use the security. Further, it argues, there is no "debt due" and thus there is no "amount owed" and, so, the time in which such a notice may be given has not begun to run.

[34] GLNG argues that the purpose of the security it seeks to call upon was to secure the repayment of the Milestone Advance Payments, not the performance of the work required under the contract. It is, says GLNG, not security for the performance of the contract but for the repayment of the loan or advance and, therefore it is not a "security" within the meaning of s 67A, and so section 67J does not apply.

[35] GLNG submits that the reference to "the performance of the contract" in the second limb of the definition of "security"[1] is a reference to the carrying out of the building and construction work required under the "building contract". Why there should be such a restriction is not immediately obvious.

[36] It is uncontentious that where the word "contract" is used in the definition of "security" it means the "building contract" referred to earlier in the definition. The definition in s 67AAA of a "building contract" has been considered in *Monadelphous Engineering Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd*[2]. Fraser JA traced the evolution of the definition through various versions and took into account extrinsic material when considering the definition of "building contract". He concluded that "the definition 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"[3]. Thus, a building contract need not be a contract which is exclusively concerned with building work. That is, with respect, a conclusion which is consistent with the balance of the Act and ordinary commercial considerations. Many building contracts contain provisions which, while related to the work to be done under the contract, are concerned with issues such as: the obtaining of relevant permissions, the arrangement of insurance, and issues relating to employment conditions and the use

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1 See [28] above.

2 [2014] QCA 330.

3 Op cit at [15].

of sub-contractors. Where s 67A refers to the "performance of the contract" there is no reason to confine it to the carrying out of building work.

[37] The guarantees the subject of this application are concerned with securing the performance of part of the contract – the Milestone Advance Payments. They, therefore, fall within the definition of "security" in s 67A.

[38] They are, therefore, liable to the operation of s 67J – if it otherwise operates in these circumstances.

Are the Milestone Advance Payments a "debt due"?

[39] Section 67J sets out the conditions under which a party to a building contract can use a security to obtain an "amount owed" under the contract. An "amount owed" is defined in s 67J(5) as "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." (emphasis added). The term "debt due" is not defined.

[40] Some assistance in construing s 67J may be obtained from the decision in *Multiplex Ltd v Qantas Airways Ltd*[4]. That case was concerned with whether Qantas was entitled to deduct liquidated damages from various progress payments to Multiplex under a contact for the construction of a hangar. In considering the issues raised, Keane JA (with whom McMurdo P and Mullins J agreed) said the following about s 67J:

> "[4] … [Section 67J] is concerned, not with the establishment of a fund to be held in trust by way of security pending the outcome of a broader dispute, but with whether moneys are payable or owed under the contract by one party to the other.
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> …
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> [6] It will be noted that s 67J is concerned to regulate the reduction of 'an amount payable under the contract' by 'an amount owed under the contract'. It is concerned with amounts which are, in truth, payable or owed under the contract. It is not concerned with amounts 'claimed to be owing' or with amounts 'certified as payable'.
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> …
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> [34] … [s 67J(2)] speaks of the owner's awareness of its 'right to obtain the amount owed', not of its 'potential right' or its 'right in the future to obtain the amount owed'. The 28 days referred to in s 67J(2) does not begin to run until a time after the right of the owner to recover some amount from the builder has actually accrued.
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> …
>
> [35] … s 67J is concerned with a wide variety of circumstances in which an amount may become owing by the builder to the owner. In the particular case of liquidated damages, the quantification of the amount owed is effected by the contract itself, so that the amount owed is quantified by the contract as and when the right to obtain that amount arises. So far as liquidated damages are concerned, it may be that a second notice under s 67J(3) is not required to be given."

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4 [2006] QCA 337.

[41] In *Multiplex Ltd v Qantas Airways Ltd* the Court of Appeal was considering an earlier version of s 67J. It then contained a two stage process if the amount owed could not be quantified. The definition of "amount owed" has been changed since then to include the words "debt due" thus fortifying, Saipem submits, the observations of Keane JA.

[42] The argument by Saipem centres on the entitlement it says it has to the bonus payments. As is noted above, Saipem's entitlement to the bonus payments depended upon completion of parts of the works by specified dates – Bonus Payment 1 by 12 May 2014 and Bonus Payment 2 by 12 July 2014. Each bonus payment increased progressively according to a formula in the event that the specified part of the work was completed before the particular date.

