SUPREME COURT OF QUEENSLAND

CITATION:	*Saipem Australia Pty Ltd v GLNG Operations Pty Ltd (No 2)* [2015] QSC 173
PARTIES:	**SAIPEM AUSTRALIA PTY LTD** ACN 000 544 507 (applicant) **v** **GLNG OPERATIONS PTY LTD** ACN 132 321 192 (respondent)
FILE NO/S:	SC No 297 of 2015
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	19 June 2015
DELIVERED AT:	Brisbane
HEARING DATE:	7 April 2015
JUDGE:	Philip McMurdo J
ORDER:	**Upon the Applicant giving the usual undertaking as to damages:** **1. Until determination of the originating application or further earlier order, the Respondent by itself, its employees and agents, be restrained from calling on, demanding, receiving or having any recourse to and converting into money any of the bank guarantees referred to in para 1 of the interlocutory application filed 7 January 2015, to recover any of the sum claimed in relation to Mechanical Completion in a letter of 18 December 2014 from the Respondent to the Applicant.** **2. Until 4.00 pm on 3 July 2015, the Respondent by itself, its employees and agents, be restrained from calling on, demanding, receiving or having any recourse to and converting into money any of the said bank guarantees to recover any of the sum claimed in relation to Practical Completion in a letter of 18 December 2014 from the Respondent to the Applicant.**
CATCHWORDS:	CONTRACTS – BUILDING ENGINEERING AND RELATED CONTRACTS – THE CONTRACT –

CONSTRUCTION OF PARTICULAR CONTRACTS AND IMPLIED CONDITIONS – SECURITY AND RETENTION FUNDS – where the applicant claimed the respondent was not entitled under s 67J of the *Queensland Building and Construction Commission Act* 1991 (Qld) to use a security in the form of two bank guarantees to obtain an amount owed to it, because no amount was actually due to the respondent – applicant argued that the contract entitled the respondent to have recourse to bank guarantees only to "recover any debt due" and that whether the liquidated damages claimed constituted debts due was to be determined by an arbitrator

EQUITY – EQUITABLE REMEDIES – INJUNCTIONS – RELEVANT CONSIDERATIONS – BALANCE OF CONVENIENCE GENERALLY – where the applicant sought interlocutory injunction restraining the respondent from demanding payment under two bank guarantees – uncontradicted evidence the applicant would suffer reputational damage if the respondent made demands upon guarantees – respondent argued that the applicant could avoid that risk by paying the amounts claimed – where a contractual clause provided the applicant would not restrain the respondent from making a demand under a performance guarantee even when it disputed the respondent's right to payment – where this could be said to act as a "risk allocation device" to allocate risk as to who should be out of pocket pending resolution of a dispute – when a performance guarantee acts as a risk allocation device this often has a decisive impact upon the balance of convenience if the court is asked to restrain by interlocutory injunction the use of the guarantee – whether non-compliance with s 67J of the *Queensland Building and Construction Commission Act* 1991 (Qld) should tilt the balance in favour of an injunction - where the respondent would be prejudiced by the grant of an injunction because it would not have the money to which it allegedly was entitled –respondent restrained from calling on the bank guarantees

EQUITY – EQUITABLE REMEDIES – INJUNCTIONS – INTERLOCUTORY INJUNCTIONS – INJUNCTIONS TO PRESERVE STATUS QUO OR PROPERTY PENDING DETERMINATION OF RIGHTS – OTHER CASES – respondent argued the applicant had no case for final determination which could found an interlocutory application because the disputes about extensions of time and certain completion dates in the Originating Application must be determined by an arbitration – the applicant claimed final relief in the form of declarations that the liquidated damages were not amounts owed or debts due to the respondent and that notices given under s 67J of the *Queensland Building and Construction Commission Act* were invalid – the

applicant had legal rights from the contract and from s 67J requiring the protection of an interlocutory injunction – where the respondent was restrained from calling on the bank guarantees

STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – PARTICULAR WORDS AND PHRASES – whether it was a purpose of the *Queensland Building and Construction Commission Act* 1991 (Qld) that a notice given in breach of s 67J(2) should be invalid – the better view seems to be that noncompliance would have the consequence of invalidating the notice – whether the respondent gave notice to the applicant within 28 after it became aware of its right to obtain the amount owed – where the contract provided that the obligation to pay liquidated damages arose only when a certificate of completion was issued by the respondent company's representative – notice under s 67J must state the amount owed – the 28 day period to give notice under s 67J did not commence from the date of awareness that something was owed but from the date the respondent certified the date for completion and became aware of the period of delay

