SUPREME COURT OF QUEENSLAND

CITATION:	*Siemens Limited v Forge Group Power Pty Ltd (in liq)* [2014] QSC 184
PARTIES:	**SIEMENS LIMITED** ACN 004 347 880 (Applicant) **v** **FORGE GROUP POWER PTY LTD (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED)** ACN 103 678 324 (Respondent)
FILE NO/S:	BS 4813 of 2014
DIVISION:	Trial Division
PROCEEDING:	Hearing
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	14 August 2014
DELIVERED AT:	Brisbane
HEARING DATE:	11 August 2014
JUDGE:	Philip McMurdo J

ORDER:

1. The applicant be given leave *nunc pro tunc* to begin and proceed with this proceeding pursuant to s 471B of the *Corporations Act* 2001 (Cth).

2. Upon the applicant by its counsel:

(a) giving the usual undertaking as to damages;

(b) undertaking that it will prosecute the proceeding with diligence;

(c) undertaking to obtain three additional unconditional bank guarantees from a reputable Australian trading bank for an amount of $566,670 each as further security for interest and expiring no earlier than 31 December 2015 and to provide those additional bank guarantees to the solicitors for the respondent on the following dates: the first by 20 August 2014, the second by 13 February 2015 and the third by 14 August 2015

it is ordered that until trial or earlier order the respondent, by itself, its employees and agents, including the receivers and managers, be restrained

from having recourse to and converting into money any of the following bank guarantees:

(a) Bank Guarantee Ref 5033900063 dated 22 November 2013 in the sum of $694,500;

(b) Bank Guarantee Ref 5031292204 dated 19 October 2011 in the sum of $5,347,250;

(c) Bank Guarantee Ref 5031292202 dated 19 October 2011 in the sum of $5,347.250; and

(d) the further bank guarantees to be provided pursuant to that undertaking.

EQUITY – EQUITABLE REMEDIES – INJUNCTIONS – INTERLOCUTORY INJUNCTIONS – RELEVANT CONSIDERATIONS – BALANCE OF CONVENIENCE – where the applicant sought an injunction restraining the respondent from having recourse to three bank guarantees – where it was conceded that there was a serious question to be tried – whether the applicant would suffer some irreparable injury – whether the applicant would suffer financial and reputational loss – whether the balance of convenience favoured the granting of the injunction.

Corporations Act 2001 (Cth), s 471B

Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd (2001) 208 CLR 199, distinguished.
Beecham Group Ltd v Bristol Laboratories Pty Ltd (1968) 118 CLR 618, cited.
Castlemaine Tooheys Ltd v South Australia (1986) 161 CLR 148, applied.
Fletcher Construction Australia Ltd v Varnsdorf Pty Ltd [1998] 3 VR 812, not followed.
Hubbard v Vosper [1972] 2 QB 84, cited
Merritt Cairns Constructions Pty Ltd v Wulguru Heights Pty Ltd [1995] 2 Qd R 521, cited.
Multiplex Ltd v Qantas Airways Ltd [2006] QCA 337, cited.

COUNSEL: M Christie SC, with TJ Breakspear, for the applicant

SL Doyle QC, with M Trim, for the respondent

SOLICITORS: Baker McKenzie for the applicant

Norton Rose Fullbright for the respondent

[1] The applicant ("Siemens") seeks an interlocutory injunction which would restrain the respondent ("Forge") from having recourse to three bank guarantees.

[2] Each of the guarantees was given in respect of the construction of a power station near Mount Isa. In October 2011, Forge and a company then called APA DPS Pty Ltd entered into the head contract for the construction of that facility. On the same day, a subcontract was made between Forge and Siemens, under which Siemens agreed to design, manufacture and supply certain equipment. Clause 7.3 of that subcontract required Siemens to provide two bank guarantees to secure its

performance. Clause 7.5 of the subcontract provided for the circumstances in which Forge could have recourse to that security. One of the bank guarantees which are the subject of this application was provided pursuant to those provisions of the subcontract.[1] The amount of that guarantee is $5,347,250. Another guarantee,[2] in an identical amount, was also provided as required by those provisions, but it was returned by Forge in December 2013.