[43] The Completion Date for both of the bonus payments was able to be extended if there was an event which fell within the definition of "delay event", a term which is defined in clause 3 of the contract.

[44] Saipem contends that it is entitled to extensions of time for both Bonus Payment 1 and Bonus Payment 2 and, as a result, is entitled to the bonus payments and the benefit of clause 61(e) which provides:

> "The contractor acknowledges and agrees that any of the Milestone Advance Payments paid to the contractor pursuant to clause 60.3(a) (if any) which have not then been repaid, set off or deducted under clause 60.3(c) shall be set off against the company's liability to pay any bonus payment pursuant to this clause 61."

[45] GLNG answers this in two ways. First, it says that s 67J does not apply but, if it does, there is no entitlement to a set off because there is, among other things, no right for Saipem to have the bonus windows extended.

[46] GLNG argues that the term "debt due" simply characterises the kind of claim for which recourse may be had to a security. In other words, it argues, the entitlement to have recourse is limited to amounts which are liquidated claims that arise under the building contract, as opposed to unliquidated claims for damages for breach of contract, or tortious or restitutionary claims.

[47] GLNG also argues that clause 60.3 allows it to set off the Milestone Advance Payments against obligations to Saipem but not the reverse. A similar provision is made in clause 60.3(c). Thus, GLNG argues, there is no express contractual right for Saipem to set off its claim to the remainder of the bonus payments against the obligation to repay the Milestone Advance Payments to GLNG. It is a one way valve.

[48] It is worth bearing in mind that this Act and, in particular, part 4A, is intended to be applicable across an industry which deals with a wide variety of building work which is often conducted pursuant to standard form contracts. It was not argued before me, and therefore I will not deal with it any further, other than to say that the term "debt due" is a term frequently used in standard form contracts in the building industry in which specific breaches or defaults are defined as constituting a "debt due".

[49] It was argued on Saipem's behalf that the contract expressly recognises that the bonus payments to which Saipem is entitled will be set off against the Milestone Advance Payments. While GLNG's argument that the contract does not recognise any entitlement to set off on the part of Saipem is, strictly speaking, correct, the provisions in clause 61(e) appear to mandate the setting off of Milestone Advance Payments (which have not been repaid or otherwise set off or deducted) against GLNG's liability to pay any bonus payment.

[50] In any event, Saipem says that it has an entitlement to an equitable set off. GLNG's response to that is that unless and until Saipem successfully disputes GLNG's certification and assessments, its contractual entitlements are determined by reference to those certifications and assessments. It argues that any right can only arise if those certifications and assessments are overturned. In other words, Saipem does not presently have a cause of action that sounds in the recovery of money. The second argument put forward is that a set off is confined to money claims. The authority relied upon for that proposition is *Air New Zealand Limited v Wellington International Airport Limited*.[5] That decision, though, appears to be more concerned with the claim that declaratory relief be able to be set off.

[51] The circumstances in which an equitable set off may be raised were considered by Gummow J in *James v Commonwealth Bank of Australia*[6]. Those circumstances have, more recently, been considered by the New South Wales Court of Appeal. In *H P Mercantile Pty Ltd v Dierickx*[7] Emmett JA (giving the judgment of the Court) said:

> "[136] For there to be an equitable set-off, the set-off must essentially be bound up with and go to the root of, challenge, call in question, or impeach the title of the claimant. Equitable set-off is available where the party seeking it can show a recognised equitable ground for being, to the relevant extent, protected from its adversary's demand. The mere existence of a cross-claim is not sufficient. There must be some ground for equitable intervention beyond the mere existence of a cross-claim, such that it can be said that the equity of the defendant impeaches the claimant's title to the legal demand being enforced (*James v Commonwealth Bank of Australia* (1992) 37 FCR 445 at 457 - 458).
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> [137] For example, where a mortgage is granted to a solicitor as security for costs and the mortgagor client has a cross-claim against the solicitor asserting that the costs would not have been incurred had the solicitor conducted himself with integrity, skill and attention, there will be a clear case of equitable set-off. Similarly, a court of equity may recognise a set-off of an unliquidated claim for damages for breach of a building contract against claims for money due under the contract. Again, where a lender promises to provide further advances for a development project and the borrower is unable to complete the development project and repay the advances actually made, equity would allow a set-off of the borrower's damages caused