Queensland Building and Construction Commission Act 1991 (Qld), s 67E, s 67J

Austrak Pty Ltd v John Holland Pty Ltd [2006] QSC 103, cited
Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd (2001) 208 CLR 199, distinguished
Beyfield Pty Ltd v Northbuild Construction Sunshine Coast Pty Ltd [2014] QSC 12, approved
Cardile v LED Builders Pty Ltd (1999) 198 CLR 380, cited
Central Petroleum Ltd v Century Energy Services Pty Ltd [2011] WASC 211, considered
Clough Engineering Ltd v Oil and Natural Gas Corporation Ltd [2008] FCAFC 136; (2008) 249 ALR 458, applied
Cooke v Warriner, unreported, Supreme Court of Queensland, McMurdo J, SC No 294 of 2004, 23 July 2004, considered
Fletcher Construction Australia Ltd v Varnsdorf Pty Ltd [1998] 3 VR 812, applied
Monadelphous Engineering Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd [2014] QCA 330, considered
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28, cited
Saipem Australia Pty Ltd v GLNG Operations Pty Ltd [2014] QSC 310, considered
Siemens Ltd v Forge Group Power Pty Ltd (in liq) [2014] QSC 184, considered
Sugar Australia Pty Ltd v Lend Lease Services Pty Ltd [2015]

VSCA 98, considered
Tasker v Fullwood [1978] 1 NSWLR 20, cited
Vos Construction & Joinery (Qld) Pty Ltd v Sanctuary Properties Pty Ltd [2007] QSC 332, cited
Watpac Australia Pty Ltd v Spring Hill Developments (No 1) Ltd [2006] QSC 269, considered

COUNSEL: G A Thomson QC, with P L Somers for the applicant
P Dunning QC, with G D Beacham for the respondent

SOLICITORS: Clayton Utz for the applicant
Ashurst Australia for the respondent

[1] The applicant, which I will call Saipem, applies for an interlocutory injunction to restrain the respondent, which I will call GLNG, from demanding payment under two bank guarantees. They were provided by Saipem to GLNG under a contract between them for Saipem to construct a gas pipeline and related infrastructure.

[2] In an earlier proceeding arising out of the same contract, Saipem was refused an interlocutory injunction to restrain GLNG from calling certain other bank guarantees. The present application involves different issues from that one which was determined by Martin J.[1]

The contract

[3] The contract was made in 2011 between Saipem as the Contractor and GLNG, which was described as the Company, as agent for Santos GLNG Pty Ltd, PAPL (Downstream) Pty Ltd, Total GLNG Australia and KGLNG Liquefaction Pty Ltd. The contract has been amended on several occasions.

[4] Clause 5 required Saipem to provide bank guarantees to secure its performance. The relevant parts of cl 5 are as follows:

> "5.1 Provision of Bank Guarantees
>
> (a) On or before the Commencement Date, the contractor must provide the Company with:
>
> (1) an original unconditional Bank Guarantee in favour of the Company for 5% of the Contract Price (Bank Guarantee 1); and
>
> (2) an original unconditional Bank guarantee in favour of the Company for 5% of the Contract Price (Bank Guarantee 2).
>
> (b) The Performance Security is for the purpose of ensuring the due and proper performance of this Contract.

[1] *Saipem Australia Pty Ltd v GLNG Operations Pty Ltd* [2014] QSC 310.

(c) Provision of the security by the Contractor in accordance with this clause 5 is a condition precedent to the Contractor's entitlement to payment under this Contract.

…

5.5 Conversion of Performance Security

(a) Notwithstanding anything else to the contrary in this Contract, the Company may demand, receive and use the proceeds of any Performance Security to recover any Loss suffered or incurred by the Company as a result of Contractor's default under this Contract or to recover any debt due from the Contractor to the Company.

(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:

(1) the financial institution that issued the Performance Security from paying the Company pursuant to the Performance Security;

(2) 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

(3) 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)."

[5] Clause 21.1(b) required Saipem to complete certain stages of the work by certain dates. In particular, it was to achieve "Mechanical Completion … by the Date for Mechanical Completion", which was the date specified in item 3 of Sch 1 of the contract (30 June 2014) as adjusted in accordance with the contract. Similarly, it was to achieve "Practical Completion by the Date for Practical Completion" as specified in item 4 of Sch 1 (60 days from the date for Mechanical Completion) and as adjusted in accordance with the contract. By cl 1.1, the date *of* Mechanical Completion and the date *of* Practical Completion, in each case, was to be the date certified as such by the Company's Representative.

[6] By cl 21.2, if Saipem considered that it had been or was likely to be delayed in achieving, relevantly, Mechanical Completion or Practical Completion, it was to give a

notice to the company, and in that event, it could make a written claim for an extension of time under s 21.3.

[7] By cl 35(a), if Saipem did not achieve Mechanical Completion or Practical Completion by the required date, it was required to:

> "… pay liquidated damages to the Company at the Liquidated Damages Rate for each Day after the date for Mechanical Completion or Practical Completion as applicable until … Mechanical Completion or Practical Completion is achieved."

By item 13 of Sch 1, the Liquidated Damages Rate in each case was an amount of $450,000 per day (with an upper limit which is not presently relevant).

[8] Clause 54 provides a dispute resolution procedure which the parties are obliged to employ for any dispute arising out of or in connection with the contract. That process would culminate by an arbitration under cl 54.9. However, cl 54.8 provides that nothing in cl 54 "will prejudice the right of a Party to institute proceedings to seek urgent injunctive or urgent interlocutory relief".