[3] Also in October 2011, Siemens, Forge and APA DPS Pty Ltd entered into a so-called Multipartite Deed. Clause 9.2 of that instrument required Siemens to provide two bank guarantees to Forge. One of the guarantees provided pursuant to that provision is a subject of the present application.[3] It is also in an amount of $5,347,250. The other guarantee provided under the Multipartite Deed was returned by Forge to Siemens in December 2013.

[4] The third of the guarantees which are the subject of this application is in an amount of $694,500.[4] It was provided in November 2013 pursuant to an agreement between Siemens and Forge described as an "Amending Agreement" to their subcontract. (It is by that agreement that the parties agreed to the return of two of the bank guarantees in December 2013.) By cl 6.1 of the Amending Agreement, they agreed that Siemens should provide to Forge "an unconditional bank guarantee …for a sum of $694,500". This third guarantee had an expiry date of 15 May 2014. However, Siemens has caused that guarantee to be extended by the issuing bank, so that it now has an expiry date of 28 March 2016, which is the date of the expiry of the other guarantees.

[5] On 11 February 2014, voluntary administrators were appointed to Forge. The company's financiers then appointed receivers and managers. On 18 March 2014, the administrators became liquidators of Forge.

[6] By a Deed of Novation dated 17 April 2014, Siemens, Forge and Diamantina Power Station Pty Ltd (formerly APA DPS Pty Ltd) agreed that the subcontract between Siemens and Forge would be discharged and that Siemens would complete the balance of the subcontract under a new contract with Diamantina in substantially the same terms. By cl 4.1 of the Deed of Novation, it was agreed that its terms would not "prejudice any accrued rights, obligations, claims or liabilities arising out of the Subcontract in connection with the performance of the Subcontract before the Novation Date which [Forge] and [Siemens] may have against each other".

[7] On 12 May 2014, the receivers and managers appointed to Forge wrote to Siemens, giving notice of an intention to make demand upon the three subject guarantees. That demand was given purportedly pursuant to cl 7.5 of the subcontract. At least at present, Forge accepts that the third of the guarantees is also subject to the constraints expressed in cl 7.5.

[8] Clause 7.5 relevantly provides as follows:

> "7.5 Recourse to Security

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1 Bank guarantee Ref 5031292202.
2 Bank guarantee Ref 5031292201.
3 Bank guarantee Ref 5031292204.
4 Bank guarantee Ref 5033900063.

(a) Subject to Clause 7.5(d), the Customer may have recourse to any Security and convert into money any Security that is not money and use those moneys:

(i) as may be provided or allowed for in the Contract; or

(ii) to satisfy any amount which is due and payable or which the Customer reasonably believes is due and payable by the Contractor to the Consumer under or in connection with the Contract; and

(iii) the Contractor has not paid.

(b) …

(c) If any amount is due and payable, or the Customer reasonably believes any amount is due and payable, by the Contractor to the Customer under or in connection with the Contract, the Customer shall provide the Contractor with a written demand for payment of such amount(s). …

(d) The Customer agrees that it will not have recourse to any Security or convert any Security into money until:

(i) 5 Business Days from the date of receipt by the Contractor of the demand referred to in Clause 7.5(c) have expired; and

(ii) the Contractor has failed to pay the amount stated in such notice.

…"

[9] The amount demanded by Forge was $35,819,594.38, a sum which had five components, each of which was said to consist of losses sustained by Forge as a result of breaches of the subcontract. One of those components was for an amount of $500,000, claimed as liquidated damages for delay. The other components were effectively claims for unliquidated damages for breach of contract. The notice stated that these causes of action had each accrued prior to the novation of the subcontract. It contained the assertions that "Forge reasonably believes that there is an amount due and payable by Siemens to Forge under the … Subcontract" and that accordingly, Forge was entitled to demand payment of that total sum within five business days. Purportedly pursuant to cl 7.5(c), the receivers and managers also gave notice of their intention to have recourse to the three guarantees in the event of non-payment of the demanded amount.

[10] One of the bases for Siemens' case comes from the fact that save in one respect, the amount demanded consists of claims for unliquidated damages, none of which, it says, could constitute an "amount [which] is due and payable" as that expression is

used in cl 7.5.[5] In turn, it says that Forge could not have *reasonably* believed that such amounts were amounts due and payable, because such belief would be contrary to the terms of the clause.