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5 [2008] 3 NZLR 87.
6 (1992) 37 FCR 445.
7 [2013] NSWCA 479; (2013) 306 ALR 53

> by the lender's failure to make the further advances before the lender would be permitted to enforce its security against the borrower (see *James v Commonwealth Bank* at 458 - 459).
>
> [138] It is not, of itself, an objection to the availability of equitable set-off that either or both of the legal demands is made pursuant to a statute that creates new obligations and rights that give rise to debts or liabilities in unliquidated damages. The question is whether the statute excludes what otherwise would be the operation of equitable set-off upon those statutory debts and liabilities. The claim to set-off must involve an impeachment of the title to the claimant's demand, and not merely the right to obtain judgment on the demand. It is sufficient that the existence of the claimant's demand would not have come about but for the claimant's breaches of duty. It is sufficient if the defendant's set-off complaint against the claimant goes directly to impeach the claimant's demand (see *James v Commonwealth Bank* at 459)."

[52] The claims made by Saipem with respect to the extensions of time are not the subject of dispute before this court.

[53] Four extensions of time were claimed and one was accepted for a period less than that which was claimed. Details of those claims were set out in the submissions provided by Saipem. They were not the subject of challenge in the sense that GLNG concedes that they are arguable but does not concede that they have any merit. Nor was it contested that Saipem could be entitled to retain the full amount of the bonus payments even if it was not successful in all of its claims. If they are successful, then Saipem can use them to "challenge … or call in question …the title of" GLNG to the money. Similarly, it could be argued that Saipem has a case similar to the example given in *H P Mercantile*, that is, where a lender promises to provide further advances for a development project and the borrower is unable to complete the development project and repay the advances actually made, equity would allow a set-off of the borrower's damages caused by the lender's failure to make the further advances before the lender would be permitted to enforce its security against the borrower.

[54] For the purposes of this application it is only necessary that Saipem demonstrate that it has substantial claims which, if accepted, will entitle it to a set off. It need only demonstrate that there is a prima facie case in the sense that there is a sufficient likelihood of success to justify the preservation of the status quo pending the trial.

[55] The issues discussed above: (a) whether there is a debt due, (b) the capacity to set off in light of s 67J, and (c) whether an equitable set off can be made in light of the claims made for extensions of time, constitute a serious question to be tried as to the capacity of Saipem to set off in such a way that GLNG would not be entitled to recover under the bank guarantees.

Balance of convenience.

[56] GLNG concedes that the disputes raised by Saipem are arguable but does not concede that they will ultimately be shown to have any merit. They were described in GLNG's written submissions as "fact heavy and technically complex claims

which may or may not succeed". GLNG also asserted that Saipem did not hold a building licence when it entered into the contract. This was something raised for the first time on the application and Saipem was not in a position to call evidence necessary to meet the allegation. A recent amendment to the Act (Schedule 1A) sets out circumstances in which an exemption from the requirement to hold a licence can arise. Given that this matter was raised for the first time in submissions, I do not propose to consider it in the absence of evidence.

[57] Under this happening, Saipem argues three matters. First, that its prima facie right to shelter behind s 67J of the Act will be destroyed if the Milestone Payment Security is called upon. Secondly, GLNG will not suffer any prejudice because it will still retain the security in respect of Milestone Advance Payments if it is found that any amount is owing to it. Thirdly, Saipem called evidence that it would suffer loss to its reputation if the security was called upon. Evidence was given that should the security be called upon it would be likely to have an adverse effect on Saipem's credit rating and its ability to deal effectively with banks, and it would be subjected to an increase in costs in obtaining future financial security. This was met by evidence from GLNG that it was not aware of Saipem tendering for any new work and that Saipem was expected not to be operating in Queensland following completion of the project. That evidence was hearsay and weak hearsay at that.