GLNG's claims for delay

[9] On 18 December 2014, GLNG gave two notices claiming liquidated damages. In one notice, it claimed that the date for Mechanical Completion had become 12 July 2014 and that the date of Practical Completion was 26 July 2014, a total of 14 days delay resulting in liquidated damages of $6,300,000 liquidated damages. In the other notice, it claimed that the date for Practical Completion had become 14 September 2014 and that the date of Practical Completion was 9 October 2014, a delay of 25 days delay resulting in liquidated damages of $11,250,000.

[10] After 18 December last, GLNG set off against Saipem's payment claims an amount of $4,983,896.13, reducing GLNG's claim for liquidated damages in relation to Mechanical Completion to $1,316,103.87.

[11] By those two notices, GLNG demanded payment by 9 January 2015 and added that if Saipem failed to pay the amount demanded, GLNG reserved its rights, including its rights to "call on the Performance Security to recover this amount owed by the Contractor to Company". It further stated that "[t]o the extent required, this notice is given under section 67J of the *Queensland Building and Construction Commission Act* 1991 (Qld)".

[12] Saipem says that it is entitled to extensions of time under cl 21.3 which would have the effect of extending the dates for Mechanical and Practical Completion. It has referred its claims to the dispute resolution process under the contract. Even something less than total success on those claims for extensions of time would result in Saipem not being liable for either of the periods of delay alleged by GLNG. Saipem's claims for extension of time will have to go to arbitration. At this hearing, Saipem said that that could be done by the end of June 2015.

[13] Further, the parties are also in dispute as to the dates on which Mechanical Completion and Practical Completion were achieved. Again that has been referred to the dispute resolution process.

[14] In this application, GLNG concedes that Saipem has a serious case, determinable by an arbitration under the contract, for an outcome under which Saipem would not be liable for damages for delay in either of the respects alleged by GLNG.

Saipem's case

[15] This proceeding was commenced by an Originating Application filed on 7 January 2015. The relief sought was several declarations, most relevantly a declaration that GLNG was not entitled to "call on, demand, receive and use" the relevant bank guarantees. GLNG gave undertakings not to call on the guarantees. At the hearing, those undertakings were extended until the date on which judgment on this interlocutory application is given.

[16] By this application, Saipem seeks an order that until determination of the Originating Application, GLNG be restrained from calling on, demanding, receiving or having any recourse to and converting into money any of the bank guarantees.

[17] Saipem makes three arguments for its case that GLNG should not have recourse to the guarantees. One argument relies upon the terms of the contract. The others rely upon s 67J of the *Queensland Building and Construction Commission Act* 1991 ("the Act").

[18] The first argument is that the contract, more particularly cl 5.5(a), entitles GLNG to have recourse to the bank guarantees, in this case, only "to recover any debt due" and that the liquidated damages claimed are not debts due to GLNG. Rather, they are amounts which GLNG claims are debts due and which, Saipem says, will be disallowed by an arbitrator.

[19] As to the second and third arguments, s 67J of the Act relevantly provides as follows:

> "67J Set-offs under building contracts
>
> (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.
>
> …

> (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."

[20] Saipem's second argument is that s 67J, upon its proper interpretation, restricts GLNG from using the bank guarantees for a circumstance where there is in fact an "amount owed", meaning "a debt due" from Saipem to GLNG. Again, Saipem says that there is no amount owed to GLNG.

[21] The third argument relies upon s 67J(2). It is that each of the notices of 18 December 2014 was not given within 28 days after GLNG became aware, or ought reasonably to have become aware, of its right to obtain the amount owed.

Saipem's first argument

[22] Counsel for GLNG conceded that there was a serious case in favour of Saipem that it was entitled to extensions of time and therefore that there was no debt due to Saipem.[2] Nevertheless, they submitted that the case lacked strength.[3] Each side presented written submissions as to the merits or otherwise of the extension of time claims. Those submissions were made by reference to a very large amount of evidence. But neither side ultimately pressed for a finding as to the relative strength of Saipem's case for extensions of time. I accept that Saipem has a serious case but make no finding as to its relative strength.

[23] Notwithstanding that concession, GLNG argues that Saipem has no case for final determination which could found an interlocutory injunction. GLNG cites this statement by Gummow and Hayne JJ (with whom Gaudron J agreed) in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*:[4]

> "The basic proposition remains that where interlocutory injunctive relief is sought in a Judicature system court, it is necessary to identify the legal (which may be statutory) or equitable rights which are to be determined at trial and in respect of which there is sought final relief which may or may not be injunctive in nature."

The Honours there cited what was said by the plurality in *Cardile v LED Builders Pty Ltd* as follows:[5]

> "However in England, it is now settled by several decisions of the House of Lords that the power stated in Judicature legislation - that the court may

---

2 T 1-6.
3 Ibid.
4 (2001) 208 CLR 199, 241 [91].
5 (1999) 198 CLR 380, 395-396 [31].

> grant an injunction in all cases in which it appears to the court to be just and convenient to do so - does not confer an unlimited power to grant injunctive relief. Regard must still be had to the existence of a legal or equitable right which the injunction protects against invasion or threatened invasion, or other unconscientious conduct or exercise of legal or equitable rights."

[24] In the passage upon which GLNG relies, Gummow and Hayne JJ identified, as did other judgments in that case,[6] the reason why an injunction had been wrongly granted in that case, namely that the plaintiff had no legal or equitable right which it could seek to establish against the defendant by a final determination.