The present proceeding

[11] Siemens commenced this proceeding by an Originating Application on 23 May 2014, which was made returnable in the Applications List on 2 June 2014. The Originating Application seeks both final and interlocutory relief. It seeks a permanent injunction restraining Forge, including its receivers and managers, from having recourse to and converting into money any of the three guarantees. It claims an interlocutory injunction in the same terms (save that it operate until trial or further order). The interlocutory injunction was adjourned to the Civil List and was heard on 11 August 2014.

[12] The parties filed and served written outlines of submissions prior to the hearing. The written submissions for Forge strongly disputed that there was any serious question to be tried. However, at the commencement of the hearing, counsel for Forge conceded that there was a serious question to be tried about their client's entitlement to call on the guarantees and have recourse to the funds.[6]

[13] It is therefore unnecessary to discuss the submissions which counsel for Siemens had outlined on issues affecting the existence of a question to be tried. Although the apparent strength of the respective cases can be relevant in this context,[7] neither side seemed to argue that the relative strength of its case was significant for the balance of convenience.

Loss if no injunction

[14] Therefore, Siemens must establish that it is likely to suffer some irreparable injury for which damages would not be an adequate remedy (if an injunction is not granted) and that the balance of convenience favours the granting of an injunction: *Castlemaine Tooheys Ltd v South Australia*,[8] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*.[9]

[15] It was submitted for Siemens that there would be losses of relevantly two kinds. First, there would be the loss of the moneys paid under the guarantees, which would be unable to be recovered by Siemens from Forge in the event that Siemens' case ultimately prevailed, because of Forge's insolvency. In particular, the moneys would likely be paid to the secured creditor which appointed the receivers and managers. I was informed that its secured debt exceeded the total of the three guarantees.

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5 Citing *Merritt Cairns Constructions Pty Ltd v Wulguru Heights Pty Ltd* [1995] 2 Qd R 521 at 522, 523 and 526 and *Multiplex Ltd v Qantas Airways Ltd* [2006] QCA 337 at [6].

6 T 1-4.

7 See eg R Meagher, J Gummow and M Leeming, *Equity Doctrines & Remedies* (LexisNexis Butterworths, 4th ed, 2002) at [21-375] citing *Hubbard v Vosper* [1972] 2 QB 84 and *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618.

8 (1986) 161 CLR 148 at 153 per Mason A-CJ.

9 (2001) 208 CLR 199 at 217-218 per Gleeson CJ.

[16] Secondly, Siemens argues that there would be an effect upon its commercial reputation, for which it could not be adequately compensated by an award of damages, especially given Forge's insolvency.

[17] As to that first type of loss, Forge argues that Siemens can be protected by an undertaking, to be given by certain other parties, to effectively restore what would be paid under the guarantees. A form of undertaking has been executed by three parties: Australia and New Zealand Banking Group Limited, Swiss Re International SE and QBE Insurance (Australia) Limited as "the Beneficiaries". The undertaking is relevantly as follows:

> "In respect of the above proceedings, we provide the following undertaking to the Court in terms stated:
>
> > 'If the Court refuses the Application, with the consequence that the Respondent may call upon and have recourse to the Bank Guarantees (and if it in fact does so through its Receivers and Managers), then the Beneficiaries provide an undertaking to the Court that:
> >
> > (1) if a court of competent jurisdiction orders that the Respondent had no entitlement to call upon and have recourse to the Bank Guarantees (in whole or in part); or
> >
> > (2) if the Applicant and the Respondent otherwise execute an enforceable written agreement as to the manner in which the proceeds of the Bank Guarantees are to be distributed, and
> >
> > if the Respondent fails to pay within the terms of the order or agreement, then we undertake to pay the Applicant such sum of money as is ordered or agreed, in accordance with the terms of any order, judgement (sic) or the relevant agreement referred to in paragraphs (1) and (2) above: up to a maximum aggregate amount of the value of the Bank Guarantees.'"

[18] It can be seen that there are two circumstances which would engage the promise by "the Beneficiaries" to make a payment to Siemens. One is by the event of an agreement between Siemens and Forge "as to the manner in which the proceeds of the bank guarantees are to be distributed". But there is no undertaking offered by Forge, its receivers or the Beneficiaries to the effect that the proceeds of the bank guarantees will be preserved so that they could then be "distributed" under such an agreement. Instead, the likelihood is that they would be paid to the secured creditor which appointed the receivers.