[58] GLNG referred to clause 5.5 of the contract which concerns "conversion of performance security". In particular clauses 5.5(b) and 5.5(c) which provide:

> "(b) The Company may, in its absolute discretion, call on the whole, or any part, of any Performance Security, under clause 5.5(a). If the Company calls on any part of any Performance Security it retains the right, in its absolute discretion, to call on the whole, or any part, of the remainder of that Performance Security.
>
> (c) The contractor covenants with the Company that the Contractor will not institute any proceedings, exercise any right or take any steps to injunct or otherwise restrain:
>
> (i) the financial institution that issued the Performance Security from paying the Company pursuant to the Performance Security;
>
> (ii) the Company from taking any steps for the purpose of making a demand under any Performance Security or receiving payment under any Performance Security, or otherwise exercising its rights under any Performance Security; or
>
> (iii) the Company using the money received under any Performance Security,
>
> even where the Contractor disputes the Company's right to payment (including where dispute resolution proceedings have been commenced under this contract)."

[59] Clause 60.5(c) provides that the "provisions of clause 5.3, 5.5(b), (c), (d) and (e) will apply to any Milestone Payment Security as if the references in that clause to 'Performance Security' were to 'Milestone Payment Security'".

[60] That, GLNG submits, demonstrates that the risk of harm to which Saipem refers is a risk which it has created for itself, by entering into the contract on the terms that it did.

[61] GLNG placed considerable weight on the decision of the Full Court of the Federal Court of Australia in *Clough Engineering Ltd v Oil and Natural Gas Corporation Ltd*.[8] Clough and ONGC were parties to a construction contract. Three banks had issued guarantees for the performance of the contract. In the event that Clough failed to honour any of the commitments entered into under the contract, ONGC was entitled to invoke those performance guarantees. Clough sought to restrain ONGC from making a demand upon it after ONGC terminated the contract. It also sought to prevent the banks from making payment pursuant to the guarantees.

[62] In *Clough*, the court considered the many authorities which relate to the proper construction to be applied to performance bank guarantees. They commenced with the High Court's decision in *Wood Hall Ltd v Pipeline Authority*.[9] They made particular reference to the statements in *Wood Hall* about the commercial purpose of guarantees, namely that they be regarded as equivalent to cash. The guarantees in the instant case are unqualified just as the guarantees in *Clough* were unqualified. In the joint judgment in *Clough*, their Honours set out the three principal exceptions to the rule that a court will not enjoin the issuer of a performance guarantee, or bond, from performing its unconditional obligation to make a payment. Those exceptions are:

(a) The court will enjoin the party in whose favour the performance guarantee has been given from acting fraudulently. No such claim is made in this case.

(b) The party in whose favour the performance bank guarantee has been given may be enjoined from acting unconscionably in contravention of s 51AA of the *Trade Practices Act* 1974 (Cth) (now s 20 of the Australian Consumer Law (*Competition and Consumer Act* 2010 (Cth) sch 2)). It is not submitted that any of the categories of unconscionable conduct apply in this case.

(c) While the court will not restrain the issuer of a performance guarantee from acting on an unqualified promise to pay if the party in whose favour the bond has been given has made a contract promising not to call upon the bond, breach of that contractual promise may be enjoined on normal principles relating to the enforcement by injunction of negative stipulations in contracts. This is not a ground advanced by the applicant.

[63] It is also important, under the topic of balance of convenience, to bear in mind why a beneficiary of a performance guarantee may have stipulated for such an entitlement.

[64] In *Fletcher Construction Australia Ltd v Varnsdorf Pty Ltd*[10] two reasons for making such a stipulation were identified:

(a) To provide security for a valid claim against the contractor; and

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8 (2008) 249 ALR 458.

9 (1979) 141 CLR 443.

10 [1998] 3 VR 812.

(b) To allocate the risk between the parties as to who shall be out of pocket pending the resolution of a dispute between them.

[65] In that case Callaway JA considered the question of the construction of the underlying contract as to whether the guarantee is provided solely by way of security or also as a risk allocation device. He said:

> "Remembering that we are speaking of guarantees in the sense of standby letters of credit, performance bonds, guarantees in lieu of retention monies and the like, the latter purpose is often present and commercial practice plays a large part in construing the contract. 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 expressly 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."