[25] The submission for GLNG is that there is no final relief claimed in this proceeding which could provide a legitimate purpose for the interlocutory injunction which is sought. It is submitted that the court could not determine in this proceeding the disputes about extensions of time and the dates by which mechanical and Practical Completion were achieved, because they must be determined by an arbitration. Therefore, it is said, there is no final relief which could be claimed here that could found the interlocutory relief.

[26] Saipem does claim final relief. It claims declarations that the amounts demanded by GLNG for liquidated damages are not amounts owed or debts due and that the notices purportedly given under s 67J were invalid. It seeks a further declaration that GLNG is not entitled to have recourse to securities as it said it would do in its letters last December. There is no specific claim for a final injunction but there is a claim for "further or other orders". Accepting for present purposes that this court could not determine the merits of the disputes as to whether GLNG is entitled to liquidated damages as it is claimed, it does not follow that no final relief can be granted as is sought by the Originating Application. If Saipem's case is upheld by an arbitrator, then in this proceeding there could be a declaration that there is no amount owed or debt due as GLNG claimed in the December notices and a final injunction to restrain GLNG from having recourse to the bank guarantees on the basis of those notices.

[27] Saipem's application for interlocutory relief does not have the defect of that in *ABC v Lenah Game Meats*. Unlike the plaintiff in that case, Saipem claims to have legal rights from the contract and from s 67J which require the protection of an interlocutory injunction before those rights are the subject of a conclusive adjudication.

Saipem's second argument

[28] The argument here is that s 67J(1) permits the contracting party for a building contract to use a security only where there is actually an amount owed under the contract. By the definition of "amount owed" in s 67J(5), that means that s 67J prevents the contracting party from using a security where no debt is actually due to it.

[29] Saipem then refers to s 67E of the Act which provides in part as follows:

---

[6] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 215-220, especially at [12], [16] per Gleeson CJ and 231-232 [60] per Gaudron J.

"(2) However, if a building contract, or a provision of a building contract, is inconsistent with a provision (the *Act provision*) of this part applying to the building contract, the building contract, or the provision of the building contract, has effect only to the extent it is not inconsistent with the Act provision.

(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."

[30] The apparent purpose of this argument, namely that GLNG's recourse to the bank guarantees is limited to a "debt due" by the Act (as well as by cl 5.5(a) of the contract) is to negate the covenant in cl 5.5(c). In *Monadelphous Engineering Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd*,[7] Fraser JA (with the agreement of Muir and Morrison JJ A) said that a similar provision to cl 5.5(c) could have no effect upon an application for an interlocutory injunction to restrain recourse to bank guarantees in a way said to be inconsistent with s 67J(1).

[31] I will return to that obiter dicta of Fraser JA when discussing the balance of convenience. The present question is whether, as Saipem argues, s 67J(1), and not just cl 5.5(a) of the contract, limits recourse to the bank guarantees to where there is a debt due. In *Beyfield Pty Ltd v Northbuild Construction Sunshine Coast Pty Ltd*,[8] it was said that "section 67J also confines the operation of retention clauses to 'debts due'". This statement must be read in context. The question there being considered was whether s 67J(1) was confined to circumstances of "debts due" so that it would not apply to the use of a security or retention amount, pursuant to a term of the building contract, to recover unliquidated damages. It was held that s 67J did extend to the circumstance of a claim for unliquidated damages, so that recourse could not be had to a security for the purpose of satisfying such a claim unless a notice was given under s 67J(1). The term "amount owed" was thereby given a broad interpretation to include unliquidated damages. In context, I do not read that statement in *Beyfield* as supporting Saipem's argument on the present question.

[32] In the previous s 67J[9] it was provided:

"67J(1) The contracting party for a building contract may reduce an amount payable under the contract by an amount owed under the contract, or use a security for the building contract, wholly or partly, to obtain an amount owed under the contract, only if-

(a) *the reduction of the amount payable or the use of the security is permitted under the contract*; and

(b) the contracting party is given-

(i) written notice …"

(my emphasis)

---

7 [2014] QCA 330, 15 [41].
8 [2014] QSC 12, 11 [40].
9 Inserted by Act No 43 of 1999, s 29.

Subparagraph (a) made it clear that it was the contract which was the source of the entitlement to use the security, rather than the section itself. The effect of the present section is no different. It is not in terms which provide that a security or retention amount may be used only where there is an amount owed under the contract.

[33] Rather, s 67J(1) affects the right of a contracting party to use a security or retention amount only by requiring the notice which it describes. The section is engaged where that entitlement to use a security or retention amount otherwise exists and once engaged, its effect is to qualify the entitlement by requiring the notice. Therefore, if no debt is due to GLNG, it is precluded from using the bank guarantees by the terms of cl 5.5(a) rather than by, or also by, s 67J(1).

Saipem's third argument

[34] By s 67J(2), GLNG could use the bank guarantees for these claims for liquidated damages only if it gave notice to Saipem under s 67J(1) within 28 days after it became aware, or ought reasonably to have become aware, of its right to obtain the amount owed.