[19] Apart from that prospect of some future compromise between Siemens and Forge, the event which would engage the Beneficiaries' undertaking is:

> "if a court of competent jurisdiction orders that [Forge] had no entitlement to call upon and have recourse to the bank guarantees (in whole or in part) …"

At least if read alone, those words would prevent the undertaking from being engaged if a court held that Forge had an entitlement to call upon the guarantees in *some* amount but less than the "whole" of the guarantees. The meaning of those words might be affected by the words "if [Forge] fails to pay within the terms of the order", which might indicate that the Beneficiaries' undertaking would be engaged by an order which required that some amount to be paid by the respondent because it was an amount which ought not to have been demanded under the guarantees. Counsel for Forge said that the latter was the meaning intended by those who had signed the undertaking. In my view, the undertaking is at least ambiguous in this respect. Counsel for Forge said that another undertaking could be provided in order to make that matter clearer.

[20] A further difficulty with this undertaking to be provided by the Beneficiaries is that it is limited to a maximum of the aggregate amount of the three guarantees. But if those amounts are paid as Forge has demanded, inevitably there would be some cost to Siemens from the payment of those amounts. That cost is not the subject of evidence. But that is understandable because this undertaking, although dated 6 August, was provided (as an exhibit to an affidavit sworn by a lawyer for the respondent) only on the day of the hearing. I infer that whatever is the precise arrangement between Siemens and the bank which has provided these guarantees, there would be some substantial cost to Siemens from the payment of the guarantees, even if the amounts paid under them were returned. Therefore, the undertaking which is offered would not preclude the prospect of a substantial loss to Siemens.

[21] The other type of loss which Siemens says it will suffer is one to its reputation. This is the subject of an affidavit by its chief financial officer, Mr Ruessel. He says that Siemens "has never had a Bank Guarantee called upon which has not subsequently been returned". He says, on information from "representatives of the plaintiff", that should moneys be paid under these guarantees, "the plaintiff's reputation in the construction industry would be significantly damaged". On his evidence, it is common for parties such as Siemens, when tendering for contracts, to be asked whether a bank guarantee or security has ever been cashed or called upon, a question which he says is routine overseas, although less common in Australia. Again on the information provided by others within Siemens, he says that "if a tenderer has had a bank guarantee or security cashed or called upon, then its chances of successfully tendering for other contracts in the future are greatly reduced". He further says that if these amounts are paid to Forge, then Siemens' bank would no longer be able to provide a reference, to be used in tendering for contracts, in the terms in which it has provided to date. Lastly, Mr Ruessel is informed that the prospects of obtaining finance from other institutions could be reduced by the fact of these guarantees being paid, or at least that this would affect the cost of that finance.

[22] Counsel for Forge said that effectively no weight should be given to Mr Ruessel's evidence. Their argument was that Mr Ruessel had effectively disproved his own evidence, as to the likely effects of a payment under these guarantees, by the disclosure in his affidavit that "the plaintiff has never had a bank guarantee called upon which has not subsequently been returned". Therefore, if other guarantees provided for Siemens have been "called upon", what could be the damage to the reputation of Siemens from that occurring in this case?

[23] As I read Mr Ruessel's evidence, its effect is that there is a substantial prospect of damage to the reputation of Siemens as a reliable contractor from the making of the payment which, absent an injunction, would be demanded from its guarantor. I accept that this evidence has less weight for the fact that the "representatives of the plaintiff" who have provided this information to Mr Ruessel are not identified, at least in a way which would compellingly demonstrate their personal knowledge of these matters. But ultimately an objection to this evidence was not pressed and Mr Ruessel was not required for cross-examination. The evidence is not in any respect inherently unlikely and it cannot be given no weight.

[24] In my conclusion, Siemens has demonstrated the likelihood of losses for which it could not be adequately compensated by an award of damages. In relation to its loss of reputation, such a loss would be difficult to quantify fairly and in any case, it is a loss which Siemens would have to recover from an insolvent party.

Balance of convenience

[25] The question then is whether the balance of convenience favours the granting of an injunction. If an injunction is granted, Forge will be without the benefit of these funds until its claimed entitlement to them is upheld in this or another proceeding. It claims that it will lose interest of the order of $1.7 million over 1.5 years. It says that Siemens has not adduced evidence of its ability to pay that interest, especially in a context where Siemens is said to be liable to Forge in an amount exceeding $35 million.