[66] After examining further authorities, the Full Court in *Clough* said:

> "[82] Notwithstanding the importance of commercial practice, the statements in these authorities do not suggest that the Court should depart from the task of construing the terms of the contract in each case. What the authorities emphasise is that the commercial background informs the construction of the contract. In particular, as Callaway JA said in the passage quoted above, **the 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**.
>
> [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. This view is also supported by the remarks of Charles JA in *Fletcher Construction* [1998] 3 VR at 820-821. There, his Honour analysed and placed some doubt upon the correctness of decisions such as *Pearson Bridge (NSW) Pty Ltd v State Rail Authority of New South Wales* (1982) 1 Australian Construction Law Reports 81 at 86.
>
> [84] In *Pearson Bridge* at 86, and in other authorities which have followed it, Yeldham J held that the words "(i)f the Principal becomes entitled to exercise all or any of the rights under the contract" contained an implied negative stipulation which qualified the Principal's entitlement to call upon the guarantee. In *Fletcher Construction* [1998] 3 VR, Charles JA at 820-821 appeared to prefer the views of Cole J in *Hughes Bros Pty Ltd v Telede Pty Ltd* (1989) 7 BCL 210, where his Honour concluded that a similar clause contained no such qualification.

> [85] The question of construction as to whether the underlying contract contains a qualification on the right to call upon the security must be determined in light of the contract and the form of the performance guarantee as contained in the contract. This accords with the basic principle of construction that the terms of an instrument must be read as a whole: *Re Media, Entertainment and Arts Alliance; Ex parte The Hoyts Corporation Pty Ltd* [1993] HCA 40; (1993) 178 CLR 379 at 386-387. It also accords with the approach taken to the construction of the underlying contract in the leading authorities to which we have referred: see for example *Wood Hall Ltd* 141 CLR at 445, 451, 457-458; *Fletcher Construction* [1998] 3 VR at 821-822." (emphasis added)

[67] In an effort to answer the decision in *Clough*, Saipem referred to *Bateman Project Engineering Pty Ltd v Resolute Ltd*[11]. *Bateman* was referred to in *Clough* as an instance of the over-riding rule that the "primary focus" will always be the proper construction of the contract. In *Bateman*, Owen J was concerned with a clause which provided that "…the [defendants] shall be entitled to proceed with the conversion of the security for the amount claimed and the [plaintiffs] shall not hinder, obstruct, restrain or injunct the Principal from so doing and the [plaintiffs] will not exercise [their] rights under clause 32 prior to the [defendants] drawing down the securities."[12] His Honour held that such a clause was void as being against public policy as an ouster of the jurisdiction of the court.

[68] There is an important difference, so far as the balance of convenience is concerned, between the clause in *Bateman* and the clause in *Clough.* As was identified in *Lucas Stuart Pty Ltd v Hemmes Hermitage Pty Ltd*[13]:

> "[37] … In *[Clough]* the Full Federal Court placed considerable weight upon the fact that the clause there under consideration required provision of a performance guarantee in the form of that set out in an appendix and that the form referred to the payment by the guarantor "notwithstanding any dispute(s) pending", without reference to the contractor and "without any demur, reservation, contest or protest" (249 ALR 458 at [30] and [88]–[112]). Whilst the Clause pursuant to which the bonds were provided in the present case (cl 6.1) refers to "unconditional undertakings" the Contract does not contain any wording such as was contained in the *pro forma* performance bond regarded in *Clough* as effectively qualifying the terms of the condition precedent stated in the relevant clause."[14]

[69] The words in clause 5.5(c) of the contract are clear. They are similar to those used in *Clough*. GLNG does not advance an argument that this clause prevents the court from exercising jurisdiction. It contends that the assessment of the balance of convenience should give considerable weight to the agreement of the parties. The parties intended that GLNG would have the unfettered right to call upon a

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11 [2000] WASC 284.
12 At [12].
13 [2010] NSWCA 283.
14 per Macfarlan JA.

performance security even, as (c) provides, where Saipem disputed GLNG's right to payment (including where dispute resolution proceedings have been commenced). The risk has been allocated by the contract to Saipem. There are no clear words which would inhibit GLNG as the beneficiary of the guarantee from invoking it. The parties determined, through the provisions of the contract, that any risk would be borne by Saipem in these circumstances. Where a party has accepted the risk, then it has a substantial hurdle to overcome when dealing with the balance of convenience. In this case, the various matters set out above lead to the balance tipping in favour of GLNG.

Conclusion

[70] While I have found that there is the necessary serious question to be tried, the balance of convenience does not favour the granting of the application. It follows that the application must be dismissed.