[35] As to the claim for delay in achieving Mechanical Completion, GLNG's letter of 18 December 2014 stated that on 1 September 2014, it had certified Mechanical Completion as achieved on 26 July 2014. More than 28 days passed between GLNG's certificate and its notice. The facts are uncontroversial and it is clear that GLNG's notice was given too late to be compliant with s 67J(2). More than a serious question is demonstrated: Saipem has proved that GLNG may not use the securities for its claim for delay in achieving Mechanical Completion.

[36] The only submission for GLNG to uphold its late notice for the Mechanical Completion claim is that a notice is not ineffective under s 67J merely because it is given outside the period of 28 days. That submission is supported by the view expressed by Fryberg J in *Watpac Australia Pty Ltd v Spring Hill Developments (No 1) Ltd*.[10] But his Honour there noted that the point had not been the subject of detailed argument and had arisen only during the hearing. Further, it was not essential to the outcome. Fryberg J there referred to s 67J(3) which provides:

> "(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."

Fryberg J said that the word "stopped" might mean restrained by the court's injunction and that the lateness of a notice would be a discretionary consideration in favour of "stopping" (in that way) the use of the security.

[37] The same question was adverted to but not decided by Douglas J in *Vos Construction & Joinery (Qld) Pty Ltd v Sanctuary Properties Pty Ltd*.[11]

---

[10] [2006] QSC 269.
[11] [2007] QSC 332, 8 [22].

[38] The question here is whether it was a purpose of the Act that a notice given in breach of s 67J(2) should be invalid, for which regard must be had to "the language of the relevant provision and the scope and object of the whole statute".[12] The question is yet to be conclusively determined. It is unnecessary for a concluded view to be reached here. However, the better view seems to be that a noncompliance with s 67J(2) would have the consequence of invalidating the notice. Although the word "stopped" is unusual, I could not readily accept that it refers only to the effect of an injunction. The word "stopped" is used twice in s 67J(3) with, it is to be expected, the same meaning. Where it is used for the second time, the word could not mean "restrained by a court". This point is arguable for GLNG. But overall it does not detract from the apparent strength of Saipem's case in respect of the claim for delay in achieving Mechanical Completion.

[39] GLNG's Practical Completion certificate was dated 10 December 2014. Its notice was given within 28 days of that certificate. But the certificate certified the Date of Practical Completion as 9 October 2014. More than 28 days passed between that date and the notice under s 67J.

[40] As discussed, under cl 35 of the contract, liquidated damages were to be paid if Saipem did not achieve Practical Completion by the Date for Practical Completion. Clause 1.1 defined the Date of Practical Completion as the date certified by GLNG's representative in a Practical Completion certificate as the date on which Practical Completion was achieved. Until the Practical Completion Certificate was issued, the obligation to pay liquidated damages under cl 35(a) had not arisen. Until then there was no (relevant) "amount owed" by, or "debt due" from, Saipem. GLNG could not give a notice under s 67J unless there was an amount owed, because such a notice had to advise Saipem of the amount owed: s 67J(1).

[41] Saipem relied upon a letter dated 26 September 2014 and two letters dated 20 November 2014 from GLNG on the question of Practical Completion. In those letters, GLNG was maintaining that Practical Completion had not occurred. If its contentions in those letters were correct, then GLNG apparently knew, more than 28 days prior to 18 December 2014, that something would have to be paid for liquidated damages for a delay in achieving Practical Completion. But the 28 day period which is relevant under s 67J does not commence from an awareness that something would have to be paid to the contracting party.

[42] Section 67J is materially different from its predecessor which I considered in *Cooke v Warriner*,[13] a case upon which Saipem relies. Section 67J then provided for two notices prior to using a security. It required a "first notice" advising of the proposed use and "if the amount owed can be quantified when the first notice was given, of the amount owed". It further required, if the amount owed could not be quantified when the first notice was given, that a further notice to be given advising of the amount owed. Section 67J(2) then provided that the first 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". It was in relation to those provisions that I said in *Cooke v Warriner* that in some cases a party must keep its right to recourse to the security alive by giving a notice, although the amount owed could not

---

[12] *Tasker v Fullwood* [1978] 1 NSWLR 20 at 24 approved in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 390-391; [1998] HCA 28 at [93];.

[13] Unreported, Supreme Court of Queensland, McMurdo J, SC No 294 of 2004, 23 July 2004.

then be quantified. Section 67J in its present terms is obviously different and provides for but one notice, which must state the amount owed.

[43] Saipem's contention that the notice was too late for the Practical Completion claim seems to be weak. As I construe the contract, there was no entitlement to liquidated damages until the date of Practical Completion was certified. If I am incorrect in that construction, the question would be about when GLNG knew or ought to have known that Practical Completion had been achieved, because there could be no awareness of the amount owed without an awareness of the period of delay. I would accept that if, upon the proper construction of the contract, that is a relevant question, then there would be some case for Saipem, from the fact that GLNG ultimately certified the date for Practical Completion as early as 9 October 2014.