[26] Siemens is a publicly listed company and its financial position should be apparent to Forge, which in turn has declined to adduce any evidence on the subject. The absence of evidence from Siemens on this question can be explained by the fact that there was nothing in the outline of the argument for Forge which questioned the financial means of Siemens and the point was raised only at the hearing.

[27] But in any case, the position of Forge could be protected by what was proposed by Siemens at the hearing, which is that further security be provided against the prospect of this loss of $1.7 million. It is proposed that further security of $566,670 would be provided now, to be followed by further security, again in that amount, in six months and again in 12 months time (to correspond broadly with the accrual of that interest).

[28] Once that further security is offered by Siemens, it cannot be said that there is any real prospect of a loss to Forge from the granting of the injunction. The usual undertaking as to damages will be given by Siemens, but Forge will also be protected by the provision of this further security. Given the risk of damage to Siemens if an injunction is not granted, the balance of convenience clearly appears to favour the granting of the injunction.

[29] It is necessary however to refer to some further submissions which were made for Forge. It was said that Siemens has already been guilty of delay in the prosecution of its claim. This proceeding was commenced in May but, apart from this interlocutory application, it has not been prosecuted. In my view, Siemens cannot be fairly criticised in that respect. The preparation of this interlocutory application must have been a substantial exercise. And the terms of a statement of claim would be affected by the grant or refusal of the interlocutory injunction.

[30] It was submitted that Siemens had failed to demonstrate that it could be given a final injunction in the terms which are sought by the Originating Application, so that it should not be given an interlocutory injunction in corresponding terms. It is said that there is no foundation for a permanent deprivation of the benefit of the bank guarantees, as would result from a grant of a final injunction in the terms sought by the Originating Application. Reference was made to *Australian Broadcasting Corporation v Lenah Game Meats*,[10] where Gleeson CJ rejected a proposition that a party could have a "free-standing" right to interlocutory relief.[11] But the objection to the interlocutory injunction which was sought in that case was that there was no serious question to be tried, because the facts alleged by the applicant for the injunction could not, as a matter of law, establish a right of action for which there could be some final relief granted.[12] The present case is different. Here the applicant for the injunction says that in the circumstances as they now exist, Forge cannot call for payment under the guarantees. It has thereby identified a cause of action for which it could be given final relief. The terms of that final relief might not be those which are set out at present in the Originating Application. But that difference does not warrant the refusal of this interlocutory injunction.

[31] In its outline of argument, Forge said that it risked losing the benefit of the guarantees if they expired before the conclusion of the litigation. As I have noted, they will each expire on 28 March 2016. As that date approaches, the course of the litigation may well warrant the interlocutory injunction being discharged or varied but that is a matter for future determination.

[32] Counsel for Forge also relied upon some observations by Callaway JA in *Fletcher Construction Australia Ltd v Varnsdorf Pty Ltd*,[13] to the effect that securities such as these guarantees are given "to allocate the risk as to who shall be out of pocket pending resolution of a dispute".[14] The submission seemed to be that this observation was relevant in two ways. The first was as to the likelihood of reputational damage here, a factual question upon which, in my view, his Honour's observation is not presently critical. The second seemed to be a submission to the effect that courts should not enjoin the enforcement of such security whenever there is a dispute between the parties, because that would interfere with the deliberate allocation of the risk which Callaway JA described. However, Siemens has done more than deny the claims made by Forge. As is conceded, it has demonstrated a serious case to be tried to the effect that, according to the parties' agreement, Forge is not entitled to call upon the securities.

Conclusion

[33] That serious case having been demonstrated, and the balance of convenience favouring an injunction, there will be an interlocutory injunction in the terms sought within paragraph 2 of the Originating Application. That injunction will be conditional upon the provision of undertakings by the applicant, being the usual undertaking as to damages, an undertaking by Siemens that it will prosecute the proceeding with diligence and an undertaking to provide further security, totalling $1.7 million, as described earlier in these Reasons.

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10 (2001) 208 CLR 199.
11 Ibid at 218.
12 Ibid.
13 [1998] 3 VR 812.
14 Ibid at 826.

[34] The prosecution of this proceeding requires the leave of the court pursuant to s 471B of the *Corporations Act* 2001 (Cth). The claim is not one which could be pursued satisfactorily within the liquidation. It requires the intervention of the court. It is plainly a case where leave to proceed should be given and there will be an order accordingly.