Balance of convenience

[44] There is uncontradicted evidence that Saipem will suffer damage to its reputation if GLNG makes demands upon the guarantees. Mr Palmitessa, the Administration Finance and Control Manager for Saipem, said that a demand on the guarantees would have a likely adverse effect on the company's credit rating, increase its costs of obtaining future finance and decrease its competitiveness in bidding for future contracts. For those reasons, he said, Saipem "went to considerable lengths" to pay a sum of more than $28 million to avoid GLNG calling up the securities which were the subject of the previous proceedings between the parties in which Saipem was refused interlocutory relief on 19 December last.[14] He said that credit reporting agencies maintain records of instances where bank guarantees are called upon and reports of those agencies are used by suppliers of materials used in the type of projects undertaken by Saipem.

[45] Mr Palmitessa's evidence was criticised in the submissions for GLNG. But it was not tested by cross-examination or contradicted by other evidence. Nor is it inherently implausible. The evidence should be given some weight. Whilst it is the evidence in the present case which must be considered, there are many judgments in which similar evidence has been persuasive.[15]

[46] GLNG responds to this evidence by submitting that Saipem can do what it did last December when refused an interlocutory injunction, namely it can pay the sums demanded. For this submission, it cites a judgment of Kenneth Martin J in *Central Petroleum Ltd v Century Energy Services Pty Ltd*,[16] as follows:

> "79 I accept that there may well be instances where the cold calling of a performance guarantee may deliver reputational damage to the exposed party (who has caused the guarantee to be provided by the financial institution). Nevertheless, the present case seems to me to be not at all of that ilk, in terms of potential prejudice to the Applicant's business reputation. Here, it sits readily within the capacity and financial wherewithal of this Applicant to quickly and completely

---

[14] Referred to above at para [2].

[15] See the cases discussed by Chesterman J in *Austrak Pty Ltd v John Holland Pty Ltd* [2006] QSC 103, described by Fraser JA in *Monadelphous Engineering Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd* [2014] QCA 330, 16 [44] as "strong expressions of opinion … by judges of very considerable experience in this field".

[16] [2011] WASC 211, 25-26 [75]-[80].

> extricate itself from all potential threat of this Banker's Undertaking being called. It could in swift time (effectively on a without prejudice basis) render a payment of the relatively modest sum (assessed in a commercial context) to Century. The Applicant's damaged business reputation argument is a paradigm case of a party 'bootstrapping' towards its own asserted prejudice to achieve its end game of injunctive relief. This I assess to be unacceptable.
>
> 80 So, had I otherwise been persuaded that the Applicant could show a serious question to be argued, by reference to contractual construction arguments which arise, it is unlikely I would have been satisfied that the balance of convenience lay in the Applicant's favour. Relief by injunction being inherently equitable in nature, the present case is one where, as a matter of discretion, I would have been deeply troubled that a court of equity was asked to assist a party who could easily, but had deliberately chosen not to, assist itself."

[47] In that case, the amount likely to be demanded under the guarantee was approximately $312,000. In the present case, more than $12 million would be demanded. On the last occasion, Saipem found about $28 million to avoid a demand on guarantees. It does not follow, because the present amount or amounts are smaller, that it can do so again. But nor was there evidence that it could not do so. Saipem is a member of the Saipem Group of companies for which the financial report as at 30 June 2014 was exhibited to Mr Palmitessa's affidavit. The submissions did not address the content of that report and I could not make a finding from it about the present ability of Saipem to pay these debts to avoid a call upon the guarantees.

[48] Understandably, GLNG relies upon cl 5.5(c) of the contract. Saipem there agreed that it would not take any steps to restrain GLNG from making a demand under a Performance Security even when it disputed GLNG's right to payment and where dispute resolution proceedings had been commenced. By this clause in particular, it can be said that the bank guarantees are a "risk allocation device", in the sense that they are given "to allocate the risk as to who should be out of pocket pending resolution of a dispute", as Callaway JA said in *Fletcher Construction Australia Ltd v Varnsdorf Pty Ltd*.[17] Callaway JA explained that there can be two reasons why the contract may have provided for a performance guarantee, as follows:[18]

> "One is to provide security. If it has a valid claim and there are difficulties about recovering from the party in default, it has recourse against the bank. The second reason, which is additional to the first, is to allocate the risk as to who shall be out of pocket pending resolution of a dispute. The beneficiary is then able to call upon the guarantee even if it turns out, in the end, that the other party was not in default. … It is a question of construction of the underlying contract whether the guarantee is provided solely by way of security or also as a risk allocation device."

[49] Where, upon the proper construction of the contract, the second purpose of a performance guarantee is risk allocation in this sense, that has an impact, often a decisive impact, upon the balance of convenience if the court is asked to restrain by an

---

[17] [1998] 3 VR 812, 826.
[18] [1998] 3 VR 812, 826-827.

interlocutory injunction the use of the guarantee. In a recent case in the Victorian Court of Appeal, *Sugar Australia Pty Ltd v Lend Lease Services Pty Ltd*,[19] Osborn and Ferguson JJA said:

> "[21] If a provision in a building contract requiring a performance bond is intended to operate as a risk allocation device pending the final determination of the dispute between the parties then that intention must be fundamental to a consideration of the justice of an application made to restrain recourse to such a bond pending final determination of the dispute.
>
> …
>
> [25] The fact that a performance bond is intended to operate as a risk allocation device is not, of course, necessarily determinative of the right of a party to have recourse to it. It may be subject to a contractual qualification or limitation upon the circumstances in which recourse may be had. Nevertheless, the fundamental characteristic of a risk allocation device informs the task which the Court must undertake in resolving whether or not to grant an injunction.
>
> …
>
> [31] Whilst it may be accepted that the usual principles governing interlocutory injunctions fell to be applied in the present case, it must also be accepted that they fell to be applied in respect of an unusual form of contract, if it be the case that the commercial purpose of the performance bond was to allocate risk pending final determination of the dispute. Such a contractual provision fundamentally alters the context in which the court must exercise its discretion by changing the complexion of the status quo and raising the prospect of substantial injustice if the purpose of the provision is defeated. That is, the status quo in such circumstances becomes what the parties have agreed as to which of them should bear the financial risk pending final determination, not the continuation of where that risk would naturally fall in the absence of a performance bond to call upon.
>
> …
>
> [34] If the commercial purpose of a contractual provision is defeated that must bear squarely on the ultimate risk of injustice inherent in the grant of an injunction."

[50] *Fletcher* was applied by the Full Court of the Federal Court (French, Jacobson and Graham JJ) in *Clough Engineering Ltd v Oil and Natural Gas Corporation Ltd*[20] where the court said:[21]

---

[19] [2015] VSCA 98, 4, 5, 8, 9.
[20] [2008] FCAFC 136; (2008) 249 ALR 458.
[21] [2008] FCAFC 136, 31 [80]; (2008) 249 ALR 458, 479.

> "Thus, subject to exceptions of fraud and unconscionability, the beneficiary of a performance guarantee granted in its favour as a risk allocation device, will be entitled to call upon the guarantee even if it turns out, ultimately, that the other party was not in default."

The Full Court said that the importance of such securities in the construction industry "is a factor which bears upon the question of construction of the contract".[22] The court added that notwithstanding the importance of this commercial practice, it is the task of the court in each case to construe the terms of the contract.[23]

[51] In the present case, cl 5.5(c) clearly demonstrates that the Performance Securities were provided also as a means of risk allocation of this kind. Such a term was not present in *Siemens Ltd v Forge Group Power Pty Ltd (in liq)*,[24] and there the balance of convenience was critically affected also by the insolvency of the beneficiary of the guarantee.

[52] But Saipem submits that cl 5.5(c) should not have that effect because Saipem's rights were founded upon the Act and any inconsistency between the Act and the contract had to be resolved in favour of the Act. As to that inconsistency, Saipem refers to s 67E(2) and (3). Saipem also refers to s 108D of the Act which provides that a person cannot contract out of the provisions of the Act.

[53] It is therefore necessary to consider whether there is an inconsistency as Saipem suggests and the extent of that inconsistency.

[54] Section 67E(2) provides that a provision of the building contract has effect only to the extent that it is not inconsistent with a provision of the Act. Section 67E(3) provides that a building contract is unenforceable against the contracted party to the extent that it provides for retention amounts or security in a way that is inconsistent with a "condition" to which the contract is subject under Div 2. Some sections within Div 2 expressly subject a building contract to a condition: s 67K(2), s 67L(1), s 67M(2) and s 67N(1). Section 67J is not in those terms. However, Sch 2 of the Act defines "condition" as including "a limitation or restriction". In *Beyfield Pty Ltd v Northbuild Construction Sunshine Coast Pty Ltd*, it was held that the provisions of s 67J constitute a "restriction" and that therefore s 67J was affected by s 67E.[25] I respectfully agree with that interpretation. GLNG did not appear to contend otherwise.

[55] But as I have concluded earlier, if no debt is due to GLNG, it is precluded from using the bank guarantees by the terms of cl 5.5(a) rather than by s 67J(1). The effect of s 67J is to subject the contract to a condition that a notice according to s 67J(1) and (2) must be given prior to the use of a security. By cl 5.5(c), the parties agreed that GLNG should not be prevented from using a security if in fact its right to payment was disputed. They agreed that pending the determination of their dispute, GLNG should be able to use the security. That is not inconsistent with s 67J, because it did not permit GLNG to use the security without complying with s 67J, or in other words, without giving a notice according to s 67J(1) and (2).

---

22 [2008] FCAFC 136, 31-32 [81]; (2008) 249 ALR 458, 479.
23 [2008] FCAFC 136, 32 [82]; (2008) 249 ALR 458, 479.
24 [2014] QSC 184.
25 [2014] QSC 12, 6-7 [23]-[27].

[56] If the contract could be interpreted as permitting GLNG to use a security without giving a notice according to s 67J(1) and (2), the contract would be inconsistent with the condition imposed by s 67J and to that extent would be of no effect (s 67E(2)) and, in the terms of s 67E(3), unenforceable against Saipem. In a case where there was no argument that GLNG was proposing to use a security in non-compliance with s 67J, cl 5.5(c) would not assist GLNG. One reason for that might be an inconsistency between that clause and s 67J. Another reason, which I would prefer, would be that cl 5.5(c) should not be interpreted as applying to a case where, indisputably, the use of the security was not permitted according to the contract or s 67J.

[57] But the present case is not of that kind. Here the parties are in dispute not only about whether there is an amount owed, but also about whether notices have been given in compliance with s 67J. Clause 5.5(c) would apply to the dispute of the second kind, subject to the impact of s 67E. There is recent obiter dicta of the Court of Appeal which is to the effect here that cl 5.5(c) cannot be relied upon by GLNG: *Monadelphous Engineering Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd* where Fraser JA, with the agreement of Muir and Morrison JJA said:

> "[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."

In that case, the question to be tried was whether the contract between the parties was a "building contract" for the purposes of the Act. If it was such a contract, s 67J applied and indisputably there had been no compliance with it. What was there said was obiter dicta, because an interlocutory injunction was refused for other reasons.

[58] It was argued for GLNG that the effect of that passage from *Monadelphous* was that a provision such as cl 5.5(c) was still not irrelevant to the assessment of the balance of convenience. That submission cannot be accepted. Fraser JA said that the relevant contractual provisions (which were substantially the same as cl 5.5(c) here)[26] "cannot be relied upon when assessing the harm" that the applicant would suffer if an injunction is withheld but the applicant succeeds at the trial.

---

[26] See [2014] QCA 330, 15 [41].

[59] For these reasons, s 67E (and perhaps s 108D) does affect the assessment of the balance of convenience. But it does so only in so far as Saipem's case is that notices have not been given according to s 67J. It is only in that respect that there is an inconsistency between the contract and s 67J. There is no such inconsistency in the agreed allocation of risk by cl 5.5(c) to a dispute about whether, according to the contract, GLNG is entitled to use the security.

[60] Saipem has established a serious case both as to the contractual entitlement to use the guarantees and the compliance or otherwise with s 67J. The relative strength of its case of the first kind cannot be fairly assessed within this judgment. But the balance of convenience does not favour the grant of an interlocutory injunction upon that case, having regard to the parties' agreement and cl 5.5(c). The risk of damage of the kind described in Mr Palmitessa was one which, the parties agreed in the contract, should be borne in this circumstance. Therefore, at least if the case was limited to a claim that there was no contractual entitlement to use the guarantees, an injunction should be refused.

[61] The question then is whether the addition of the case of non-compliance with s 67J should tilt the balance in favour of an injunction. The case of non-compliance in relation to Mechanical Completion damages is strong. The only basis for questioning Saipem's case is whether a failure to give a notice within the time required by s 67J(2) is fatal to its effect. Because the stronger argument on that point is in Saipem's favour, I would be persuaded to enjoin the use of the guarantees for the Mechanical Completion claim, subject to the further consideration of whether there should be an injunction in relation to that claim by GLNG if an injunction is to be refused for the larger claim about Practical Completion.

[62] Saipem's case about non-compliance with s 67J in relation to Practical Completion is weak. Upon my interpretation of the contract, the relevant amount was not due until the date of Practical Completion was certified, and the s 67J notice was given within 28 days from that event.

[63] It is submitted that should an injunction be granted, there would be no prejudice to GLNG because it would retain security of the guarantees, to which it could have recourse if it is ultimately determined that Saipem is liable for liquidated damages. However, GLNG would be prejudiced because it would not now have the money to which, upon that hypothesis, it is presently entitled.

[64] I have accepted that there is a prospect of loss to Saipem if GLNG is permitted to make a demand under the guarantees. GLNG says that that risk could be avoided by Saipem paying the amounts of its claims. GLNG's submission was foreshadowed by written submissions delivered more than a week ahead of the hearing. It is significant that Saipem does not suggest that it is unable to make those payments.

[65] I infer that it is at least probable that Saipem could pay the amounts claimed, if it has to do so to avoid a demand upon the guarantees. In that way, the prospect of substantial damage to Saipem would be avoided. With that consideration and because of the relatively weak case in relation to s 67J for the notice about Practical Completion, I am not persuaded to enjoin GLNG in respect of that claim, for more than a period of 14 days within which Saipem should have the opportunity to pay GLNG.

[66] I return to the question of whether there should be a different result upon the Mechanical Completion claim. It was submitted that there would be no utility in granting an injunction limited to this claim if Saipem was to be exposed to damage from a demand on the guarantees for the other claim. A submission of that kind was persuasive in *Monadelphous*. But in the present case, it is likely that Saipem will make a payment to avoid a demand upon the guarantees. The interests of justice favour that outcome on the Practical Completion claim. In my view, they do not favour the same outcome on the Mechanical Completion claim, where Saipem has demonstrated a strong case for challenging a call upon the guarantees.

Orders

[67] For these reasons there will be an interlocutory injunction, until determination of the Originating Application or further earlier order, restraining GLNG from having recourse to any of the bank guarantees referred to in the interlocutory application filed 7 January 2015, to recover any of the sum claimed in relation to Mechanical Completion in a letter of 18 December 2014 from GLNG to Saipem.

[68] There will be an injunction for a period of 14 days restraining the respondent from having recourse to any of those guarantees for the payment of any of the sum claimed in relation to Practical Completion in a letter from GLNG to Saipem of 18 December 2014.